

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

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0004

BETWEEN:

WINGROVE GEORGE

Appellant

and

**[1] THE SENIOR MAGISTRATE
[2] DIRECTOR OF PUBLIC PROSECUTIONS**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Sylvester Anthony and Mrs. Angelina Sookoo-Bobb for the Appellant
Mr. Dane Hamilton, QC with him, Mr. D. Victor Elliott-Hamilton
for the Respondents

2019: November 13;
2020: July 31.

Civil appeal — Misconduct in public office — Judicial review — National Assembly Elections Act of Saint Christopher and Nevis — Principles of the election jurisdiction — Scope of the election jurisdiction — Whether the election jurisdiction of the high court encompasses the offence of misconduct in public office — Implied repeal of the common law — Whether judicial review is an appropriate remedy — Importation of the election jurisdiction in Saint Kitts and Nevis — Costs on an application for leave for judicial review

The appellant, Mr. George, was the acting Supervisor of Elections when elections were held in St. Christopher and Nevis on 16th February 2015. Two years later, and after his appointment was revoked, he was arrested and charged with two offences of misconduct in public office. The charges related to the said 2015 elections. It was alleged that Mr. George,

whilst acting as Supervisor of Elections, failed to carry out his duty to ensure that the results of the election for constituency number 4 and constituency number 6 were announced in a timely manner.

Mr. George applied to the High Court for leave to apply for judicial review of the decisions of (i) the Director of Public Prosecutions in preferring the charges against him, and (ii) the magistrate in issuing a warrant for his arrest. The application for leave to apply for judicial review was refused and the learned judge awarded costs to the respondents to be assessed if not agreed within 21 days.

Aggrieved, Mr. George appealed to the Court of Appeal. The thrust of the appeal was threefold. Mr. George contended that (i) as the charges related to offences alleged to have been committed during the election time and in the course of an election, the peculiar and exclusive nature of the election jurisdiction meant that the charges could only have been brought pursuant to the election jurisdiction of the court; or, alternatively, pursuant to the National Assembly Elections Act and therefore by way of an election petition; (ii) the charges could not be brought under the common law jurisdiction of the court as the common law was not incorporated into the election jurisdiction and the court cannot expand the election jurisdiction to include common law offences and; (iii) the trial judge should have allowed leave to file an action for judicial review as it would have been appropriate in the circumstances to resolve an issue of law and thereby save time and expense by determining that there was no realistic prospect of success of the charges since Mr. George had no duty to announce the results of elections in the media and there was no evidence before the court of any directive from the Electoral Commission for him to do so.

Held: dismissing the appeal in part; allowing the appeal in relation to cost in the court below; and making an order that each party bear its own cost in the appeal, that:

1. The election jurisdiction is a very limited jurisdiction which relates to the validity of the election of members of Parliament/the National Assembly. The principles which apply to the election jurisdiction do not apply to every matter or conduct related to an election. While the charges against Mr. George are related to conduct during an election of members to the National Assembly, they do not, in any way, have the potential to affect the validity of the election of those members. The proceedings brought by the DPP do not therefore engage the election jurisdiction of the court and accordingly the principles applicable to the election jurisdiction do not apply.

Peters (Winston) v Attorney-General and Another, Chaitan (William) v Attorney-General and Another (2001) 63 WIR 244 considered; **Ram v Attorney General and others and other appeals** [2019] CCJ 10 (AJ) considered; **Devon Nair v Yong Kuan Teik** [1967] 2 All ER 34 considered; **Joseph Parry v Mark Brantley; Leroy Benjamin (The Supervisor of Elections) and another v Mark Brantley; Hensley Daniel v Mark Brantley** [2012] ECSCJ No. 233 applied; **Cedric Liburd v Eugene Hamilton and others; The Attorney General of Saint Christopher and Nevis v Cedric Liburd and others** [2011] ECSCJ No. 334 applied; **Saint Christopher and**

Nevis Constitution Order Chapter 2.01, Laws of Saint Christopher and Nevis, Revised Edition 2009 applied.

2. The applicability of the common law offence of misconduct in public office to St. Christopher and Nevis has not been expressly repealed by the Elections Act or any other Act of Parliament. In the absence of an express prohibition to the application of common law offences in relation to the conduct of a person during elections, the common law is applicable. Additionally, the principle of implied repeal is not applicable in these circumstances as there is no inconsistency between the common law and the National Assembly Elections Act which would render the Elections Act, as the law enacted later in time, the prevailing law. Furthermore, there is a presumption against implied repeal and plain words would be needed to repeal the common law offence of misconduct in public office. Accordingly, the charges for the offence of misconduct in public office could be brought pursuant to the common law and the learned judge was open to find that the proposed judicial review action had no arguable ground with a reasonable prospect of success.

R v Goldstein; R v Rimmington [2005] UKHL 63 applied; **Secretary of State v Bank of India** [1938] 2 All ER 797 applied; **Churchwardens and Overseers of West Ham v Fourth City Mutual Building Society and Another** [1892] 1 Q.B. 654 applied; **Hamnet v Essex County Council** [2017] EWCA Civ 6 applied; **Jennings v United States Government** [1982] 3 All ER 104 applied; **Nwogbe v Nwogbe** [2000] 2 FLR 744 applied.

3. Where a matter relates to the interpretation of statute and is not based on evidence, it would be appropriate for the matter to be resolved by way of judicial review. However, in his application for leave, Mr. George first had to satisfy the court that his argument on the applicability of the Elections Act and the election jurisdiction and the resultant alleged invalidity of the charges had a reasonable prospect of success, which he failed to do. Further, whether Mr. George breached any duties, if such duties existed, is an evidentiary matter to be determined in the criminal court and the judicial review process is not appropriate to deal with such matters as there are alternative remedies.

Gangar v Her Worship Ejenny Espinet [2008] UKPC 48 considered; **Sharma v Brown-Antoine and others** [2006] UKPC 57 applied; **McNicholls v Judicial and Legal Services Commission** [2010] UKPC 6 applied.

4. A trial judge has a discretion to award costs on an application for an administrative order where the court considers that the applicant has acted unreasonably. Whilst bringing an action for judicial review where the law is settled can be considered unreasonable and attract a cost order, in the present circumstances, it cannot be said that Mr. George had acted unreasonably as the issue of election offences and how conduct by public officers relating to elections should be dealt with, had not previously been considered and determined by the court before very recently in **Skerrit v Defoe** and in which

case this court gave a majority decision. The award of costs therefore fell outside of the generous ambit within which reasonable disagreement is possible and should be set aside.

Part 56.13(6) of the **Civil Procedure Rules 2000** considered; **Dufour and Others v Helenair Corporation Limited and Others** (1996) 52 WIR 188 applied.

JUDGMENT

[1] **THOM JA:** On 16th February 2015, an election of members of the National Assembly of Saint Christopher and Nevis was held pursuant to writs of election issued by the Governor General of Saint Christopher and Nevis. The appellant, Mr. Wingrove George ("Mr. George"), was the acting Supervisor of Elections. His appointment was subsequently revoked on 24th June 2015.

[2] On 15th December 2017, Mr. George was charged with two offences of misconduct in public office. The particulars of the charges allege that he failed to carry out his duty to ensure that the results of the election for constituency number 4 and constituency number 6 were announced in a timely manner. The charges were preferred by information laid in the Magistrates' Court by the Director of Public Prosecutions ("the DPP"). The charges are worded the same therefore I will only outline the charge in relation to constituency number 4. It reads as follows:

"For that you, between the 16th day of February, 2015 and the 17th day of February, 2015 in Basseterre, in the Parish of St. George in the Magisterial District "A" in the Federation of St. Christopher and Nevis, whilst carrying out public functions in the public office of Acting Supervisor of Elections for the Federation of St Christopher and Nevis to supervise the conduct of Elections of Representatives in the Federation of St. Christopher and Nevis, misconducted yourself in the said public office, in that, having received the results from the Returning Officer for Constituency Number 4, and without reasonable explanation or justification, you failed to carry out your duty to ensure the announcement of the election results for Constituency Number 4 contrary to Common Law."

[3] Mr. George was arrested and placed on bail in the sum of \$25,000.00 with two sureties and required to surrender his travel documents and report to the police

station every Monday and Friday between 6:00 am and 12:00 noon until the final determination of the criminal matters.

The court below

[4] Mr. George sought leave to apply for judicial review of the decision of the DPP to lay the information and of the decision of the Senior Magistrate to issue the warrant. Mr. George sought several reliefs, including orders of certiorari to quash the decision of the DPP and the Senior Magistrate. He also sought an injunction prohibiting the matters from being adjudicated, and an interim order staying or suspending the terms and conditions of his bail. In his affidavit in support of his application, Mr. George contended that the results for all constituencies were sent to the media on 17th February 2015, the day following the election and the elected members were sworn into office on 18th February 2015.

[5] After hearing submissions from both sides, the learned judge refused the application for leave to apply for judicial review and awarded costs to the respondents to be assessed if not agreed within twenty-one (21) days. The learned judge summarized his reasons for dismissing the application at paragraph [88] of his judgment. It reads:

“[88] In the premises, the Applicant has not shown that there is an arguable ground for judicial review having a realistic prospect of success for the following reasons: (1) clear words need to be found in the Elections Act to abrogate the common law offence of misconduct in public office and no such words can be found in the Elections Act; (2) the authorities cited by the Applicant show that election legislation must be construed narrowly and do not cover matters not expressly provided for in the legislation itself – so by failing expressly to provide for the offence of misconduct in public office, it cannot be incorporated into the Elections Act under the guise of statutory interpretation or otherwise; (3) the continued existence of common law offences applicable to conduct relating to elections is not inconsistent with the regime provided for under the Elections Act; (4) the offences for which the election petition applies relate to matters that have an impact on the election result itself or relate specifically to the candidate himself or herself (see section[s] 96 and 97 of the Elections Act), not all offences under the Elections Act, let alone common law offences outside the Elections Act that have no impact whatsoever on the result of the election or relate at all to any candidate; and (5) even assuming that such an offence was part of the

Elections Act, it is doubtful whether it can be brought by way of election petition under section 94 of the Elections Act and which provide that a complaint to be made for an undue return or undue election of a member of the National Assembly to be made by way of an election petition.”

The Appeal

- [6] Mr. George contends that the learned judge erred in finding as he did and appealed against the whole of the judge’s decision on several grounds. In her written submissions, counsel for Mr. George, Mrs. Angelina Sookoo-Bobb, summarized these grounds under three headings namely: (a) the peculiar and exclusive nature of the election jurisdiction; (b) the applicability of the common law to elections and (c) realistic prospect of success. Mr. George also specifically appealed the learned judge’s cost order¹.

Election jurisdiction

- [7] Mrs. Sookoo-Bobb submitted that the election jurisdiction of the court, which is peculiar and exclusive, covers all aspects of an election including dealing with conduct which constitutes offences under the **Saint Christopher and Nevis National Assembly Elections Act**² (“the Elections Act”). She further argued that elections are governed exclusively by the **Saint Christopher and Nevis Constitution Order**³ (“the Constitution”) and the Elections Act and that therefore the common law (civil or criminal) does not apply to matters relating to elections unless expressly incorporated by Parliament in legislation such as the Elections Act. In support of her submissions, Mrs. Sookoo-Bobb relied on cases such as **Browne v Francis-Gibson and Another**,⁴ **Gladys Petrie and Others v The Attorney-General and Others**,⁵ and **Peters (Winston) v Attorney-General and Another, Chaitan (William) v Attorney-General and Another**.⁶

¹ See para 2.12 of the Appellant’s Interlocutory Notice of Appeal

² Cap 2.01, Laws of Saint Christopher and Nevis, Revised Edition 2009.

³ S.I. No. 881 of 1983.

⁴ (1995) 50 WIR 143.

⁵ (1968) 14 WIR 292.

⁶ (2001) 63 WIR 244.

[8] The nature of the election jurisdiction in the Commonwealth Caribbean has been the subject of several litigation by way of election petitions as illustrated in the several cases referred to by Mrs. Sookoo-Bobb and more recently by the Caribbean Court of Justice in **Ram v Attorney General and others and other appeals**.⁷ In **Ram v Attorney General**, the CCJ referred to the cases of **Devon Nair v Yong Kuan Teik**⁸ and **Peters v Attorney-General** which traced the history and development of the peculiar and exclusive nature of the election jurisdiction. It must be noted however that these cases deal with the validity of the election and validity of return of members to Parliament and are made by election petition. In **Ram Saunders PCCJ** stated:

“[39] The view that the court’s jurisdiction is a restricted one is not novel. It has been long recognised and made clear in cases such as the Guyanese High Court decision of *Petrie v A-G* that the Court’s jurisdiction in this regard is not at large and not ‘inherent’. The jurisdiction is derived from the Constitution. The Constitution specifies that this jurisdiction is as ordained by Parliament. What is prescribed by [P]arliament in this regard must strictly be followed by the courts. This means that, for example, the time limitations set out in legislation governing the presentation and progression of an election petition are construed as condition precedents to the validity of the petition. Rawlins CJ explained this in *Joseph v Reynolds* noting that:

‘In keeping with the strict approach, our courts have generally insisted that the provisions in elections legislation must be strictly complied with... Our election courts have consistently stated that they have little or no discretion to waive non-compliance with the applicable statutory requirements. Accordingly, the consistent result is that failure to comply is fatal to the petition rendering it a nullity, unless the court finds that the failure goes to form. The jurisprudence in our courts states that time and other electoral proceedings statutory requirements are conditions precedent to instituting a proper electoral challenge, which are mandatory and peremptory. The election court has no power to extend time or allow amendments filed out of time unless election legislation so provides.’

[40] There are two important policy reasons for the Constitution denying the court an inherent jurisdiction in this realm and allowing that jurisdiction to be specifically conditioned by rules laid down by [P]arliament. Firstly, as previously indicated, this is a jurisdiction that concerns membership of [P]arliament itself. As an element of the separation of powers, the

⁷ [2019] CCJ 10 (AJ).

⁸ [1967] 2 All ER 34.

Constitution recognizes that it is Parliament, and not the court under any inherent jurisdiction of the court, that should be at liberty to define the contours of a jurisdiction that peculiarly concerns membership of Parliament. Secondly, as Bollers CJ stressed in *Petrie*, it is in the public's interest that the validity of an election and hence membership of [P]arliament should be quickly determined according to strict rules and procedures that are pre-determined by [P]arliament."

[9] The principles which can be derived from the above cases are: (a) the election jurisdiction is an exclusive jurisdiction given to the court in the Constitution; (b) the jurisdiction is a narrow one which relates to the election of members of the Parliament/National Assembly; (c) the court has no inherent jurisdiction in exercising the election jurisdiction; (d) the rules and procedures governing the jurisdiction are those rules and procedures set out in the legislation; (e) the rules and procedure governing the jurisdiction are to be strictly followed; and (f) common law remedies, practice and procedures are not applicable to the election jurisdiction.

[10] The relevant provision in the Constitution which gives the High Court an election jurisdiction is section 36. It reads:

"(1) The High Court shall have jurisdiction to hear and determine any question whether —

- (a) any person has been validly elected as a Representative;
- (b) any person has been validly appointed as a Senator;
- (c) any person who has been elected as Speaker from among persons who were not members of the National Assembly was qualified to be so elected or has vacated the office of Speaker; or
- (d) any member of the Assembly has vacated his or her seat or is required, by virtue of section 31(4), to cease to perform his or her functions as a member of the Assembly.

(2) An application to the High Court for the determination of any question under subsection (1)(a) may be made by any person entitled to vote in the election to which the application relates or by any person who was, or who alleges that he or she was, a candidate at that election or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

- (3) An application to the High Court for the determination of any question under subsection (1)(b) or (1)(c) may be made by any Representative or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.
- (4) An application to the High Court for determination of any question under subsection(1)(d) may be made
 - (a) by any Representative or by the Attorney-General; or
 - (b) in the case of the seat of a Representative, by any person registered in some constituency as a voter in elections of Representatives, and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear and be represented in the proceedings.
- (5) There shall be such provision as may be made by Parliament with respect to
 - (a) the circumstances and manner in which and the imposition of conditions upon which any application may be made to the High Court for the determination of any question under this section; and
 - (b) the powers, practice and procedure of the High court in relation to any such application.”

[11] Section 36 has been considered on a number of occasions by both the High Court and this Court, including in the cases of **Joseph Parry v Mark Brantley; Leroy Benjamin (The Supervisor of Elections) and another v Mark Brantley; Hensley Daniel v Mark Brantley**⁹ and **Cedric Liburd v Eugene Hamilton and others; The Attorney General of Saint Christopher and Nevis v Cedric Liburd and others**¹⁰ emanating from this jurisdiction. These cases relate to the validity of the election of a member. On every occasion the court applied the election jurisdiction principles outlined at paragraph [10] above.

[12] In my view, the Elections Act covers matters which relate to elections but do not necessarily form part of the court’s election jurisdiction and, in those instances, unless the Election Act expressly so prohibits, the common law would apply. The principles which apply to the election jurisdiction do not apply to every matter or conduct related to an election. By way of example, the election jurisdiction would

⁹ [2012] ECSCJ No. 233.

¹⁰ [2011] ECSCJ No. 334.

not be engaged and the principles would not apply to a charge under section 102 of the Elections Act, which creates an offence where an employer refuses to grant an employee reasonable time to vote, or pursuant to section 103 (d) which creates an offence where an election officer prevents a person from voting at a polling station where the election officer knows or has reasonable cause to believe the person is entitled to vote. These are not matters which affect the validity of an election of a member of the National Assembly. Likewise, the proceedings brought by the DPP do not engage the election jurisdiction of the court and therefore the principles applicable to the election jurisdiction do not apply. As was reiterated in **Ram**, the election jurisdiction is a very limited jurisdiction which relates to the validity of the election of members of Parliament/the National Assembly. While the charges against Mr. George are related to conduct during an election of members to the National Assembly, this in and of itself does not bring it within the election jurisdiction as it does not in any way affect the validity of the election of members of the National Assembly.

Application of the common law

- [13] Mrs. Sookoo-Bobb submitted that where the Elections Act expressly outlines conduct which would constitute offences (such as section 91(6) which creates an offence where an election officer wilfully delays, neglects or refuses to duly return a person who was elected and entitled to have been returned), the court cannot expand the election jurisdiction to include common law offences. Learned counsel for the appellant argued that the position in the United Kingdom (“the UK”) is different since the UK election legislation expressly incorporated common law offences. She submitted that the learned judge therefore erred when he placed reliance on the case of **R v Hussain**¹¹ a decision of the English Court of Appeal which, in her view, was of no assistance since no question arose of the applicability of the common law. Rather, in the view of the appellant, the learned judge should have relied on and applied the case of **Peters v Attorney-General** where the Court of Appeal opined that the election jurisdiction was not imported from the UK with the

¹¹ [2005] EWCA Crim 1866.

common law. The power which the House of Lords exercised to determine disputed elections was part of the common law of Parliament. There is no common law of Parliament in Trinidad and Tobago, where disputes have always been determined by the exclusive jurisdiction of the courts. This position, learned counsel contended, also applies in St. Kitts and Nevis. Learned counsel also contended that as the election jurisdiction in St. Kitts and Nevis did not exist until the passing of the Constitution and Election Ordinance in 1952, of what was at the time Saint Christopher Nevis and Anguilla, the common law does not and cannot apply to election offences unless expressly provided for by statute.

[14] Mrs. Sookoo-Bobb referred this Court to section 34 of the Constitution, which outlines the duty of the Supervisor of Elections, and submitted that the learned judge further erred when he failed to find that the charges against Mr. George were not viable since Mr. George had no duty to announce the results of elections in the media and there was no evidence before the court of any directive from the Electoral Commission for him to do so. She further indicated that there is no offence in the Elections Act for delay of announcement of election results by the Supervisor of Elections.

[15] Learned counsel for the appellant drew a distinction between the appellant's case and cases where charges are brought during an election period as defined in **N.P. Ponnuswami v Returning Officer, Namakkal Constituency**¹² and **Gladys Petrie** for offences unrelated to the conduct of the elections such as assault, theft, or wounding. Learned counsel submitted that in the latter cases, persons could be prosecuted pursuant to the common law, but in cases such as the appellant's case where the conduct is related to an election, a charge could only be made pursuant to an offence under the Election Act. In the view of counsel for the appellant, the learned judge was therefore obliged to find that there was an arguable ground with a realistic prospect of success since the DPP has no authority to lay charges for the common law offence of misconduct in public office, for a delay in the announcement

¹² (1952) SCR 218.

of election results, where such conduct was not made an offence under the Elections Act. The appellant submitted that the learned judge's decision was therefore contrary to law and that the magistrate had no jurisdiction to determine the charges.

- [16] Learned counsel for the appellant contended, alternatively, that in view of the provisions of section 91(6) of the Election Act, any conduct relating to an election offence could only be pursued in the manner provided in the Elections Act, being by way of an election petition as held by the High Court in **Roosevelt Skerrit and others v Mr. Bernard Pacquette and others**,¹³ and in this case no election petition was filed.
- [17] This Court has, since the hearing of this appeal but prior to the delivery of this judgment, set aside the decision of the lower court in **Skerrit**. In any event the issue in **Skerrit** was different to the issue in this appeal. **Skerrit** was concerned with whether the magistrate had jurisdiction to hear and determine an election offence of bribery or whether the matter had to be determined on an election petition. This Court by a majority decision¹⁴ determined that the magistrate had jurisdiction to try the offence.
- [18] Mr. Dane Hamilton, QC, counsel for the respondents, submitted in response that the Elections Act does not exclude the common law jurisdiction of the court. Express provisions were necessary for the common law to be excluded and there are no such provisions in the Elections Act abolishing the common law as it relates to the conduct of elections. Mr. Hamilton, QC argued that the Elections Act therefore does not abolish the common law offence of misconduct in public office in relation to matters occurring during an election. Learned counsel for the respondents referred this Court to the **St. Christopher and Nevis Common Law (Declaration of Application) Act**¹⁵ and submitted that the common law of the England, so far as

¹³ [2018] ECSCJ No. 193.

¹⁴ See: Antoine Defoe and another v Roosevelt Skerrit and another [2020] ECSCJ No. 172.

¹⁵ Cap 3.05, Laws of Saint Christopher and Nevis, Revised Edition 2002.

it is not amended or repealed, is the law of St. Christopher and Nevis. In the absence of an express statutory provision, it is not open to the court to declare that the common law offence of misconduct in public office does not apply to the Supervisor of Elections, as the court has no power to abolish offences. Learned Queen's Counsel relied on the cases of **R v Goldstein**; **R v Rimmington**¹⁶ and **Secretary of State v Bank of India**¹⁷ in support of this argument. He also referred this Court to offences in the Elections Act which are also offences at common law such as bribery. Mr. Hamilton, QC further submitted that in circumstances where conduct amounts to an offence both under statute, such as the Elections Act, and at common law then the DPP may choose whether to proceed under the common law or under the Elections Act.

- [19] Mr. Hamilton, QC agrees that there is no express provision in the Constitution or the Election Act which requires the Supervisor of Elections to announce election results. However, he contends that it is an incidental duty of the Supervisor of Elections to announce the returns of all the constituencies to the public.

The Elections Act

- [20] The Elections Act was enacted pursuant to section 36(5) of the Constitution. The Elections Act makes provisions for, among other things, registration of voters, arrangements for elections, election petitions and election offences.
- [21] By sections 50, 51, 52, 53, 84, 89, 90, and 101 – 114 the Elections Act creates several offences in relation to the registration of voters and the conduct of elections. These are all summary offences. Some offences relate to specific statutory officers who fail and/or neglect to perform a duty imposed under the Elections Act, while others may be committed by members of the public generally. By way of example, section 51 creates an offence where a registration officer willfully or without reasonable cause omits to register a person who is qualified to be registered.

¹⁶ [2005] UKHL 63.

¹⁷ [1938] 2 All ER 797.

Similarly, section 103 creates several offences including where an election officer makes a false entry or return on a document or willfully counts a vote which he or she has reasonable cause to believe was not validly cast. Also, of note, pursuant to section 90, it is an offence for a person on a public road or in a public place to influence a voter to vote for any candidate during the hours of polling.

[22] It is common ground that the Elections Act does not create any offence in relation to the Supervisor of Elections and specifically none in relation to the performance of his duties as stipulated in the Constitution or pursuant to the Elections Act. Mrs. Sookoo-Bobb's submission in summary was, in the absence of such express statutory offence the Supervisor of Elections cannot be charged with any offence in relation to any purported failure to perform any duty relating to elections. This, in my view, raises the central issue in this appeal; whether the absence of the offence of misconduct in public office, in the Elections Act, means that a person cannot be charged with the offence in relation to conduct related to elections.

[23] Unlike the UK, there is no express provision in the Elections Act of St. Christopher and Nevis which generally incorporates common law offences. As indicated earlier, some common law offences such as bribery have been expressly incorporated into the Elections Act but not the offence of misconduct in public office. Misconduct in public office was part of the common law of St. Christopher and Nevis prior to the enactment of the Elections Act. The applicability of the common law offence of misconduct in public office to St. Christopher and Nevis has not been expressly repealed by the Elections Act or any other Act of Parliament. In my view, in the absence of express prohibition of the application of the common law offences to conduct in relation to elections, the common law is applicable. This was the approach of the House of Lords in **Goldstein; Rimmington**, on which Mr. Hamilton QC relies. In **Goldstein; Rimmington**, the defendants were each charged in separate cases with the offence of causing a public nuisance. One of the issues before the court was whether having regard to the express statutory provision creating the offence of public nuisance, the common law offence of public nuisance

continued to exist. While the court found that there may now only be rare instances where a charge could be prosecuted for the common law offence of public nuisance, Lord Bingham with whom the others agreed opined that:

“But as the courts have no power to create new offences, so they have no power to abolish existing offences. That is a task for Parliament, following careful consideration (perhaps undertaken, in the first instance, by the Law Commission) whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect. It is not in my view open to the House in resolving these appeals to conclude that the common law crime of causing a public nuisance no longer exists.”

[24] The principle of implied repeal is also not of assistance to the appellant. The general principle is where the provisions of two statutes are inconsistent, then the provisions of the later statute will prevail. The test as stated in **Churchwardens and Overseers of West Ham v Fourth City Mutual Building Society and Another**¹⁸ and applied in **Hamnet v Essex County Council**¹⁹ is ‘Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?’. In the case at bar the provisions of the Elections Act are not so inconsistent with or repugnant to the common law that the two cannot stand together. There is no provision in the Elections Act which makes misconduct of the Supervisor of Elections an election offence. Thus, there is no inconsistency with the common law offence of misconduct in public office. It is to be noted that Parliament took the time to expressly create offences for conduct by statutory officers relating to an election, but expressly did not do so in relation to conduct on the part of the Supervisor of Elections. In my judgment, having regard to the numerous offences expressly created in the Elections Act, if Parliament was desirous of abrogating the common law it would have done so expressly.

[25] There is also a presumption against implied repeal as seen in **Jennings v United States Government**,²⁰ and in the case of **Nwogbe v Nwogbe**²¹ where Walker LJ

¹⁸ [1892] 1 Q.B. 654.

¹⁹ [2017] EWCA Civ 6.

²⁰ [1982] 3 All ER 104.

²¹ [2000] 2 FLR 744.

stated: “[i]n modern times when standards of parliamentary draftsmanship are high, the presumption against implied repeal is strong.” The office of Supervisor of Elections is an office created by the Constitution. The holder of that office is given, by virtue of section 34 of the Constitution, the important duty of supervising the conduct of elections. The manner in which the office holder executes those duties is a matter of great public importance. At common law a public officer could be prosecuted if he/she misbehaves in exercising his/her public duties. Having regard to the importance of the duty of the Supervisor of Elections, the presumption against implied repeal is very strong. In my view, plain words would be needed to repeal the common law offence of misconduct in public office, especially in relation to the Supervisor of Elections.

Appropriateness of judicial review proceedings

[26] Mrs. Sookoo-Bobb also referred to the statutory duties of the Supervisor of Elections as outlined in section 34 of the Constitution and sections 91(2) – (5), of the Elections Act, and submitted that there are no allegations in the charges preferred by the DPP that Mr. George has failed and/or neglected to perform any of his statutory duties. On this basis Mrs. Sookoo-Bobb argued that the learned judge therefore erred in not finding that there was a reasonable prospect of success in the proposed judicial review action since the charges preferred before the magistrate were hopeless and, in other words, were bound to fail. Learned counsel for the appellant relied on the case of **Gangar v Her Worship Ejenny Espinet**.²²

[27] Section 34(1) of the Constitution outlines the general duty of the supervisor of elections as follows:

“(1) There shall be a Supervisor of Elections whose duty it shall be to exercise general supervision over the registration of voters in elections of Representatives and over the conduct of such elections.”

Sections 91(2)-(5) of the Elections Act read as follows:

“(91)(2) The Supervisor of Elections shall, on receiving the return of any member elected to serve in the National Assembly, cause it to be entered

²² [2008] UKPC 48.

in the order in which such return is received by him or her for such purpose and thereupon immediately cause a notice to be published in the Gazette of the name of the candidate so elected and in the order in which it was received.

(3) The Supervisor of Elections shall, on receiving the return of any member elected to serve in the National Assembly, transmit the writ with the return endorsed thereon to the Governor-General within the time in such writ.

(4) The Governor-General shall within seven days of the receipt of the said writ, return the same to the Supervisor of Elections for safe custody in accordance with the provisions of section 92.

(5) The Supervisor of Elections shall, immediately after each general election, cause to be printed a report giving, by polling division, the number of votes polled for each candidate, the number of rejected ballot papers, the number of names on the lists of voters, together with any other information that he or she may deem fit to include; and shall also, at the end of each year, cause to be printed a similar report on the by-election held during the year.”

[28] In **Gangar** the appellant was a member of Parliament. After he completed his term, he was charged with two offences on 4th June 2004 alleging that he made false declarations as to his financial affairs in the calendar years 1998 and 1999, contrary to the Integrity in Public Life Act 1987. The declarations were made on 23rd September 1999 and 10th October 2000. The magistrate rejected the appellant’s submissions that the where the charges had not been filed within the six months limitation period, the magistrate had no jurisdiction to proceed with them, and held that the two charges should be heard together. The court considered section 9 of the Judicial Review Act which provides:

“The court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision save in exceptional circumstances.”

[29] At paragraph [25] of **Gangar** the court stated as follows:

“[25] Their Lordships are quite satisfied that the circumstances here were exceptional and that judicial review provided an appropriate way of deciding the two ruling under challenge. Clearly it was convenient to obtain an early binding decision on whether the two charges should be decided separately or together. Equally it was convenient, indeed highly desirable, to decide at an early stage whether or not the charges were statute barred, a pure question of statutory construction. As Kangaloo JA observed (at para [30]):

'I can see no useful purpose being served by going through a full-blown hearing before a Magistrate with all the concomitant expenditure, stress and inconvenience and a possible conviction only to be vindicated on appeal in the criminal proceedings, when a judicial review application based solely on questions of interpretation of statute, is available.'

[30] I accept the principle in **Gangar** that where the matter relates to the interpretation of statute and is not based on evidence, it would be appropriate for the matter to be resolved by way a judicial review. However, Mr. George was nonetheless required to satisfy the court that he had a reasonable prospect of success on the interpretation of the Elections Act. Also, whether the DPP can establish a prima facie case on the charges against Mr. George or more specifically whether Mr. George has breached any of his duties, if such duties existed, is an evidentiary matter to be determined in the criminal court. The criminal court is well equipped with its plenitude of powers to deal with the complaints by the appellant. All of his complaints can be resolved within the criminal process itself, either at the trial or possibly by application for a stay of proceedings as an abuse of process. The judicial review process is not appropriate to deal with such matters. In **McNicholls v Judicial and Legal Services Commission**²³ the Privy Council in considering an appeal from Trinidad and Tobago warned against the inappropriateness of judicial review proceedings where disciplinary charges were instituted. The Court stated:

"Experience shows that applications of this kind themselves cause substantial delay, especially when they lead to one or more appeals. Save perhaps in an exceptional case, the officer against whom a charge is made should not apply for judicial review but utilize the procedure set out in regulation 98, which sets out in detail the procedure which 'shall apply' to the hearing by a disciplinary tribunal of a charge of misconduct."

Conclusion

[31] It is well settled that the general principles which govern a court in determining whether leave should be granted for judicial review are the principles set out by the Privy Council in **Sharma v Brown-Antoine and others**²⁴ as follows:

²³ [2010] UKPC 6

²⁴ [2006] UKPC 57.

“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; *R v Legal Aid Board ex parte Hughes* (1992) 5 Admin LR 623 at 628, and Fordham, *Judicial Review Handbook* (4th Edn 2004), p 426. 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. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (On the application of N) 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 or 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.’

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 processes of the court may strengthen’; *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733.”

[32] In light of the above, I am of the view that the learned judge correctly applied the test in **Sharma**. The learned judge gave detailed reasons for his findings. I can find no fault in his reasoning. I am therefore not persuaded that the learned judge erred in dismissing the application on the basis that it had no arguable ground with a reasonable prospect of success.

[33] Further, in my view whether the charges against Mr. George have any basis in law or whether a prima facie case could be made out on the charges are matters for the criminal court. I am not persuaded that the complaints raised by the Supervisor of Elections cannot be raised and determined in the criminal process, as for example they could possibly be the subject of an application for a stay of proceedings on the basis of abuse of process as was the case in **R v Horseferry Road Magistrates'**

Court, ex p Bennett.²⁵ I would accordingly dismiss the appeal and affirm the decision of the learned judge. As Lord Bingham observed in **Sharma**, this decision is made on legal grounds. I wish to emphasize that it casts no aspersions of any kind on the integrity of Mr. George whose innocence of the conduct alleged against him is at this stage to be presumed. Further, nothing contained herein is to be taken as expressing a view on the merits or demerits of the complaints.

Costs

- [34] In dismissing Mr. George's application, the learned judge awarded costs to the respondents to be assessed if not agreed within twenty-one (21) days. His reasons for so doing are outlined at paragraph [90] of the judgment which reads:

"[90] The general rule in applications for administrative orders is that no order for costs may be made against an applicant unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application: under CPR 56.13.(6)] I am of the view that the applicant acted unreasonably because there are many reasons I have found why the main ground underpinning the application for leave to apply for judicial review was bound to fail and in all circumstances hopeless. This is not an application that should have been brought at all since the learning is clear on all points raised. Consequently, I must depart from the general rule and order that the Applicant pay the costs of the Respondents in these proceedings."

- [35] Rule 56.13(6) of the **Civil Procedure Rules 2000**, on which the learned judge relied to award costs to the respondent, relates to the hearing of an application for an administrative order. It reads:

"(6) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

The matters raised by Mr. George are not frivolous or vexatious. Whilst bringing an action for judicial review where the law is settled can be considered unreasonable and attract a cost order, in the present circumstances, it cannot be said that Mr. George acted unreasonably. The issue of election offences, and how conduct by

²⁵ (1994) 1 AC 42.

public officers relating to elections should be dealt with, had not been considered and determined by the court before the issue of jurisdiction of the magistrate to determine the election offence of bribery arose in **Skerrit v Defoe** and in which case this court was given a majority decision. In the circumstances it could not be said that Mr. George acted unreasonably in seeking leave to file a claim for judicial review. Furthermore, his lack of an arguable ground with a reasonable prospect of success does not necessarily equate to him acting unreasonably in making the application.

[36] In awarding costs, the learned judge exercised his discretion. The principles on which an appellate court will interfere with the exercise of discretion with the lower court are well settled and have been stated in many decisions of this Court following the decision of **Dufour and Others v Helenair Corporation Limited and Others**.²⁶ In my view, for the reasons stated above, the learned judge erred in principle in the exercise of his discretion and therefore I would set aside the award of costs to the respondents.

[37] For the reasons stated above, I would order that the appeal be dismissed and also order each party to bear their own costs in this Court and in the court below.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar

²⁶ (1996) 52 WIR 188.