

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

Claim No. DOMHCV 2020/0218

IN THE MATTER OF A DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS, THE CHIEF OF POLICE AND REGAN BALTHAZAR TO PROCEED WITH CRIMINAL COMPLAINTS AGAINST THE APPLICANT AND THE INDICTMENT RELATING THERETO.

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO PART 56 OF THE CIVIL PROCEDURES RULES 2000 CLAIMING THE ADMINISTRATIVE ORDERS OF CERTIORARI TO QUASH THE CHARGE OF REGAN BALTHAZAR AND TO PROHIBIT THE DIRECTOR OF PUBLIC PROSECUTION FROM PROCEEDING WITH THE INDICTMENT ON THE CRIMINAL CHARGES AGAINST THE APPLICANT WHICH INDICTMENT IS DATED APRIL 11TH 2019 AND DEPOSITION FILED 10TH 2019.

AND

IN THE MATTER OF THE CONSTITUTION OF THE COMMONWEALTH OF DOMINICA

AND

IN THE MATTER OF AN APPLICATION BY SHANE GRAHAM A PERSON ALLEGING THAT SECTION 8 (1), 8 (2) (a), (b), (c), (d) and (e) OF THE CONSTITUTION OF THE COMMONWEALTH OF DOMINICA ARE BEING, HAVE BEEN AND LIKELY TO BE INFRINGED

AND

IN THE MATTER OF AN APPLICATION FOR REDRESS BY SHAME GRAHAM UNDER SECTION 16 OF THE CONSTITUTION OF THE COMMONWEALTH OF DOMINICA

Between:

SHANE GRAHAM

Applicant

and

[1] **THE CHIEF OF POLICE**
[2] **OFFICER REGAN BALTAZAR**
[3] **DIRECTOR OF PUBLIC PROSECUTION**

Respondents

Appearances:

Gina Dyer Munro of Dyer & Dyer for the Applicant
Kayan Toussaint State Counsel of the Attorney General's Chambers for the
Respondents

2022: January 31;
May 20;
(Written submissions filed)
2023: June 9;

DECISION

[1] **STEPHENSON J.:** If a person has suffered grievance at the hands of a public body there is opportunity for him to obtain redress through the Courts. A person who feels he has been wronged has a right to invoke the inherent supervisory jurisdiction of the High Court which enables the Court to review decisions of government functionaries, inferior courts, tribunals and other administrative bodies to ensure that they did not act illegally, irrationally or commit some procedural impropriety.

Re: CCSU -v- The Minister for Civil Service¹

[2] Before the court is an application for leave to apply for Judicial Review. This claim is intermingled with applications for Constitutional redress.

[3] It is unfortunate that the submissions were filed both in support of and in opposition to the application since December 2021 and those submissions were duly filed away and only recently been brought to the court's attention. It is my sincere hope that counsel and the parties would accept my humblest apologies for the delay in the delivery of my ruling. This court is aware that

¹ [1985] I.C.R. 14

matters such as these should be dealt with on an urgent basis and it is indeed very unfortunate that this decision was not dealt with, with the expediency required. Further, it is noted that this period was an extremely difficult period for the court due to the infestation of mold followed by the onset of the Covid Quake.

[4] At the leave stage, the court is required to look at the overall evidence presented and to identify the grounds on which the appellants' challenge is arguable.

[5] The test for leave to apply for Judicial Review was adumbrated in the Privy Council in the oft quoted and applied in the **Sharma's** case², Lords Bingham and Walker elucidated the test for the grant of leave in the following terms³

'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. ... It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the Court may strengthen.'⁴

[6] As the English Court of Appeal recently said with reference to the civil standard of proof in **R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468**, at para [62], in a passage applicable mutatis mutandis to arguability:

'...the more serious the allegation the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.' [Emphasis added.]

[7] The applicant's case was supported by affidavit evidence filed on his behalf dated 22nd September 2021, 22nd October 2021, February 5th 2021, April 14th 2021 and September 7th 2021. Written submissions were made on the 7th September 2021. There was also an affidavit filed in support of the applicant's case by counsel Mr E Peter Alleyne on the 5th February 2021.

² [2006] UKPC 75, [2007] 1 WLR 780 (2006) 69 WIR 379

³ Ibid Pages 387 to 388

⁴ [2007] 1 WLR 780 a

- [8] The applicant submits that at the preliminary inquiry of the charges laid against him that the virtual complainant was cross examined by his counsel and the deposition as filed with his indictment never disclosed that cross-examination. The applicant further complained that he has sought disclosure at the case management hearing of the criminal matter that the Director of Public Prosecutions was ordered to make full disclosure which order has never been complied with.
- [9] This court understand that the applicant complains also that the DPP is biased and acting with *mala fides* by indicting him when his counsel was not afforded the opportunity to cross examine witnesses at the Preliminary Inquiry and also not recording the cross examination of the virtual complainant on the deposition.
- [10] Counsel on behalf of the applicant contends that Judicial Review in criminal matters is allowed where the prosecution seeks to proceed to trial where evidence is not available, further that the absence of the evidence creates a situation leading to an unfair trial to which the applicant is constitutionally entitled to.
- [11] Counsel Dyer Munro also submitted that the failure on the part of the Director of Public Prosecutions to give disclosure as requested provides grounds for Judicial Review.
- [12] The right to be heard can be stated as a person having the right to have the opportunity to tell their story in their own words. Accused persons also have the right to have decisions made in their matter without personal bias. They are also expected to be treated with respect, dignity and courtesy and there is also the expectation that public authorities will act in their best interest.
- [13] One of the grounds upon which judicial review is granted is procedural unfairness this court is of the view that this is the basis upon which the applicant is seeking to review the decisions essentially taken by the Director of Public Prosecutions. The concept of procedural fairness is based on the principle of natural justice built on what has been referred to as the “twin pillars” of “the rule against bias” and the “right to be heard”.
- [14] Actual bias, if established, is a conclusive factor in disqualifying a decision maker. The right to be heard is without a doubt a fundamental right in criminal cases. If a person is denied this right, it amounts to a flaw which can invalidate the impugned decision. It is a principle of judicial review that

judicial review remedies are discretionary a claimant may show that the impugned decision was improperly made but the court may in some circumstances decline to grant the remedy sought, having consideration of all the circumstances of the court.

[15] Counsel Dyer Munro urged the court to consider that:

- (i) depositions as filed are faulty in that, the cross examination of the virtual complainant was not duly recorded on the depositions, further that the applicant was not permitted to cross examine the witnesses for the prosecution who were deposed at the preliminary inquiry.
- (ii) The Director of Public Prosecutions, in filing the indictment with the faulty depositions acted with *mala fides* in the prosecution of the matter against the applicant.
- (iii) That the prosecution has failed to comply with an order for discovery and that in responding to the application for leave to file judicial review the applicant produced affidavit evidence in his application to say that they have not seen the original exhibits upon which the prosecution intends to rely on since the passage of Hurricane Maria

[16] **The** following matters are to be considered as submitted by Counsel for the applicant:-

- 1) Whether the Learned Director of Public Prosecutions acted *Mala Fides* in presenting the indictment in light of the fact that the Cross-examination of the virtual complainant was not recorded in the deposition?
- 2) Whether the case of **State v Alphius Auguiste** is relevant to the issues raised in this application?
- 3) Whether the Claimant has a valid basis for the Constitutional relief and/or Judicial Review and the applicable principles when there is a hybrid claim for constitutional relief and judicial review?

[17] In considering the procedural complaint made in this application for leave to apply for judicial review the court is mindful of the fact that it is called upon not to review the merits of the decision made by the Director of Public Prosecution but rather the applicant has made out a prima facie case that the course of conduct embarked on by the Director of Public Prosecution to file and indictment with the depositions as attached was unfair, unreasonable or in violation of the principles of natural justice.

[18] A person seeking judicial review must first obtain leave to do so pursuant to part 56.3(1) of the Civil Procedure Rules 2000. It is trite law that the permission stage in these proceedings serves to filter out challenges which are unarguable, doomed to fail or subject to some legal or discretionary bar. As Lord Bingham said in **R-v- Secretary of State for Trade and Industry Exp Eastway**⁵ “The requirement of permission to apply for judicial review is imposed primarily to protect public bodies against weak and vexatious claims.”

[19] The well-known and often quoted consideration and test for the granting of leave to file judicial review proceedings as adumbrated in **Sharma -v- Browne Antoine et al**⁶ that the applicant is required to show that he has an arguable case with a realistic prospect of success not subject to any discretionary bar. In this case the question before the court is whether the decision to prosecute was susceptible to judicial review that is whether the decision to prosecute the applicant should be examined by way of judicial review or whether the criminal process should be allowed to take its normal course. The privy council also held that “it was well established that judicial review of a prosecutorial decision although available is a highly exceptional remedy”⁷

[20] The Privy Council noted *inter alia* that there are safe guards available to a defendant in a criminal trial and that the criminal court has the power to restrain proceeding which are an abuse of its process, even where such abuse does not compromise the fairness of the trial process.

[21] The challenge to the Director of Public Prosecution’s decision to indict the applicant was launched on the following planks:

- i. That Section 48 of the Magistrates Code of Procedure Chapter 4:20 of the Revised Laws of the Commonwealth of Dominica was breached. Counsel referred the court to

⁵ [2000] 1 WLR 2222 at page 2227H

⁶ *Privy Council Appeal No 75 of 2006*

⁷ *Ibid* at paragraph 2

the case of **R v Phillips & R-v- Quayle**⁸ where it was held that where a deposition is irregular that this vitiates the committal, and this court notes the distinguishing factor in that the case from the case at bar, in that the defendant was present at all times when the witnesses gave evidence at the preliminary inquiry unlike that which occurred in the case as cited and relied on by Counsel Dyer Munro which caused the Court of Appeal to order that the committal proceedings were invalid;

- ii. That **John Bramble V R**⁹ applies to the case at bar and sets out the statutory requirements for adducing depositions.
- iii. That judicial review in criminal matters is allowed where the prosecutor/police is proceeding to trial where evidence is not available, and where an allegation that the absence of evidence creates the impossibility of the constitutional right to a fair trial. Further, that judicial review also applies where there is a failure to give disclosure (in advance) of trial and that there is a real risk of an unavoidable, unfair trial due to absence of evidence and lack of full disclosure.
- iv. That the court should apply the case of **Ludlow v DPP**¹⁰ where the issues of lost evidence/evidence unavailable was adjudicated upon in considering the case at bar where the missing photographs, the missing CD and the missing medicals are factors which will operate to deny the applicant a fair trial and creating a real risk of unavoidable unfair trial.
- v. That there is a good arguable case herein for leave to be granted on the ground that there has been no disclosure by the third named respondent and the reference made to the judgment of **PG v DPP**¹¹ where the learned Judge Hardiman stated *inter alia* that reasons “*I wish to make it clear that, in my view, at least, unless and until a satisfactory provision for disclosure or discovery in criminal cases comes into being, an applicant is, in a suitable case, entitled to raise the question of disclosure on judicial review.*”

[22] The respondents submit that:

- i. They acknowledged the duty of the police is to preserve evidence which dates back to the case of **R-v- Lushington ex potto**¹² where it was found that whilst there is a duty on the part of the constables to retain for use in the courts, things which may be

⁸ (1939) 1 K.B. 63

⁹ (1959) 1 WIR 473

¹⁰ [2008] IESC 54 (31 July 2008)

¹¹ [2006] IESC19/2, [2007] 3 IR 39

¹² [1894] 1 QB

evidence of a crime and which have come into possession of constables without wrong on their part. This duty it was contended however, did not require the respondent to act beyond their capabilities and manpower and in the case at bar the event causing the respondents not being able to produce the exhibits in compliance with the order for discovery was due to an even beyond the control or imagination of the prosecution in the case at bar was not due to their negligence or willful actions.

- ii. Counsel on behalf of the respondents cited and relied on **R-v- Uxbridge**¹³ where the court rejected an application to judicially review a committal on the grounds that the applicants were prejudiced by the disposal of the articles of evidence subject of the case rendering prejudiced by the disposal of the articles of evidence subject of the case rendering it impossible for the applicants' experts to examine the goods on their behalf. Johnson LJ had this to say

“[7] Scrutiny by way of judicial review in anticipation of a trial has obvious practical and unhelpful consequences both in terms of the delay of any trial, and the consequential increase in burden upon the Superior Courts. It thus requires to be justified. However, even assuming a perfectly resourced system both in trial and appellate courts – and that is an ideal unlikely ever to be achieved in practice – there are other significant problems with the system of judicial review when used to determine issues relating to missing or lost evidence. Judicial review is a system designed, or at least intended, to provide a speedy determination of issues relating to the jurisdiction of inferior courts. It is well adapted to determine precise issues of law. It is poorly adapted for the resolution of factual matters, particularly when those issues are to be determined in advance of a trial and through the imperfect lens of affidavits necessarily drafted by professional advisers and which, perhaps understandably, seek to maximise that party's case while exercising caution about revealing testimony capable of being deployed against the party in the event that a trial might ensue. Looked at from the vantage point of function and efficiency, it might be thought that the examination of facts and the impact of the presence or absence of such facts upon the fairness of a trial should take place in the trial court with the possibility of review on appeal. However, currently, such claims are addressed by judicial review. If the Constitution or more general principles of fairness demands that this be so, then it must indeed be so. But it is a process which, at a minimum, requires justification.

[8] The doctrinal source of what appears to be a jurisdiction unique to Ireland, whereby questions of missing and lost evidence are adjudicated in advance through the mechanism of judicial review, is a single short passage in the judgment of this court in **The State (O'Connell) v Fawsitt** [1986] IR 362. That case involved a challenge to a case then awaiting trial in Cork Circuit Court not on grounds of missing evidence but because of the undue delay in securing a

¹³ 85 CAR 366

trial date, and a consequent alleged prejudice caused by the absence and unavailability of witnesses. The context of the case, it appears, was a lack of resources and growing delays in particular at Circuit Court level rather than any more general principle.”

- iii. Counsel on behalf of the respondents also submitted that the authority cited and primarily relied on by the applicant is an Irish Appellate decision which applies law that is unique to that jurisdiction and not applicable to the case at bar. Counsel further cited and relied on **Wall -v- DPP** ¹⁴ and submitted that “the court opined that in Common Law Jurisdictions where the issue of missing evidence arises *”it appears that the issue is addressed by motion or application at or in the trial, and then is subject to appeal in an ordinary way. Irish law however, requires the matter to be addressed primarily and almost exclusively, through what might be thought to be the imperfect and ill-adapted lens of judicial review on the basis of affidavit evidence alone. That position, in my view, requires detailed analysis careful scrutiny, and justification.”* ¹⁵
- iv. Counsel on behalf of the respondents further submitted that the doctrinal source of what appears to be a jurisdiction unique to Ireland, whereby questions of missing and lost evidence are adjudicated in advance through the mechanism of judicial review, is a single short passage in the judgment of this court in *The State (O’Connell) v Fawsitt* [1986] IR 362.” ¹⁶
- v. The respondents further submitted that there is an alternative remedy available to the applicants as an application can be made to the criminal court where he can apply for a stay of proceedings. It was further submitted that the applicant would be able to raise all the issues he seeks to raise in his application for Judicial Review. Further that he would be in a position to cross examine key witnesses.
- vi. Counsel for the respondents noted that in delivering his judgment O’Donnell J considered that the role of the trial judge would be to oversee the trial and ensure his

¹⁴ [2013] I E SC 536

¹⁵ Ibid at para 14 quoted at paragraph 10 of the respondents’ submissions

¹⁶ see para 11 of respondents’ submissions

duty under law and constitution that the applicant's trial would be a fair one. Counsel therefore submitted that It follows that the instant case at bar it is not one where the applicant's trial application for leave should be allowed on the basis that his trial would be unfair due to the missing evidence. That the issue of the missing evidence can be dealt with by the trial judge in the criminal trial.

- vii. Counsel on behalf of the respondents contended that the should the continuation of prosecution constitute an abuse of process that the criminal trial process itself provides a remedy against a prosecution case that is weak but not inherently an abuse.
- viii. It is the respondent's submission that in the circumstances of this case the respondent has an alternative remedy which operates as a bar to obtaining leave. That is to raise objections at the criminal trial regarding the lack of evidence. It is also the respondent's submission that the applicant has not raised the issue of exceptional circumstances to justify the remedy claimed. **Re: Sharma -v- Browne Antoine**¹⁷
- ix. Counsel also cited and relied on the opinion of the Privy Council in **Brandt -v- Commissioner of Police et al** ¹⁸ where the Court of Appeal's finding that the administrative proceedings were an abuse of process where the applicant sought to obtain administrative orders as it regarded the admissibility of evidence in criminal proceedings where he was the defendant.

[23] It is trite law that Judicial review is the primary device used by the courts to police the exercise of public law functions. That this is a constitutionally important aspect of our law. It seeks to ensure that bodies exercising public law functions act lawfully and fairly and do not abuse their powers.

¹⁷ [2006] UKPC 57 at paras 31 and 34

¹⁸ [2021] UKPC 12

[24] It is further noted that Judicial review is *not* concerned with the merits of decisions. It focuses on the process by which decisions were made and actions taken, further, judicial review is a remedy *of last resort* which is only available where all alternative avenues of challenge or appeal have been exhausted.

[25] This court has noted and considered that the most common target and the bedrock of the applicant's case for leave to seek judicial review in the case at bar is a "decision" made by the third named respondent to indict him when the depositions as served on him are faulty, in that the cross examination of the virtual complainant was not duly stated on or formed part of the virtual complainant's deposition and that the third named defendant has failed to comply with an order of court for there to be due discovery. That the applicant's contention is that he would be unable to have a fair trial to which he is constitutionally entitled to.

[26] This court has reviewed the affidavits filed by the applicant and the submissions filed on his behalf by counsel and this court understands from the affidavits filed by the applicant in support of his application for leave, that the evidence upon which the prosecution will have to rely on to prove their case in the criminal trial is unavailable which would hamper their presentation of them presenting their case in the hope of proving their case beyond a reasonable doubt. This fact in this court's respectful view really militates against the respondents' case and not the applicant's case as at the criminal trial the third named respondent has the duty to prove the case against the applicant beyond a reasonable doubt and would have to have the necessary evidence available so to do.

[27] This court has considered the issue and requirements of procedural fairness which requires that the person be given a fair hearing, which will dictate that he should be informed of the allegations against him and be given an opportunity to meet the allegations, that it must be ensured that before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner, and giving due consideration to the possibility of the prejudice which the applicant contends will be inflicted upon him on the grounds as stated above. Whilst this court appreciates the applicant's concerns regarding the evidence to be possibly adduced at the criminal trial. This court is of the respectful view that the matters of admissibility and discretion on these aspects are better determined by the trial judge. It is to be remembered or considered that the prosecution's case in all reasonable probability will

stand or fall on the presentation or non-presentation of the evidence in light of their duty at trial to prove their case beyond a reasonable doubt.

[28] This court is of the respectful view that the matters of admissibility should be determined by the trial judge subject to what weight or inferences are to be drawn by the jury after they are directed by the trial judge. In the round and in the balancing exercise to be undertaken by the court, this court is of the view that the matters brought to the court's attention by counsel in her submissions on behalf of the applicant are not such that establishes that she is likely to succeed in presenting a case at the hearing of the application for judicial review as the matters relied upon do not in this court's respectful opinion preclude a fair trial or is such that they cannot fairly be addressed by rulings of the trial judge and in his directions to the jury,

[29] This court notes the statement of Fennelly J in the case of **PG -v- DPP**¹⁹ when he said "*The trial judge must be as in law, bound to arrange the progress of the trial so as to render justice and guarantee fair procedures to all parties especially the accused*"

[30] This court considers that the primary and important consideration is whether or not the applicant could obtain a fair trial and that it is the applicant's duty to establish a real risk of an unfair trial which cannot be avoided by appropriate ruling and direction on the part of the judge concluding the criminal trial. This court considers that the question to be considered is whether there is a real risk based on the circumstances of this case that the applicant would not receive a fair trial.

[31] The court notes that the application for judicial review has been made in advance of the trial and this court is of the respectful view that the judge at the criminal trial has a duty to ensure that the trial is a fair one in all the circumstances, which includes all issues arising in and during the trial.

[32] In the case at bar the onus of proof is on the applicant to establish to the court at this stage the leave stage that there is a real prospect of success that he will be able to establish that there is a real risk of an unfair trial. **Re: Ludlow -v- DPP**²⁰. In all the circumstances of the case the applicant has failed to discharge the onus of proving that he has a reasonable prospect of succeeding in his application for Judicial Review.

¹⁹ [2006] IESC19/2, [2007] 3 IR 39

²⁰ [2008] 1 ESC 54

[33] Regarding the protection of the fair trial process as it regards lost evidence resulting in the DPP's failure to obey the orders made for disclosure based on the averments before the court that the exhibits would not have been seen since the passage of Hurricane Maria falls woefully short of action on the part of the prosecution to act with mala fides as alleged by the applicant. It has been noted that there is jurisprudence which has developed over the years particularly in Ireland regarding the evidence relevant to the guilt or innocence of an accused person and what must as far as was necessary and practicably be kept until the conclusion of the trial. It has been considered and stated that the "*An Garda S  ch  na*" in Ireland because of their unique and investitive role are under a duty to seek and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. **Re: Braddish -v- The DPP**²¹ as mentioned in the case of **Wall -v- Director of Public Prosecutions** as referred to and relied on by Counsel Dyer Munro on behalf of the applicant.

[34] In that case it is to be noted that it was discussed *inter alia* that each case should be determined on its own circumstances, also that the court has a duty to protect due process and duty to disclose and preserved is dependent on all circumstances of the matter. Further, that there is no requirement to engage in disproportionate commitment of manpower and resources. The duty required is to be interpreted in a practical manner of the facts of the case.

[35] It is noted in the Wall Case in considering the relevant law where there is the unavailability of exhibits under consideration the law was decided in **Savage -v- Director of Public Prosecutions**, it was held that "*if evidence is destroyed whether bona fide or mala fide is part of the matrix of facts but is not relevant in the test to be applied by the court.*"

[36] It is the applicant to establish that he would likely succeed at or upon the hearing of the substantive matter (Likelihood of success) that there is a risk that the circumstances which have occurred would render it unfair. He has to establish that there is a real possibility that the third named respondent acted mala fides and he would not be able to obtain a fair trial. An unfair trial means as this court understands it as one which cannot be avoided by appropriate rulings and direction from the trial judge, this court also understands that the risk must be a real one and it must be unavoidable unfairness at trial.

²¹ [2001] 3 IR 127

[37] This court is not satisfied that the applicant in the case at bar has established that there is a real chance of his succeeding in establishing his case on Judicial Review that he will be denied a fair trial or that his constitutional rights so to do will be infringed.

[38] In **Wall -v- DPP**²² it was said that “scrutiny by way of Judicial Review in anticipation of a trial has obvious practical and unhelpful consequences both in terms of the trial ... it requires that this to be justified. “... looked at from the standpoint of function and efficiency it might be thought that the examination of the facts and impact of the presence or absence of such falls upon the fairness of trial should take place at the trial with the possibility of review at appeal”²³

[39] It is well established law that where there is an alternative remedy which is appropriate the court may not grant leave to file for judicial review. Having regard to the applicant’s concerns and the basis of his application, this court is of the view, that the application regarding the unavailability of evidence or failure by the Director of Public Prosecutions to disclose the evidence can be made to the trial judge at the criminal trial in the matter, thereby the applicant has an alternative remedy which he can pursue. This is a bar to the granting of leave to file judicial review.

[40] There is in the case at bar no need for the accused to mount a constitutional challenge his indictment or to seek to obtain administrative orders from the court because the criminal trial the applicant can seek relief in respect of the evidence which has not been disclosed or which may have been destroyed or lost based on the respondents’ affidavit evidence that that the exhibits subject to the disclosure order have not been seen since the passage of the hurricane Maria.

[41] The destruction and devastation meted and suffered across the length and breadth of Dominica is well known and documented. Regarding the failure by the magistrate to record the cross examination of the virtual complainant on the deposition taken at the preliminary inquiry can also be dealt with by the trial judge in the criminal proceedings. This court agrees with plethora of statements by many judges that the trial judge in criminal proceedings has the constitutional responsibility to ensure that the trial of the accused is a fair one.

²² Op cit

²³ Ibid at para 7

[42] One cannot but help note also that it is open to the Director of Public Prosecutions who is clothed with the constitutional power and authority to decide whether or not to proceed with the matter even though an indictment has been filed and that would be in light and upon due consideration of all the circumstances attendant to this matter.

[43] The court is therefore of the view that applying the test as to whether to grant leave to file judicial review the applicant has failed to show that he has a good arguable case which has a reasonable prospect of success. In the circumstances of this case leave is therefore not granted.

[44] Further in considering and applying the decision of the Privy Council in the case of **Brandt -v- The Commissioner of Police**²⁴ where the first instance decision and the Court of Appeal decision that the filing of the constitutional and administrative law proceedings were upheld in that these proceedings do amount in the case at bar to an abuse of process. The application for leave to file judicial review is not granted and the matter dismissed as an abuse of process.

[45] This court wishes to express its thanks to counsel on both sides not only for their patience in waiting for the decision in this case which was unhappily overlooked but also for their very helpful submissions filed. It is hoped that counsel on both sides of this case will give due considerations to their respective cases going forward.

[46] There is no order as to costs.

M E Birnie Stephenson
High Court Judge

BY THE COURT

REGISTRAR

²⁴ [2021] 4 ALL E R 637

