

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**SAINT CHRISTOPHER AND NEVIS
NEVHCVAP2022/0003**

BETWEEN:

MICHAEL J. PREST

Appellant

and

**[1] MAGISTRATE DISTRICT “C”
[2] CORPORAL RANDOLPH DIAMOND
[3] THE ATTORNEY GENERAL
[4] THE DIRECTOR OF PUBLIC PROSECUTION**

Respondents

Before:

The Hon. Mde. Gertel Thom
The Hon. Gerard St. C Farara
The Hon. Mde. Esco Henry

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Peter Foster KC with him Ms. Jackie Hunkins-Taylor for the Appellants
Ms. Simone Bullen-Thompson for the First and Third Respondents
Mr. Anand Ramlogan SC with him Ms. Sherry-Ann Liburd-Charles for the
Second and Fourth Respondents

2023: September 18;
2024: April 16.

Interlocutory appeal – Judicial review - Appeal against decision to quash grant of leave for judicial review – Section 33(3)(a) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Cap. 3:11- Jurisdiction of Court of Appeal to hear appeals in a criminal cause or matter – Whether this appeal is a criminal cause or matter – Whether the learned judge erred in refusing to grant the appellant’s application for an adjournment of the hearing and determined that the matter be heard on paper – Whether the learned judge applied the wrong principles in exercising his discretion to set aside leave – Whether the learned judge made findings of fact which were not supported by evidence

On 21st July, 2021 the second respondent and member of the Royal St. Kitts and Nevis Police Force, Corporal Randolph Diamond submitted to the learned magistrate two information with respect to the appellant, outlining the offences that he (1) having received the sum of US\$2,530,000.00 for the use and benefit of Mark Kucher, did fraudulently convert the money to his own use and (2) being a trustee of the sum of US\$2,530,000.00 for the use and benefit of Mark Kucher did, fraudulently convert the money for his own use contrary to sections 20 and 19(d) respectively of the Larceny Act Cap. 4.16. Having received evidence on oath from Cpl. Diamond, the learned magistrate issued a warrant of arrest in relation to each offence. The warrants have not been executed as the appellant is outside of the jurisdiction.

On 27th August 2021, the appellant applied for leave to make a claim for judicial review and sought orders to quash the decision of the first respondent made on 21st July 2021 to issue arrest warrants against the appellant for the alleged contravention of sections 19(d) and 20. The appellant also sought an interim order for a stay of execution of the two arrest warrants issued by the first respondent pending the determination of the application for judicial review and an interim injunction restraining any publication of the existence of the arrest warrants pending the determination of the judicial review application.

The learned judge granted the appellant leave to apply for judicial review *ex parte*. The learned judge, at an *inter partes* hearing, granted the interim reliefs sought and ordered that the execution of the arrest warrants be stayed pending the hearing of the judicial review claim. The appellant subsequently filed his fixed date claim for judicial review.

The respondents made applications to set aside the order granting leave to bring a judicial review claim on the premise that the appellant was seeking to challenge the basis of the Director of Public Prosecution's decision to prosecute him and that the appellant had alternative remedies available to him in the criminal proceedings. On 18th March 2022, the learned judge having considered the submissions of the parties, set aside the leave granted to bring a claim for judicial review and the interim orders and struck out the fixed date claim for judicial review. The judge found that the issues raised are matters best addressed in the criminal justice system and that it would be inappropriate for the court to hear a claim for judicial review on the grounds outlined by the appellant.

The appellant being dissatisfied with the ruling of the learned judge appealed with three main issues emerging for determination at the hearing: (i) the learned judge erred in refusing to grant the appellant's application for an adjournment of the hearing and determined that the matter be heard on paper, (ii) the learned judge applied the wrong principles in exercising his discretion to set aside leave and (iii) the learned judge made findings of fact which were not supported by evidence.

On consideration of the submissions, the issue of whether this Court has jurisdiction to determine the appeal was raised. The Court directed that the parties file submissions on the effect of section 33(3)(a) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Cap. 3.11 and subsequently received those submissions.

Held: dismissing the appeal, affirming the decision of the learned judge and ordering the appellant to pay the respondents their costs on the appeal to be assessed by a judge of the lower court, that:

1. The preliminary issue which arises is whether this appeal is a "criminal cause or matter" as prohibited by section 33(3)(a) of the Eastern Caribbean Supreme

Court (Saint Christopher and Nevis) Act Cap. 3:11. The principle emanating from the authorities on this issue is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a “criminal cause or matter”. It is the nature and character of the proceedings in which the relief is sought which provides the test. Every order made in such a cause or matter is an order in a criminal cause or matter, even though the order taken by itself is neutral in character and might equally have been made in a cause or matter which is not criminal. The proceedings brought by the appellant are not collateral to the exercise of the criminal jurisdiction. They relate to the decision of the magistrate made pursuant to section 37 of the Magistrate’s Code of Procedure Act, where the magistrate issued warrants of arrest. The appellant, being dissatisfied with the ruling of the learned judge where he refused to quash the warrants of arrest appealed to this Court. The direct outcome of the learned judge’s decision may lead to the arrest of the appellant, his trial and his possible punishment for the alleged offences by the criminal court. This appeal is therefore an appeal in a “criminal cause or matter” and falls within the ambit of section 33(3)(a). This Court has no jurisdiction to hear and determine the appeal. Nonetheless, the issues on the raised grounds of appeal are addressed below.

Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147 applied; **Glasford and Others v The Commissioner of Police** (1995) 48 WIR 117 followed; **Hapgood v Commissioner of Police and Another AXAHCVP2020/003** (delivered 24th June 2020, unreported) followed; **Belhaj and Another v DPP and Another** [2018] UKSC 33 followed.

2. The right to personal liberty is not an absolute right. The constitution itself outlines circumstances in which the right may be infringed such as by a warrant of arrest. The processes of the criminal justice system inevitably impact constitutional rights, such as the right to liberty (as in this case), a warrant of arrest having been issued. The mere fact that a constitutional right has been impacted and the judge erred in his decision on review does not mean that a right of appeal is automatic. An appeal lies in relation to a person who has been convicted of a criminal offence.

Attorney General of St. Christopher and Nevis et al v Lawrence (delivered 12th May 1997, unreported) followed; **Hapgood v Commissioner of Police and another** [1921] 2 A.C. 570 followed.

3. The decision of the learned judge to dismiss the application to adjourn and to hear the matters on paper was a case management decision. It is trite law that an appellate court will not interfere with a case management decision of a judge save in circumstances where the decision was blatantly wrong. The notice of hearing which was served on all parties to the proceedings was served on 20th December 2021. Between 20th December and the date of the hearing (approximately 2 and a half months) no application was made to the Court for an adjournment. Counsel for the appellant emphasized that the times for hearing of appeals in the Belize Court of Appeal are fixed. King’s Counsel would therefore have had notice that the date of hearing was within the period fixed for

hearing of appeals in Belize yet the application for adjournment was made on the very morning the applications were scheduled to be heard. Further, Part 11.17 must be read in its entirety and Part 11.17(c) clearly gives the court a discretion to determine any application without a hearing. The learned judge was empowered in the exercise of his discretion to hear the matter on paper and the Court discerns no error in the exercise of the learned judge's discretion.

Civil Procedure Rules 2000 applied; **Dufour et al v Helenair Corporation Ltd. et al** (1996) 52 WIR 188 applied; **Global Torch Ltd v AFSC Global Management Ltd (No 2)** 2014 UKSC 64; **Broughton v Kop Football (Cayman) Ltd** 2012 EWCA Civ 1743 followed.

4. The evidence of Cpl. Diamond was prima facie evidence on which the learned magistrate could have been satisfied that Mr. Prest had received the funds. While the learned magistrate did not outline in detail the evidence she took on oath from Cpl. Diamond, Cpl. Diamond outlined the evidence he gave on oath before the learned magistrate. The learned judge did not err in finding that in view of the evidence of Cpl. Diamond and the opposing evidence in Ms. Hobson's affidavit this dispute would best be resolved in the criminal court. In issuing the warrant, the magistrate only had to be satisfied that there was prima facie evidence of the ingredients of the offence. The learned magistrate did not have to be satisfied beyond a reasonable doubt that the appellant had received the funds.

R v Wilson [1947] 2 AER 569 followed; **R v West London Justices, ex parte Klahn** [1979] 2 All ER 221 followed; **R (Johnson) v Stipendiary Magistrate** [2019] EWHC 1709 (Admin) applied.

5. Generally, where there is an alternative remedy, the court would not grant leave for judicial review. However, it does not follow that if there is no alternative remedy, leave must be granted for judicial review. An applicant must still prove that he meets the test for the grant of leave for judicial review set out in **Sharma v Brown Antoine and Another**. Having found that based on the evidence before the learned judge in the affidavits of Cpl. Diamond and the learned magistrate, that it was open to the learned judge to find that the test for the grant of leave as stated in **Sharma** was not satisfied, the fact that the appellant does not have an alternative remedy is of no moment.

Civil Procedure Rules 2000 applied; **Sharma v Brown Antoine and Another** [2006] UKPC 57 applied.

JUDGMENT

- [1] **THOM JA:** This is an appeal against the decision of the learned judge in which he set aside the grant of leave to the appellant ("Mr. Prest") to file a claim for judicial review of the decision of the first respondent, the magistrate of District

“C” in the Island of Nevis to issue two warrants for the arrest of Mr. Prest in relation to alleged contravention of the Larceny Act.¹

Background

- [2] The second respondent, Corporal Randolph Diamond is a member of the Royal St. Kitts and Nevis Police Force. On 21st July 2021, he submitted to the learned magistrate two information outlining the following offences:

“ (i) For that you between the 20th and 31st day of December 2019 at Charlestown in the Parish of St. Paul in the Magisterial District “C” in the Federation of St. Christopher and Nevis being a Trustee of Two Million Five Hundred and Thirty Thousand United States Dollars (\$2,530,000. USD) which is equivalent to six Million Five Hundred and Thirty Thousand Eastern Caribbean Currency (\$6,530,000 ECC) for the use or benefit of Mark Kucher, with intent to defraud, did convert the said two Million Five Hundred and Thirty Thousand United States Dollars (2,530,000 USD) for your own use. Contrary to section 20 of the Larceny Act Chapter 4.16 of the Revised Edition 2002 of the laws of the Federation.

(ii) For that you between the 20th and 31st day of December 2019 at Charlestown in the Parish of St. Paul in the Magisterial District “C” in the Federation of St. Christopher and Nevis having received certain property to wit the sum of Two Million Five Hundred and Thirty Thousand United States Dollars (2,530,000 USD), which is equivalent to Six Million Five Hundred and Thirty Thousand Eastern Caribbean Currency (\$6,530,000 ECC) for the use or benefit of Mark Kucher did fraudulently convert the said Two Million Five Hundred and Thirty Thousand United States Dollars (2,530,000 USD) for your own use contrary to section 19 (d), of the Larceny Act Chapter 4.16 of the Revised Edition 2002 of the Laws of the Federation.”

- [3] The learned magistrate having received evidence on oath from Cpl. Diamond issued a warrant of arrest in relation to each offence. The warrants have not been executed. Mr. Prest is outside of the jurisdiction.

- [4] On 27th August 2021, Mr. Prest applied for leave to make a claim for judicial review and sought the following orders:

“(a) An Order quashing the decision of the 1st Respondent made on July 21, 2021 to issue an arrest warrant in the first instance against the Appellant for an alleged contravention of Section 19 (d) of the Larceny Act of Saint Christopher and Nevis.

¹ Chapter 4.16 of the Revised Laws of Saint Christopher and Nevis.

- (b) An order quashing the decision of the 1st Respondent made on July 21, 2021, to issue an arrest warrant in the first instance against the Appellant for an alleged contravention of Section 20 of the Larceny Act of Saint Christopher and Nevis.
- (c) Costs.”

[5] Mr. Prest also sought the following interim reliefs:

- (a) An interim order for a stay of execution of the two arrest warrants issued by the 1st Respondent on July 21, 2021, against the Appellant pending the determination by the court of the application for judicial review.
- (b) An order for an interim injunction restraining any publication of the existence of the arrest warrants issued by the 1st Respondent on July 21, 2021, against the appellant pending the determination by the Court of the application for judicial review.

The orders were sought on the ground that:

- (i) The warrant was frivolous and constitute an abuse of process.
- (ii) The issue of the warrants constitute an abuse of process as there was no sufficient evidence that the Applicant committed the alleged offences.
- (iii) The decision of the Magistrate is contrary to section 10(4) of the Constitution of St Christopher and Nevis.

[6] The learned judge granted Mr. Prest leave to apply for judicial review *ex parte*. At an *inter partes* hearing, the learned judge granted the interim reliefs sought and ordered that execution of the arrest warrants be stayed pending the hearing of the judicial review claim. Mr. Prest subsequently filed his fixed date claim for judicial review.

[7] Applications were made by the respondents to set aside the order granting leave to bring a claim for judicial review on the basis that Mr. Prest was seeking to

challenge the basis of the Director of Public Prosecution's decision to prosecute him, and secondly, Mr. Prest had alternative remedies available to him in the criminal proceedings.

- [8] The learned judge having considered the submissions of the parties set aside the leave granted to bring a claim for judicial review and the interim orders and struck out the fixed date claim for judicial review. In so doing, the learned judge concluded as follows at paragraph 73:

"73. In conclusion I am of the view that there are exceptional reasons to set aside the leave which had been granted to Mr. Prest to commence a claim for judicial review. The issues raised are matters best addressed in the criminal justice system and it would be inappropriate for this court, to hear a claim for judicial review on the grounds outlined in the various applications and affidavits filed on behalf of Mr. Prest. He has alternative remedies available to him."

- [9] Mr. Prest being dissatisfied with the ruling of the learned judge, outlined five grounds in his notice of appeal. At the hearing, the issues which emerged for determination could be summarised as follows:

- (i) The learned judge erred in refusing to grant the appellant's application for an adjournment of the hearing and determined that the matter be heard on paper.
- (ii) The learned judge applied the wrong principles in exercising his discretion to set aside leave.
- (iii) The learned judge made findings of fact which were not supported by the evidence.

There was no alternative remedy.

- [10] The court received written submissions from the appellant and the respondents and at the hearing of the appeal, having heard submissions from the parties reserved its decision.

- [11] On consideration of the submissions, the court by Order dated 13th October 2023, directed that the parties file further written submissions on the effect of

section 33(3)(a) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act.².

[12] The Court received further submissions from the parties.

[13] Section 33(3)(a) reads as follows:

“No appeal shall lie under this section-
(a) From any order in any criminal cause or matter.”

[14] The issue raised under section 33(3)(a) is an issue which goes to whether this court has jurisdiction to determine the appeal. I will deal with this issue first.

Jurisdictional Issue

[15] Learned counsel for the appellant, Mr. Peter Foster KC. outlined nine points in his submissions in support of his argument that the appeal is not an appeal in “a criminal cause or matter” and therefore the Court has jurisdiction to hear and determine the appeal. These points can be summarised as follows:

- (a) The application for judicial review involved constitutional principles.
- (b) There are no extant criminal proceedings.
- (c) The appeal is in a civil matter.
- (d) The cases of **Belhaj and Another v DPP and Another**³ and **Sharma v Brown Antoine and Another**⁴ are distinguishable from the present appeal.

[16] The respondents contended that pursuant to section 33(3)(a) the Court had no jurisdiction to hear the appeal as the appeal was an appeal in a criminal cause or matter. They relied on several decisions of this court and the courts in the

² Chapter 3.11 of Revised Laws of Saint Christopher and Nevis.

³ [2018] UKSC 33.

⁴ [2006] UKPC 57.

United Kingdom, including **Ex p Woodall**;⁵ **Amand v Home Secretary and Minister of Defence of Royal Netherlands Government**;⁶ **Glasford and Others v The Commissioner of Police**⁷ and **Hapgood v Commissioner of Police and Another**.⁸

- [17] The central issue which arises is whether this appeal is in “a criminal cause or matter”.

Legal Principles

- [18] The principles which are applicable in determining whether an appeal is in “a criminal cause or matter” have been discussed in several cases dating back to more than a century ago including decisions such as **Ex p Woodall**; **Clifford v O’Sullivan**;⁹ and **Amand**. The principles enunciated in these cases have been applied by this Court in several cases including **Glasford**, **Lewis**,¹⁰ **Lawrence**¹¹ and more recently **Hapgood**. These principles have also recently been applied by the UK Supreme Court in **Belhaj**; and **McGuinness**.¹² In considering Section 33(3)(a) in **Glasford**, Sir Vincent Floissac CJ stated at paragraph 4 that:

“The principles which govern the question whether an order was made in a criminal cause or matter were authoritatively stated in the decisions of the House of Lords in *Re Clifford and O’Sullivan* (1921) 2AC 570 and *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147. According to these decisions, there appear to be three pre-conditions to an order being in a criminal cause or matter. The first pre-condition is that, at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to be preferred against the applicant or some other person. The second pre-condition is that the application involved consideration of that charge of crime. The third pre-condition is that the direct outcome or result of the application was or might have been the applicant’s conviction and punishment by a court or tribunal having or claiming jurisdiction to convict and punish for that crime.”

⁵ (1884) 13 QBD 479.

⁶ [1943] AC 147.

⁷ (1995) 48 WIR 117.

⁸ AXAHCVP2020/003 (delivered 24th June 2020, unreported).

⁹ [1921] 2 A.C. 570.

¹⁰ *Attorney General of Antigua and Barbuda and Another v Lewis (Artland)* (1995) 51 WIR 89.

¹¹ Civil appeal No. 1 of 1997.

¹² *re McGuinness (Attorney General for Northern Ireland and others intervening)* [2020] 2 WLR 510.

As Viscount Simon LC pointed out in **Amand's** case, which was reiterated by the Court in **Glasford** at paragraph 22 – “It is the nature and character of the proceedings in which the relief is sought which provides the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.”

- [19] More recently, the House of Lords in **McGuinness** affirmed the principles in **Amand**. Lord Sales stated at paragraph 45 as follows:

“Amand remains the leading decision at the highest level regarding the meaning of the phrase “a criminal cause or matter”, in the context regarding rights of appeal. Three points may be made about it. First the “wide” interpretation of the phrase is required to direct attention to the nature of the underlying proceedings in which the High Court is asked to intervene, rather than focusing on the abstract categorization of the proceeding in the High Court itself. Secondly, as Lord Wright put it the word “matter” does not refer to the subject matter of the proceeding, but to the proceeding itself. It is not sufficient for the underlying proceedings to relate to a subject matter which might be described as “criminal” in a broad sense, the proceeding itself has to be criminal in nature. Thirdly, in order for the proceeding (in respect of which an application is made to the High Court to intervene) to be a criminal matter the two conditions identified by Viscount Cave must be satisfied, so that it can be said that the applicant is put in jeopardy of criminal punishment by the proceedings and such jeopardy has to be the direct outcome of the proceedings.”

- [20] And at paragraph 77:

“This involves asking the question in relation to the proceedings which underlie those in the High Court, are they proceedings “the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so... and which, if carried to their conclusion, might result in the conviction of the person charged and in a sentence of some punishment? If so, the proceedings in the High Court to challenge such criminal process will be categorized as “a criminal cause or matter” taking their character from the nature of those underlying proceedings.”

- [21] The above authorities were applied by this court in **Hapgood** where this Court considered section 29(2) of the **Eastern Caribbean Supreme Court (Anguilla) Act**¹³ which is in similar terms to section 33(3)(a). It reads:

“No appeal shall lie –

“(a) From any order made in any criminal cause or matter except as provided by this Act...”

- [22] **Hapgood** involved an appeal against an order of the learned judge made in judicial review proceedings in which the learned judge ordered that preliminary inquiry proceedings against Mr. Hapgood should continue before the learned magistrate in Mr. Hapgood’s absence. The respondent took the preliminary point that this Court had no jurisdiction to hear the appeal. Applying the above principles, this Court found that the issue to be determined concerned the nature and character of the proceedings which the learned judge reviewed, instead of the nature of the review. The Court found that the nature of the proceedings which the learned judge reviewed was preliminary inquiry proceedings, in particular whether those proceedings should continue. The outcome of the judge’s decision meant that it was quite possible that Mr. Hapgood could be convicted and sentenced in respect of the criminal charge. These proceedings the Court found were therefore undoubtedly criminal proceedings.

- [23] Pereira CJ, in delivering the judgment of the Court explained the rationale for the principle at paragraphs 24 – 25 as follows:

“24. By way of observation, the rationale underpinning the prohibition of appeals from orders made in a criminal cause or matter is apparent when considering the effect that such a right of appeal would have on the due administration of the criminal justice system. The criminal justice system quite often holds, in the balance, the liberty of persons who become subject to its jurisdiction and therefore there is a need for expediency in criminal proceedings. If orders made before the conclusion of criminal proceedings could be appealed to the Court of Appeal, the business of the Court of Appeal would undoubtedly be impeded with possible deleterious consequences for persons accused of committing a crime and persons who are victims of crimes. Furthermore, the ability of the Court to allocate the resources and to

¹³ Chapter E15 of the Revised Laws of Anguilla.

properly order its business in relation to the conduct of civil appeals would be impacted.

25. Moreover, in our opinion, prohibition on appeals from orders made in a criminal cause or matter is essential in so far as it seeks to restrict defendants from circumventing the punishment that would be imposed upon a conviction. Indeed, a defendant who anticipates a guilty verdict could simply delay his conviction and sentence by the prosecution in a series of appeals from orders made by a trial judge throughout the criminal proceedings. Equally, the focus on the underlying proceedings, as the measure of whether the appeal is from an order made in a criminal cause or matter; ensures that even proceedings which emanate from criminal proceedings but appear civil in nature, such as certain judicial review proceedings do not escape the prohibition under Section 29 (2) of the Act, for the singular reason that the proceeding being appealed is not itself criminal in nature. We considered that if there were a right of appeal to the Court of Appeal in circumstances similar to the case at bar, it would run counter to the aim of expediency and by extension promote injustice in the criminal justice system.”

[24] Applying these principles to the appeal, it is necessary to examine the nature of the proceedings that were under review in the High Court.

[25] Mr. Prest sought the following orders on judicial review:

- (1) An order quashing the decision of the first respondent made on 21st July to issue two warrants of arrest for the appellant for alleged contravention of sections 19(d) and 20 of the Larceny Act of Saint Christopher and Nevis.

The orders were sought on the grounds that:

- (1) The warrant was frivolous, and constitutes an abuse of process;
- (2) The issue of the warrants constitutes an abuse of process as there was no sufficient evidence that the appellant committed the alleged offences;
- (3) The decision of the Magistrate contravenes Section 10(4) of the Constitution of St. Christopher and Nevis.

Submissions and Discussion

The Application for Judicial Review involved Constitutional Principles

- [26] Mr. Foster KC submitted that the judicial review application before the learned judge involved constitutional principles of the protection of the law, liberty, natural justice and procedural fairness. Where a constitutional right is threatened such as the right to liberty which is central to this case as Mr. Prest's right to liberty is threatened by the warrants of arrest having been issued in error by the learned magistrate, the Administrative Court is clothed with jurisdiction to protect those rights. King's Counsel referred the Court to the following passages in the CCJ decision of **The Maya Leaders Alliance et al v Attorney General of Belize**:¹⁴

"(42). We wish to be clearly understood as affirming that the right to protection of the law does encompass access to and the enjoyment of the fundamental rules of natural justice.

(47) The law is evidently in a state of evolution, but we make the following observations. The right to protection of the law is a multi-dimensional broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty, or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be offered "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."

- [27] Mr. Foster KC also referred to paragraphs 71 and 72 of the CCJ decision in **Solomon Marin Jr v R**¹⁵ which reads:

"71. Finally, section 6(2) of the Constitution guarantees a right to a fair hearing. A guarantee that is part of the more general and pervasive right to the protection of the law (section 3(a)) of the Constitution. In this context, again applying a generous and purposive interpretation to section 6 (2), "hearing" imports the protection of the law in relation to the entire process. Thus, the right to "a fair hearing within a reasonable time", textually covers and is intended to cover post-conviction delay as in this case. Post-conviction delay can be a denial of the protection of the law to guarantee a fair and timely hearing.

¹⁴ [2015] CCJ 15.

¹⁵ [2021] CCJ 6 (AJ) BZ.

72. Indeed, an openminded, broad, and purposive approach to constitutional interpretation that seeks to realize the fullest and most practical access to efficiently and effectively protect, uphold, and vindicate fundamental rights supports both the textual interpretation as well as the articulated intent described above. To adapt the words of Saunders PCCJ in McEwan, courts should always endeavor to place a premium on affording citizens full and effective access to the courts for the purposes of vindicating contraventions of their fundamental rights. And, to do so generously and as may be legitimately permissible under the Constitution and the law.”

[28] In determining this issue, a good starting point is an examination of Mr. Prest’s application for judicial review. In his application Mr. Prest sought the following:

“An order quashing the decision of the First Respondent made on 21st July to issue arrest warrants for the appellant for alleged contravention of Sections 19(d) and 20 of the Larceny Act of Saint Christopher and Nevis.”

[29] The only provision of the Constitution referred to by Mr. Prest in his application for judicial review is section 10(4). As the learned Solicitor-General pointed out, this provision deals with retroactivity of criminal offences and severity of sentences, issues which did not arise in the proceedings below. Based on the submissions of Mr. Foster, KC the reference should be to 10(1). I will treat it as such. It reads as follows:

“(1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

[30] There is no dispute relating to the principles stated by the CCJ in the decisions cited above. The gravamen of learned King’s Counsel submission is that there must be a right to appeal where the court below has erred in protecting the right to liberty. The warrants having been wrongfully issued, and the learned judge having failed to set them aside, there must be a right to appeal. In so far as section 33(3)(2) seeks to prohibit an appeal against such a wrong, it is inconsistent with the Constitution.

[31] It must be noted that no constitutional proceedings were brought by Mr. Prest in relation to breach of the provisions of section 10(1). It is also of note that in

the fixed date claim which Mr. Prest filed pursuant to leave which was granted *ex parte*, Mr. Prest made no mention of breach of any of his constitutional rights. The reliefs claimed in his fixed date claim are as follows:

“1. An order quashing the decision of the First Defendant made on 21st July 2021 to issue warrants against the claimant for an alleged contravention of section 19(d) of the Larceny Act of Saint Christopher and Nevis.

2. An order quashing the decision of the First Defendant made on 21st July 2021 to issue an arrest warrant against the claimant for an alleged contravention of section 20 of the Larceny Act of Saint Christopher and Nevis.

3. An order granting a permanent injunction to the claimant restraining any publication of the existence of and/or details concerning the warrant for the arrest of the Claimant.”

[32] Mr. Prest exercised his right to seek judicial review. Even if the learned judge was in error in setting aside leave with the result that the warrants of arrest could be executed against Mr. Prest, where the matter fell within the ambit of section 33(3)(2) there would be no right of appeal. This issue was addressed in **Lawrence** which was referred to by the learned Solicitor-General. There Singh JA lamented the fact that there was no right of appeal even where the decision of the learned judge was clearly wrong, the Court having found that the judge had erred in determining that the procedure to be adopted on the third trial of an accused for a criminal offence the jury having failed to arrive at a verdict on the first two occasions, was the procedure of court in the UK. Singh JA stated at paragraph 25 as follows:

“I am constrained to express my grave disquiet at the absence of a right of appeal from decisions of the High Court which fall under section 31 (3)(a) of the Supreme Court Act. Because, of the present state of the law, however grave and obvious the error of the judge of the High Court, the aggrieved party can have no redress. The instant matter is a glaring example of the inconvenience of this legislation. Section 65 of the Constitution has now been judicially stained with injudicious ink and we are jurisdictionally powerless to have that stain “tippexed”.”

[33] The right to personal liberty is not an absolute right. The Constitution itself outlines circumstances in which the right may be infringed such as by a warrant of arrest. The processes of the criminal justice system inevitably impact

constitutional rights, as in this case the right to liberty, a warrant of arrest having been issued. The mere fact that a constitutional right has been impacted and the judge errors in his decision on review does not mean that a right of appeal is automatic. **Lawrence** makes it clear that where the matter in which it arose is a criminal cause or matter, section 33(3)(a) prohibits such an appeal. An appeal lies in relation to a person who has been convicted of a criminal offence. The rationale for this is as explained by Dame Janice Pereira CJ in **Hapgood** as referred to earlier. Section 10(1) is of no assistance to Mr. Prest's case.

There are No Extant Criminal Proceedings

[34] Mr. Foster KC submitted that no charges were preferred against Mr. Prest. The cause or matter is not yet in existence. It is a prospective cause or matter since no charge currently exists. Section 33(3)(a) is therefore not applicable. There was no order made by the magistrate in a criminal cause or matter. A warrant does not constitute a charge. It has no case number.

[35] In my view this submission has no merit. It is not a condition for a matter to be "a criminal cause or matter", that a criminal charge must have been laid. It is sufficient that they may be laid. Authorities such as the case of **Provincial Cinematograph Theatres Ltd v Newcastle-upon-Tyne Profiteering Committee**¹⁶ make this very clear. Also, Lord Porter in **Amand** at p. 390 stated:

"Finally it was suggested that in order that a matter may be a criminal cause or matter, it must fulfill the two conditions laid down by Viscount Cave in *Re Clifford and O'Sullivan* i.e. it must involve the consideration of some charge of crime, i.e. of an offence against public law, and that charge must be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for this offence or alleged offence. For the purpose of deciding the case then in question, those two conditions were sufficiently explicit, but I do not think they were purported to be an exact definition of a criminal cause or matter. The present case does fulfill the first requirement and though the charge will not necessarily either be preferred or be about to be preferred before any tribunal, yet the appellant was put in jeopardy of having a criminal jurisdiction, to impose punishment for the offence. *Exp. Pulbrook and*

¹⁶ (1921) 19 LGR 505.

Re Savakar are authorities for the proposition that is not necessary that the charge must be preferred before such court. It is enough that it may be so preferred.”

- [36] Criminal proceedings in St. Kitts and Nevis are commenced in the Magistrate’s Court. The relevant provisions are sections 27 and 29 of the **Magistrates’ Code of Procedure Act**.¹⁷ They read as follows:

“27. Every District Magistrate shall have jurisdiction –

- (a) To receive complaints and information of all offences and to cause to be brought before him or her either by summons or warrant, all persons charged with such offences.

29. The charge shall (subject as hereinafter mentioned) be laid on complaint and the complaint may in the discretion of the Magistrate be reduced in writing.”

- [37] The effect of the above provisions is that a person is charged when an information or complaint outlining the offence the accused is alleged to have committed is presented to a magistrate. The magistrate may either issue a summons for the person to appear in court at a particular date and time, or the magistrate may issue a warrant of arrest for the police to arrest the person and bring them to court to answer the charge.

- [38] The evidence before the High Court in the affidavit of the learned magistrate at paragraphs 4 and 5 was that Cpl. Diamond presented the learned magistrate with two information, in which the two offences were outlined. Cpl. Diamond swore to the information on oath and provided evidence in relation to the offences. The warrants were issued subsequently. The evidence clearly shows that the charges were laid. In any event the issuance of a warrant of arrest is sufficient evidence that a charge may be proffered.

The Appeal is in a Civil Matter

- [39] Learned King’s Counsel submitted that the real issue between the parties relates to an investment contract between the parties and is therefore not a criminal cause or matter. Further at the *ex parte* stage, the learned judge raised

¹⁷ Cap 3.17 of the Revised Laws of Saint Christopher and Nevis.

concerns as to whether the matter ought to be pursued as a civil matter. This submission is also unmeritorious. It is not an unusual occurrence for the conduct of a business partner in dealing with partnership property in some instances to amount to criminal conduct. What is relevant is the nature of the conduct that forms the basis of the complaint. Here the conduct alleged is fraudulent conversion of funds of the other party to the business arrangement.

Appeal distinguishable from the cases of **Belhaj and Another v DPP**; and **Sharma v Brown- Antoine**.

[40] Learned King's Counsel sought to distinguish the cases of **Belhaj** and **Sharma**. Learned King's Counsel submitted that while the above cases considered provisions equivalent to section 33(3)(a), they did so from a perspective of a challenge to the DPP's decision to prosecute or not to prosecute. Mr. Prest's case is not a challenge to the decision of the learned DPP to prosecute, rather it challenges the process by which the learned magistrate issued the warrants. He submitted that the effect of section 33(3)(a) is to ensure that the Court of Appeal does not in civil proceedings adjudicate on criminal liability as the avenue open to a person charged would be in criminal proceedings. This submission is also unmeritorious.

[41] **Belhaj** involved judicial review of the decision of the DPP not to prosecute. In determining whether the appeal was in "a criminal cause or matter" Lord Sumption with whom the majority agreed, adopted the reasoning of Lord Wright in **Amand** where he stated:

"The principles which I deduce from the authorities I have cited and the other authorities which I have considered is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is "a criminal cause or matter". The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English Court is an order in a criminal cause or matter, even though the order taken by itself is neutral in character and might equally have been made in a cause or matter which is not criminal."

[42] Lord Sumption however acknowledged that there are some decisions which are made in criminal proceedings but would not be regarded as “a criminal cause or matter.” In relation to the above statement of Lord Wright, he stated:

“In other words, Lord Wright was treating the proceedings in the Divisional Court as an integral part of the “matter” before the magistrate. Since the latter was criminal in nature so too was the former. Clearly, the principle thus stated has its limits. A decision on an application collateral to the exercise of criminal jurisdiction, such as an application for release of documents referred to in court will not necessarily itself be a decision in a criminal cause or matter” see – R(Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (2011) 1WLR 3253 where a decision in a criminal trial whether to order disclosure to a newspaper documents relating to the trial was held not to be a proceeding in criminal cause or matter.”

[43] Another example where an application in criminal proceedings was held not to be a proceeding in a criminal cause or matter is the case of **McGuinness**. There, Mrs. McGuinness, the sister of one of the victims, brought judicial review proceedings in relation to the decision of the Department of Justice for Northern Ireland to refer Mr. Stone to the Parole Commissioners for Northern Ireland for the Parole Commissioners to consider whether Mr. Stone who was convicted of serious offences and in prison, should be released on licence. The Divisional Court found in her favour. The Department of Justice and Mr. Stone appealed. The Attorney General of Northern Ireland intervened to raise the issue of the jurisdiction of the court to determine the appeal. Lord Sales in delivering the decision of the House of Lords having reviewed several of the decisions referred to above including **Ex p Woodall**, **Amand** and **Belhaj**, concluded that the appeal did not relate to the assessment or conduct of any criminal charge against Mr. Stone on which he may be tried and may be subjected to sentence. Rather the proceedings were concerned with whether the Department of Justice had correctly understood and implemented a criminal sentence imposed on Mr. Stone. The criminal process against him was long exhausted before the Department of Justice took the decision which is under challenge in the proceedings. The proceedings were therefore not in “a criminal cause or matter”.

- [44] This principle is also illustrated in the case of **R (Purdy) v Director of Public Prosecution**.¹⁸ Purdy concerned a judicial review of the DPP's refusal to publish details of his policy of the circumstances in which a prosecution would be brought for the offence of aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961. Counsel on both sides and the Court agreed that it was not "a criminal cause or matter".
- [45] Mr. Prest's case does not fall into this category when the test in **Amand** is applied. The applicable principles in determining whether a matter is "a criminal cause or matter" are the principles in **Amand**. These were the principles applied in **Belhaj** and are the same principles applicable to this appeal. The proceedings brought by Mr. Prest are not collateral to the exercise of the criminal jurisdiction. The proceedings which were the subject of review by the learned judge relate to the decision of the magistrate made pursuant to section 37 of the **Magistrate's Code of Procedure Act**, where the magistrate issued warrants of arrest. Mr. Prest being dissatisfied with the ruling of the learned judge where he refused to quash the warrants of arrest, appeals to this Court. The direct outcome of the learned judge's decision may lead to the arrest of Mr. Prest and his trial for offences under section 19(d) and 20 of the **Larceny Act** and his possible punishment for the alleged offences by the criminal court.
- [46] For all of the above reasons I find that this appeal is an appeal in a "criminal cause or matter" and falls squarely within the ambit of section 33(3)(a) and therefore this Court has no jurisdiction to hear and determine the appeal. This finding brings an end to this appeal.
- [47] In the event that I am wrong and the Court does have jurisdiction then assuming there is such jurisdiction I now set out my opinion on the issues raised in the grounds of appeal.

¹⁸ [2009] UK HL 45.

[48] In the notice of appeal, the appellant outlined five grounds of appeal. However, at the hearing Mr. Foster K.C. summarised them into two issues. Firstly, that the learned judge erred when he denied the application to adjourn the hearing and determined that the matter would be heard on paper. Secondly, the learned judge erred in the exercise of his discretion in that: (a) there was no basis for his factual findings on which the discretion was exercised; (b) he failed to apply the well-established principles for grant of arrest warrants in determining whether the magistrate's decision should be reviewed; and (c) there was no alternative remedy.

**Issue 1- Procedural Issue
Adjournment**

[49] The hearing of the applications by the respondents to set aside the leave to seek judicial review, the interim order and to strike out the fixed date claim filed pursuant to leave granted by the learned judge, was fixed for 9th March 2023. On that date Mr. Foster KC was absent. Ms. Taylor who appeared with Mr. Foster KC was present and informed the Court that learned King's Counsel was absent due to him sitting as a Justice of Appeal in the Belize Court of Appeal and sought an adjournment of the matter. The learned judge refused the application and ordered that the matter be heard on paper. The learned judge also granted leave to the parties to file further submissions.

[50] Mr. Foster KC submitted that the learned judge erred in his exercise of discretion when he refused to grant the adjournment. Learned King's Counsel submitted that Mr. Prest was not given 14 days' notice of the hearing. Further all counsel had agreed to the adjournment except the learned DPP. There was no consent of the parties that the case should be fixed for hearing on 9th March 2023.

[51] Mr. Ramlogan SC in response referred the Court to the notice of hearing which was served on all parties to the proceedings including Mr. Prest through his counsel, Ms. Taylor. The notice of hearing was served on 20th December 2021. Between 20th December 2021 and the date of the hearing, no application was made to the Court for an adjournment. Further, the decision of the judge was

a case management decision and the well-established principle is that an appellate court would be slow to interfere with a case management decision of a judge.

[52] I agree with the submission of Mr. Ramlogan SC. This Court has stated on numerous occasions that an appellate Court would not interfere with a case management decision of a judge save in circumstances where the decision was blatantly wrong.¹⁹

[53] Having reviewed the transcript of 9th March 2022 and the order of the learned judge, in my view, the learned judge did not err in the exercise of his discretion when he refused the appellant's application for an adjournment. Learned counsel had notice of the date for hearing approximately 2 ½ months prior to the hearing. Mr. Foster KC emphasised that the times for hearing of appeals in the Belize Court of Appeal are fixed. King's Counsel would have therefore had notice that the date of hearing was within the period fixed for hearing of appeals in the Belize Court of Appeal. The application for adjournment was made on the very morning that the applications were scheduled to be heard.

Hearing on Paper

[54] The learned judge having refused Mr. Prest's application for an adjournment ordered that the respondents' applications be heard on paper. In paragraph 1 of his order the learned judge stated: "The parties are at liberty to file any further submissions in response to what is already on the Court's record before 16th March 2022." It is not disputed that Mr. Prest filed further submissions pursuant to the Order.

[55] Mr. Foster KC contended that in ordering that the matter be heard on paper, the learned judge erred. He referred to CPR Part 11.17(d) which reads:

"The Court may deal with an application without a hearing if –

¹⁹ Dufour et al v Helenair Corporation Ltd. et al (1996) 52 WIR 188 ; Simou v Salliss 2017 EWCA Civ 312; Global Tech Ltd v AFSC Global Management Ltd (N0. 2) 2014 UKSC 64; Broughton v Kop Football (Cayman) Ltd 2012 EWCA Civ 1743.

(d) The parties agree and the court considers it appropriate;
or...”

[56] Learned King’s Counsel contended that the parties and in particular Mr. Prest did not agree that the matter be heard without a hearing. There is no merit in this submission. Rule 11.17 must be read in its entirety. It reads:

“11.17 The Court may deal with an application without a hearing if –

- (a) no notice of the application is required;
- (b) the court considers that the application can be dealt with over the telephone or by other means of communication;
- (c) the court does not consider that a hearing would be necessary or appropriate;
- (d) the parties agree and the court considers it appropriate; or
- (e) the parties have agreed to the terms of an order –
 - (i) (i) which does not come within rule 27.8(1) and
 - (ii) (ii) the application (or a copy of the application) is signed by the legal practitioner for all parties to the application.”

[57] It is not in dispute that paragraphs of Part 11.17 are disjunctive. Part 11.17(C) clearly gives the court a discretion to determine any application without a hearing. The learned judge was empowered in the exercise of his discretion to hear the matter on paper. I discern no error in the exercise of the learned judge discretion nor was the court referred to any. This ground of appeal fails.

Issue 2 - Exercise of Discretion Warrants of Arrest

[58] Both parties agreed that the test for setting aside the grant of leave to file a claim for judicial review is the test outlined by the Privy Council in **Sharma** where Lord Bingham and Lord Walker stated at p. 390:

“(6) Where leave to move for judicial review has been granted, the Court’s power to set aside the grant of leave will be exercised very sparingly... But it will do so if satisfied on *inter partes* argument that the leave is one that plainly should not have been granted...”

[59] The rationale for this approach was explained by Lord Bingham in **R v Secretary of State for the Home Department exp. Chinoy**²⁰ as follows:

²⁰ (1991) 4 Admin LR 457 at 462.

“I would, however, wish to emphasize that the procedure to set aside is one that should be invoked sparingly. It would be an entirely unfortunate development if the grant of leave *ex parte* were to be followed by application to set aside *inter partes* which would then be followed, if the leave were not set aside, by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked sparingly and it is an order which will only be granted in a very plain case. I am, however satisfied, that I have discretion to grant such an order if satisfied that it is a proper order in all the circumstances.”

[60] Mr. Foster KC contended that the learned judge erred in his application of the test in **Sharma and Exp Chinoy**. Mr. Foster KC submitted that the learned judge misinterpreted Mr. Prest’s case to be that the DPP did not have sufficient evidence to bring the charges against Mr. Prest. In other words, Mr. Prest was challenging the decision of the DPP to prosecute as was the case in **Sharma**. Mr. Foster KC submitted that Mr. Prest challenged the procedure the magistrate applied in deciding to issue the warrants of arrest. The applicable principles which the magistrate should have applied are the principles outlined in the case of **Exp. Klahn**²¹ which were also applied in the case of **R (Johnson) v Stipendiary Magistrate**.²² Mr. Foster KC further submitted that had the learned judge applied these principles he would have found that there were grounds to grant leave for judicial review. The evidence of Cpl. Diamond and the learned magistrate does not show that there was sufficient evidence to sustain the charges. In particular, there was no evidence that Mr. Prest had received the funds, which was an element of the charges that the prosecution had to prove. The learned magistrate failed to consider the elements of the offence. Had she done so, she would not have issued the warrants since there was no evidence that the offences were committed.

[61] Mr. Foster KC submitted further that while the learned judge recognised that the learned magistrate was required to exercise a judicial function as illustrated in *Exp Klahn*, the learned judge did not fully address the full effect of section 37 of the **Magistrate’s Code of Procedure Act**.

²¹ R v West London Justices, *ex parte Klahn* [1979] 2 All ER 221.

²² [2019] EWHC 1709 (Admin).

[62] Mr. Ramlogan SC in response submitted that there was sufficient evidence from Cpl. Diamond before the learned magistrate on which the magistrate could be satisfied that there was evidence in support of the allegations that Mr. Prest fraudulently converted the funds. There was no need for the learned magistrate to outline all of the evidence received from Cpl. Diamond. The onus was on the appellant who alleged there was no evidence that Mr. Prest received the funds to produce such evidence which had the magistrate considered such evidence she would not have arrived at the conclusion that she made.

[63] Section 37 of the **Magistrate's Code of Procedure Act** reads as follows:

“(1) In all cases where a charge is made in respect of an offence punishable either on indictment or on summary conviction the Magistrate if he or she thinks it expedient that a warrant be issued in the first instance, may take on information, and require such evidence in that behalf as he or she considers necessary to substantiate the matter of the information and may issue his or her warrant in the first instance to apprehend such person as aforesaid and to cause him or her to be brought before him or her or any other Magistrate in the State to answer the charge and to be dealt with according to law.

(2) The Magistrate may issue such warrant as aforesaid notwithstanding that a summons in respect of the matter charged has been issued at any time before the time of appearance in such summons mentioned.

Provided that where a warrant is issued in the first instance the Magistrate shall furnish a copy or copies thereof and cause a copy to be served on each party apprehend.”

[64] Section 37 gives the magistrate a discretion to issue a warrant of arrest. This discretion must be exercised judiciously. A magistrate must determine whether the evidence justifies the issue of a warrant of arrest. I find the following statement in **R v Wilson**²³, succinctly states the approach a magistrate should adopt: “A summons is the result of a judicial act. It is the result of a complaint which has been made to a magistrate on which he must bring his judicial mind

²³ [1947] 2 AER 569 at 570.

to bear and decide whether on the information or complaint before him he is justified in issuing a summons.”

[65] **Exp. Klahn** on which Mr. Foster KC relies, provides useful guidance on the approach a magistrate should adopt in exercising the discretion. Lord Widgery CJ at p.223 outlined the following factors which should be considered as follows:

- (i) Whether the allegation is an offence known to law and if so whether the essential ingredients of the offence are prima facie present;
- (ii) That the offence is not out of time;
- (iii) That the court has jurisdiction;
- (iv) Whether the informant has the necessary authority to prosecute;
- (v) Whether the allegation is vexatious.

The above list is not exhaustive. The magistrate is required to ascertain the relevant circumstances.

[66] This approach was adopted in **R (Johnson)**. The appellant Boris Johnson brought judicial review proceedings challenging the issue of a summons against him for misconduct in public office. The issue was whether he was acting as a public officer when the statements the subject of the complaint were made and secondly whether he willfully neglected to perform his duty and or willfully misconducted himself. In quashing the summons, the court found that the finding by the district judge that Mr. Johnson held a public office, and it was an influential office was not sufficient to determine that the statement the subject of the complaint was made while he was acting as a public officer.

[67] The authorities above emphasise that before issuing a warrant a magistrate is required to consider the offence alleged and be satisfied that there is prima facie

evidence of all the ingredients of the offence. It must be noted that the magistrate is not required to conduct an *ex parte* mini trial.

[68] Mr. Prest's challenge is that there was no evidence before the magistrate of a key ingredient of the alleged offences being Mr. Prest received the funds. The learned judge at paragraph 49 of the judgment considered the affidavit of Ms. Hobson in support of Mr. Prest's case that he did not receive the funds and therefore could not have fraudulently converted the money for his own use and benefit. The learned judge also considered the affidavit of the learned magistrate and Cpl. Diamond. Having done so the judge concluded at paragraph 53 that having regard to the disputed facts, the matter would best be addressed in criminal proceedings.

[69] The authorities such as **Exp Klahn**; **R (Johnson)** and **Wilson** do not require a magistrate to be satisfied that the evidence establishes beyond a reasonable doubt each ingredient of the offence. Rather the magistrate must be satisfied that there is prima facie evidence of each ingredient of the offence.

[70] The evidence that was before the learned magistrate in support of the warrants was the evidence of Cpl. Diamond. In paragraphs 4 to 14 he outlined the complaint made by Mr. Kucher and the evidence he gathered from his investigation of Mr. Kucher's complaint. His investigation included obtaining a production order from the court which enabled him to obtain evidence in relation to the \$2,539,000 which Mr. Kucher transferred to Attorney Myrna Walwyn (Attorney for PIAN) to be held in an escrow account, and which was subsequently used as part of the purchase price for BONI. PIAN holds 100% of the shares of BONI and Mr. Prest is the sole shareholder of PIAN.

[71] The learned magistrate outlined in her affidavit in paragraphs 4 and 5 that Cpl. Diamond appeared before her with two information, and he sought two warrants of arrest. She outlined the offences charged in the information. At paragraphs 6 and 7 she stated:

"6. After reading the Information and having a preliminary discussion with Cpl. Diamond, I was of the view that it was expedient that a warrant

be issued in the first instance in accordance with Section 37 of the Magistrates' Code of Procedure Act. I therefore asked Cpl. Diamond to state on oath the evidence he had in relation to the charges against Mr. Prest as they appeared in the Information. Cpl. Diamond took the Oath and complied with my request.

7. I was satisfied that Cpl. Diamond had provided me with sufficient evidence to substantiate the matter in the Information. I accordingly issued the warrants requested....”

[72] The evidence of Cpl. Diamond was prima facie evidence on which the learned magistrate could have been satisfied that Mr. Prest had received the funds. While the learned magistrate did not outline in detail the evidence she took on oath from Cpl. Diamond, Cpl. Diamond outlined in detail the evidence he gave on oath before the learned magistrate. In my view the learned judge did not err in finding that in view of the evidence of Cpl. Diamond and the opposing evidence in Ms. Hobson's affidavit this factual dispute would best be resolved in the criminal court.

[73] As stated earlier in determining whether to issue the warrant, the magistrate only had to be satisfied that there was prima facie evidence of the ingredients of the offence. The learned magistrate did not have to be satisfied beyond a reasonable doubt that Mr. Prest had received the funds.

Finding of Facts

[74] At paragraphs 51 and 52 of the judgment the learned judge stated:

“51. The evidence presented by Corporal Diamond, as referred to by Ms. Hobson was that Mr. Kutcher personally wired 2,530,000.00 US from his own account in Canada to BMO for onward transmission to an account to be held in escrow by an attorney acting on behalf of Petrodel Investments Advisors Nevis Limited (PIAN). It is asserted that Mr. Prest is the sole shareholder, main beneficiary of and directing will and mind of PIAN. He had personally negotiated the contract upon which Mr. Kutcher was acting. It is further asserted that the funds were to have been held in escrow until such time as Mr. Kutcher had obtained regulatory approval for him to acquire 45% of the shareholding in the Bank of Nevis International Ltd. That was Corporal Diamond's assertion.”

[75] Cpl. Diamond also asserted that at the direction of Mr. Prest, the funds were transferred from the attorney's escrow account into an account at the Bank of

Nevis Ltd. and subsequently used to purchase shares in the name of PIAN. It is further asserted that Mr. Prest is the sole shareholder of PIAN and therefore the main beneficiary of this transaction. Cpl. Diamond further asserted that this transaction was not designed to ensure that Mr. Kutcher had acquired the shares, which was the main purpose for which the funds were to have been held in escrow, but to benefit Mr. Prest or his company in acquiring the shares through the use of Mr. Kutcher's funds.

[76] Mr. Foster KC submitted that there was no such evidence in any of Cpl. Diamond's affidavits that were before the learned judge. Further these findings led the judge into error in concluding: "These are disputed facts and may be subject to interpretation based on the provisions of the legislation and the various documents provided. However, taking this evidence at its highest I am not of the view that the assertions raised on behalf of Mr. Prest are matters which are best suited for judicial review." In making findings for which there was no evidential basis and relying on these findings to determine that the matter was not suited for judicial review the learned judge erred.

[77] Mr. Ramlogan SC in response submitted that while the words used by the learned judge were not the exact words used in Cpl. Diamond's affidavit, the effect of the statements made by Cpl. Diamond is as stated by the learned judge. The documentary evidence shows that PIAN is the 100% owner of BONI. While Mr. Prest's children are beneficiaries of PIAN they have no control over PIAN. The evidence also shows that the legal opinions obtained by Mr. Prest show that the \$2.5mil. was to be held in escrow and only to be paid out when all approvals were obtained for 49.9% of the shares to be transferred to Mr. Kutcher.

[78] I agree with these submissions of Mr. Ramlogan SC. While Cpl. Diamond did not use the specific words stated by the learned judge in paragraphs 51 and 52, an examination of his affidavits, when read conjointly with the documentary exhibits referred to by learned Senior Counsel, in my view they provided a sufficient evidential basis for the learned judge to make the statements which he did in the paragraphs 51 and 52.

Alternative Remedy

- [79] Section 56.6(e) of CPR 2000 requires an applicant to state whether there is any alternative remedy and if so to state why judicial review is the more appropriate remedy. Generally, where there is an alternative remedy, the court would not grant leave for judicial review.
- [80] Mr. Foster KC submitted that the learned judge failed to consider that there was no alternative remedy available to Mr. Prest. Judicial review was the only route by which the decision of the learned magistrate could be challenged. Mr. Prest has no right of appeal from the magistrate's decision.
- [81] Mr. Ramlogan SC submitted in response that judicial review is a remedy of last resort and authorities such as **Sharma** establish that where there is an alternative remedy in the criminal court, judicial review should not be granted. Mr. Prest has alternative remedies available to him in the criminal court including a stay of proceedings, a challenge to the sufficiency of the evidence at case management and no case submissions. The learned judge addressed his mind to all of these matters in determining that the leave granted should be set aside. Learned senior counsel further submitted that the issue of sufficiency of evidence is for the criminal court and not an issue to be determined by way of judicial review.
- [82] Mr. Foster in reply submitted that the remedies in the criminal justice system were not appropriate since once a warrant is executed, Mr. Prest would lose his right to liberty. There is some force in this argument.
- [83] The effect of CPR 56.3 is that where there is an alternative remedy, leave for judicial review may not be granted. However, it does not follow that if there is no alternative remedy, that leave must be granted for judicial review. An applicant must still prove that he meets the test for grant of leave for judicial review as set out in **Sharma**.
- [84] The learned judge addressed the issue of alternative remedy at paragraphs 34–39 of the judgment where he referred to among other cases, the case of

Brandt v Commissioner of Police.²⁴ In **Brandt** the Privy Council stated that administrative proceedings “are an abuse of the Court’s process in the absence of some feature which at least arguably indicates the means of legal redress otherwise available in the criminal proceedings would not be adequate.” Having reviewed the authorities the learned judge was of the view that Mr. Prest had alternative remedies within the criminal justice system. He concluded at paragraph 73 as follows:

“In conclusion, I am of the view that there are exceptional reasons to set aside the leave which had been granted to Mr. Prest to commence a claim for judicial review. The issues raised are matters best addressed in the criminal justice system and it would be inappropriate for this court to hear a claim for judicial review on the grounds of the various applications filed on behalf of Mr. Prest. He has alternative remedies available to him.”

[85] The learned judge did base his finding in part on the basis that Mr. Prest had adequate alternative remedies in the criminal court. Mr. Prest’s case for the grant of judicial review is essentially that there was not sufficient evidence before the learned magistrate for the issue of a warrant. Having found earlier that based on the evidence before the learned judge in the affidavit of Cpl. Diamond and the learned magistrate that it was open to the learned judge to find that the test for grant of leave as stated in **Sharma** was not satisfied, the fact that Mr. Prest does not have an alternative remedy as contended by Mr. Foster KC is of no moment.

[86] For these reasons, if the Court had jurisdiction to determine the appeal, I would have dismissed the appeal.

²⁴ [2021] UKPC 12.

[87] For the reasons stated above, this court has no jurisdiction to determine the appeal. The appeal is dismissed. The decision of the learned judge is affirmed. The appellant shall pay the respondents their costs on the appeal to be assessed by a judge of the lower court.

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

I concur.
Esco Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar