

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

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2015/0016

BETWEEN:

**[1] DIRECTOR OF PUBLIC PROSECUTIONS
[2] ADOLPHUS DELPLESCHE
[3] FITZBOURNE CHAMBERS CORPORAL 168
[4] THE ATTORNEY GENERAL**

Appellants

and

RUDOLPHO ALEXANDER

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Joseph Delves for the Appellants
Mr. Richard Williams for the Respondent

2017: January 16;
2018: March 15.

Civil appeal – Judicial review – Application for leave to seek judicial review of prosecutorial decision to discontinue proceedings in relation to one charge and institute proceedings on a subsequent charge – Powers of Director of Public Prosecutions – Charge laid under non-existent section in Firearms Act – Nolle prosequi entered by Director of Public Prosecutions after no case submission – New charge preferred – Whether learned judge erred in granting leave to review DPP’s decision to commence proceedings on new charge – Applications to second judge to set aside leave and strike out claim – Whether second judge erred in refusing applications

The respondent, Mr. Rudolpho Alexander (“Mr. Alexander”) was charged with an offence contrary to section 14(1)(4)(a) of the Firearms Act of Saint Vincent and the Grenadines. At the trial, after the prosecution had led evidence and closed its case, defence counsel, who then appeared on Mr. Alexander’s behalf, made a no

case submission on the basis that Mr. Alexander was charged under a section in the Firearms Act which did not exist. Thereafter, the Crown sought an adjournment of the matter.

The Director of Public Prosecutions (the “DPP”) took the view that Mr. Alexander was inadvertently charged with an offence in the Firearms Act which related to a non-existent section 14(1)(4)(a) when he ought to have been charged with an offence contrary to section 14(4)(b). In addition, the DPP took the view that pursuant to the Criminal Procedure Code of Saint Vincent and the Grenadines, amendments to the charge could only have been made before the close of the prosecution’s case and that the time to amend the charge had passed. Consequently, the DPP was constrained to discontinue the proceedings in relation to the section 14(1)(4)(a) charge and therefore entered a nolle prosequi. The DPP, having determined that the offence which Mr. Alexander is alleged to have committed was of a serious nature, took into account Mr. Alexander’s circumstances and concluded that the interests of justice required that he be tried in relation to the correct charge. Accordingly, the DPP brought a new charge against Mr. Alexander in relation to section 14(4)(b) of the Firearms Act.

Mr. Alexander, being unhappy with the DPP’s decision to discontinue the criminal proceedings in relation to section 14(1)(4)(a) and to institute new proceedings under section 14(4)(b), sought and obtained leave to file a claim for judicial review. Notably, Mr. Alexander also filed his fixed date claim on even date as the application for leave. All of the named appellants, including the DPP were served with the application and the order granting Mr. Alexander leave. Having been served, the appellants applied to another learned judge (the “second judge”) to set aside the leave that was granted on the basis that there were no reasonable grounds for the grant of leave as Mr. Alexander did not have an arguable case. The appellants also applied to strike out the fixed date claim. The second judge refused the application to set aside as well as the application to strike out the fixed date claim.

The appellants, being dissatisfied with the decision of both judges, appealed. The issues for this Court’s determination are, whether the learned judge erred in the exercise of her discretion by granting Mr. Alexander leave to bring judicial review and whether the second learned judge erred in the exercise of her discretion in failing to set aside the leave that was granted to Mr. Alexander and to strike out the fixed date claim that he had filed.

Held: allowing the appeal against the decision of the first learned judge granting Mr. Alexander leave to bring judicial review proceedings; allowing the appeal against the decision of the second learned judge refusing to set aside the leave that was granted; setting aside the leave granted and ordering that each party bear their own costs, that:

1. Section 64(2) of the **Constitution** of Saint Vincent of the Grenadines empowers the Director of Public Prosecutions (the “DPP”) to institute and/or

discontinue criminal proceedings at any stage of the matter, including at the close of the prosecution's case. In fact, it is open to the DPP to enter a nolle prosequi before a conviction is rendered even if the defence has already led its defence. There is nothing unlawful, without more, about the DPP entering a nolle prosequi in a matter and proceeding to prosecute on a new charge. In addition, section 67 of the **Criminal Procedure Code** empowers the DPP to do so.

Gladys Tappin v Francis Lucas (1973) 20 WIR 229 applied.

2. The Court will refuse leave to institute judicial review unless it is 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. It is settled law that the exercise of the DPP's discretion is judicially reviewable. However, this review power should be used in exceptional circumstances. In the case at bar, the matters that are complained of fall squarely within the proper exercise of the DPP's constitutional power. Had the proper sifting of the matters been undertaken by the first learned judge, it would have been evident that leave to bring judicial review proceedings ought not to have been granted since the complaints cumulatively and individually were insufficient to establish arguable grounds nor did they have any realistic prospect of success. Therefore, the learned judge ought not to have granted Mr. Alexander leave to institute judicial review proceedings. In so doing, the judge, in the exercise of her discretion, committed an error of principle.

Sharma v Browne Antoine and Others (2006) 69 WIR 379 applied.

3. In the set aside application, the second judge concluded that there was no basis to find that the order granting leave was wrongly made. Bearing in mind that judicial review is an exceptional remedy or a remedy of last resort, any issue relating to the decision to prosecute should ordinarily be raised in the criminal proceedings. The second judge failed to have regard to the fact that all of Mr. Alexander's complaints could have been resolved within the criminal trial process and in so doing, the second judge erred in the exercise of her discretion and committed an error of principle. The second judge did not subject the material before her to the appropriate scrutiny and also failed to adhere and properly apply the relevant principles. Thus, her decision not to set aside the leave can be assailed since it falls outside of the generous ambit within which reasonable disagreement is possible.

Swingler v R [1996] 1 VR 257 applied; **Sharma v Browne Antoine and Others** (2006) 69 WIR 379 applied.

4. In exercising this Court's discretion afresh, and considering the circumstances of the alleged offence, the conduct of the DPP and the countervailing circumstances of Mr. Alexander together with the relevant legal principles and statutory provisions, the only conclusion that can be properly reached is that

the present case was totally unsuitable for judicial review proceedings. The complaints made, at their highest, would amount to mere technical errors that were put right by the institution of the new charge. This Court possesses inherent jurisdiction to prevent the misuse of its procedure in any way which would be manifestly unfair to a party to the litigation, or would in any way bring the administration of justice into disrepute. However, this is not such a case and judicial review of the DPP's decision should not be permitted.

Hunter v Chief Constable of West Midlands and others (1982) AC 529 applied; **Matalulu and Another v DPP** [2003] 4 LRC 712 applied; **R v Director of Public Prosecutions, Ex parte Kebilene and Others** [2000] 2 AC 326 applied.

JUDGMENT

Introduction

- [1] **BLNMAN JA:** This is an appeal against the decision of a learned judge refusing the applications of the appellants¹ to set aside the ex parte leave that was granted to the respondent, Mr. Rudolpho Alexander ("Mr. Alexander"), to issue judicial review proceedings and to strike out Mr. Alexander's fixed date claim form. Leave was granted by another learned judge for judicial review of the decision of the Director of Public Prosecutions (the "DPP") to enter a nolle prosequi in relation to Mr. Alexander's initial charge which was purported to be contrary to a non-existent section of the **Firearms Act**² and to institute criminal proceedings against him in relation to a new charge under the correct section of the Act.
- [2] The appellants are dissatisfied with the second judge's refusal to set aside the leave to issue judicial review proceedings and with the exercise of discretion by the first learned judge who had granted Mr. Alexander leave and has appealed against both. Mr. Alexander strenuously resists the appeal.
- [3] I propose to address the relevant background.

¹ The word "appellants" is used to refer to all four named appellants including the Director of Public Prosecutions whereas "DPP" is used to refer only to the Director of Public Prosecutions.

² Cap 386, Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

Background

- [4] Mr. Alexander was charged with an offence contrary to section 14(1)(4)(a) of the **Firearms Act**. His summary trial in relation to this charge commenced in the Serious Offences Court. During the trial which was presided over by the then learned Chief Magistrate, the Senior Prosecutor purported to lead evidence in relation to section 14(1)(4)(a) of the **Firearms Act** and thereafter closed its case. After the close of the Crown's case, defence counsel, who then appeared on Mr. Alexander's behalf, made a submission that Mr. Alexander should not have been called to lead a defence on the basis that there was no case for him to answer in relation to the offence charged since he was apparently charged under the wrong section. The Senior Prosecutor then sought and obtained an adjournment to confer with the DPP and to seek guidance for his reply to the no case submission.
- [5] The charge stated that Mr. Alexander was in possession of 30 rounds of prohibited .357 magnum ammunition without the authorisation of the Minister contrary to section 14(1)(4)(a) of the **Firearms Act** (underscoring mine). On the matters available to the Crown, the DPP took the view that Mr. Alexander was inadvertently charged with an offence in the **Firearms Act** pursuant to section 14(1)(4)(a) which did not exist, when he ought to have been charged with an offence contrary to section 14(4)(b) of the **Firearms Act**.
- [6] In addition, the DPP took the view that the **Criminal Procedure Code**³ of Saint Vincent and the Grenadines prohibited amendments to be made to the charge after the close of the prosecution's case. The DPP was therefore constrained to discontinue the proceedings in relation to the section 14(1)(4)(a) charge and entered a nolle prosequi in relation to this charge. The DPP, having determined that the offence which Mr. Alexander is alleged to have committed was of a serious nature, took into account Mr. Alexander's circumstances and concluded that the interests of justice required that Mr. Alexander be tried in relation to the

³ Cap. 172, Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

correct charge. Thus, the DPP brought a charge against Mr. Alexander in relation to section 14(4)(b) of the **Firearms Act**. This new charge stated that Mr. Alexander was in possession of 30 rounds of restricted .357 magnum ammunition without the authorisation of the Minister contrary to section 14(4)(b) of the **Firearms Act** (underscoring mine).

[7] Mr. Alexander, being unhappy with the DPP's decision to discontinue the criminal proceedings in relation to section 14(1)(4)(a) of the **Firearms Act** and to bring a new charge under section 14(4)(b), sought leave to institute judicial review proceedings of the decision of the DPP. In so doing, he filed a without notice application and prayed for a number of reliefs:

1. "A declaration that the Defendants' conduct of the prosecution against the Applicant did not apply fair procedures.
2. A declaration that the Defendants' conduct of the proceedings was an abuse of process.
3. A declaration that the entering of the nolle prosequi and the subsequent recharging of the Applicant was unfair.
4. A declaration that the Defendants were acting ultra vires and contrary to Law.
5. That the decision of the Defendants to enter a nolle prosequi and to recharge the applicant was arrived at as a result of an improper motive.
6. A declaration that the Defendants' actions were arbitrary and perverse (sic).
7. An order prohibiting the further prosecution of the Applicant in relation to the charges dated the 4th day of April 2014."

[8] He also made a number of allegations against the DPP.⁴ The complaints against the DPP can be crystallised as follows:

- (a) The DPP's actions in entering a nolle prosequi in relation to the first charge and instructing the second charge amounted to an abuse of process.
- (b) The action of the DPP was designed solely to overcome a clear dismissal of the proceedings to which he was entitled and as such was unfair and amounted to an abuse of process.

⁴ There were in fact 31 grounds of complaint stated in the application for leave to institute judicial review.

(c) Mr. Alexander was denied a fair hearing as guaranteed by the provisions of section 8 of the **Saint Vincent and the Grenadines Constitution Order** (the “Constitution”).⁵

(d) The DPP’s conduct in the circumstances was unfair and oppressive.

[9] Based on the aforementioned grounds, the learned judge granted Mr. Alexander leave to file judicial review proceedings in relation to the second charge that were instituted by the DPP.⁶

[10] It is unclear whether the fixed date claim was filed, as it ought to have been, pursuant to the leave that was granted to Mr. Alexander. However, it seems as though a fixed date claim was filed on the same date and time as the without notice application. In the fixed date claim, Mr. Alexander sought the review of the DPP’s decision on similar grounds as those stated in the without notice application.

[11] The appellants, including the DPP were served with the without notice application and the order granting Mr. Alexander leave to bring judicial review.

[12] The appellants applied to another learned judge (the “second judge”) to set aside the leave that was granted to bring judicial review proceedings on the main basis that there were no reasonable grounds for the grant of leave as Mr. Alexander did not have an arguable case. The appellants’ application was refused. The appellants also sought to have the fixed date claim struck but that too was unsuccessful.

[13] The appellants have filed a number of grounds of appeal in their notice of appeal. It is mainly against the refusal of the second judge to set aside the leave to institute judicial review and to strike out the fixed date claim that they have

⁵ Cap. 10, Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

⁶ No reasons or bases for the grant of the leave was stated in the judge’s order.

focussed their attention in this appeal. Indeed, the appellants have also launched their appeal on the ground that the first judge erred as a matter of law in granting Mr. Alexander leave to bring judicial review.

[14] Based on the several grounds of appeal that have been filed by the appellants, I have distilled the two main issues:

- (a) Whether the learned judge erred in the exercise of her discretion by granting Mr. Alexander leave to bring judicial review; and
- (b) Whether the second learned judge erred in the exercise of her discretion in failing to set aside the leave to bring judicial review proceedings that was granted to Mr. Alexander's order and to strike out the fixed date claim that he had filed.

**Issue 1 – Whether the learned judge erred in the exercise of her discretion in granting Mr. Alexander leave
Appellants' Submissions**

[15] Learned counsel Mr. Joseph Delves, who appeared on behalf of the appellants, argued that the learned judge erred in the exercise of her discretion in granting leave to Mr. Alexander to file judicial review proceedings. Mr. Delves submitted that the DPP acted within the powers that have been conferred on him to commence proceedings, discontinue them and to reinstitute new proceedings. He said that there was nothing unlawful about the exercise of the DPP's discretion. He said that the DPP took into account the relevant factors and concluded that the public interests required that Mr. Alexander be tried on the correct charge.

[16] Learned counsel Mr. Delves submitted that **Sharma v Browne Antoine and Others**⁷ has definitively laid down the test to be applied in granting leave namely: '[whether] 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.' Mr. Delves reminded this Court that it is well established that

⁷ (2006) 69 WIR 379.

judicial review of a prosecutorial decision whilst available in principle is a highly exceptional remedy. He maintained that the judge erred in the exercise of her discretion in granting Mr. Alexander leave to bring judicial review in a factual context which did not meet the threshold requirement of exceptional circumstances.

[17] Also, learned counsel complained that Mr. Alexander, in seeking to obtain leave to institute judicial review, incorrectly represented that there was no alternative means of redress. He said that Mr. Alexander ought to have utilised the alternative means of redress within the criminal trial process. Mr. Delves opined that the alternative means of redress is complete and effective.

[18] Mr. Delves contended that the matters of which Mr. Alexander complains do not infringe the proper exercise of discretion by the DPP. He said that to the contrary, it was well within the proper exercise of the DPP's discretion to discontinue the proceedings in relation to the first charge and to institute proceedings in relation to the second charge. Mr. Delves said that the DPP should not be faulted since in the proper exercise of his discretion the public interests required that Mr. Alexander should not escape prosecution on a serious charge as a result of a mere technical lapse. He said even if the allegations against the DPP are taken at their highest, they do not fall within the parameters of exceptionality as required for the grant of leave to judicially review the exercise of the DPP's discretion. He emphasised that Mr. Alexander's allegations cannot and do not amount in law to bad faith nor an abuse of process since the Director is clothed with constitutional powers to discontinue any criminal proceedings instituted or undertaken by himself or any other person or authority at any stage before judgment is delivered.

[19] Mr. Delves was adamant that the learned judge exercised her discretion improperly in granting Mr. Alexander leave. He accordingly urged this Court to allow the appeal and set aside the decision granting leave to Mr. Alexander to bring judicial review proceedings.

Respondent's Submissions

- [20] Learned counsel Mr. Richard Williams submitted that the DPP, having commenced the prosecution and defined the issues and realising that Mr. Alexander was bound to succeed in the application to be discharged, unfairly entered the nolle prosequi with the sole intention of depriving Mr. Alexander of the advantage obtained during the trial. This, he contended, amounted to an abuse of process and an unfair prejudice to Mr. Alexander. Mr. Williams maintained that the first judge exercised her discretion properly in granting Mr. Alexander leave to institute judicial review proceedings in relation to the second charge.
- [21] In support of his argument, Mr. Williams reiterated that the actions of the DPP were designed solely to overcome a clear dismissal of the proceedings to which Mr. Alexander was entitled and as such was unfair and amounted to an abuse of process. Mr. Williams stated that, in the circumstances that obtained, it was clear that the then learned Chief Magistrate would have had no choice but to uphold the no case submission that was advanced on behalf of Mr. Alexander.
- [22] Next, learned counsel Mr. Williams submitted that Mr. Alexander was not afforded a fair hearing as guaranteed by section 8 of the Constitution. He posited that to permit the DPP to continue with the prosecution in relation to the second charge will open the floodgates to this type of unfair and oppressive conduct whereby on any occasion that the DPP is aware that they have made an error or omission in the presentation of the prosecution's case, they can deny the defendant his right to be discharged by entering a nolle prosequi and recharging him and making good on the error or omission (especially in light of the fact that the prosecution had already closed their case). Mr. Williams said that it is unfair to Mr. Alexander to be put to a new trial in circumstances where he had already resisted the prosecution's case and made a submission that based on the evidence that was led that he had no case to answer.
- [23] Also, learned counsel Mr. Williams argued that it is further very unfair and

oppressive that Mr. Alexander would be expected to expend great amounts of money to reinstruct attorneys to represent him in a criminal matter that for all intents and purposes “he has already won”. He said that it is likely that Mr. Alexander will be unrepresented in this second hearing as he does not have the means to instruct attorneys again. Mr. Williams maintained that it is also very unfair that Mr. Alexander would have to endure the pressure and stress of another criminal trial and that this Court should reject the appellant’s appeal on the first issue. Mr. Williams, during his submissions before this Court, conceded that there is an alternative means of redress. He nevertheless maintained that even though there is an alternative means of redress within the criminal trial process, that there was an arguable case with a realistic prospect of success established.

- [24] Mr. Williams said that this Court should dismiss the appellants’ appeal and hold that the leave was properly granted to Mr. Alexander to bring judicial review proceedings.

Issue 2 - Whether the second learned judge erred in the exercise of her discretion in refusing to set aside the leave and strike out the fixed date claim

Appellants’ Submissions

- [25] As an alternative position, learned counsel Mr. Delves argued that the second judge ought properly to have exercised her discretion to set aside the leave that was granted to Mr. Alexander in order to institute judicial review proceedings. Mr. Delves stated that the appellants had established that Mr. Alexander had not met the threshold requirement for the grant of leave. He therefore urged this Court to set aside the leave that was granted in order to enable the DPP to proceed with the second charge against Mr. Alexander.
- [26] Mr. Delves stated that since the appellants were seeking to have the leave that was granted to Mr. Alexander set aside, the judge should have examined the circumstances so as to determine whether it ought to have been granted in the first place. He argued that the second learned judge in seeking to determine

whether the leave that was granted should be set aside asked herself the wrong question and this severely undermined the decision to which she came. He therefore submitted that as a consequence of the incorrect approach that was taken by the judge she therefore exercised her discretion incorrectly and refused to set aside the leave that was granted. Mr. Delves said that the approach taken by the second judge was merely to support and assume that the leave granted by the first judge was correct without testing whether in the circumstances this was so.

- [27] Finally, Mr. Delves urged this Court to allow the appeal and set aside the leave that was granted and also the decision of the second judge who refused to set aside the leave to issue judicial review proceedings. He further submitted that this Court should strike out the fixed date claim that was filed by Mr. Alexander pursuant to the leave that he had been granted.

Respondent's Submissions

- [28] Mr. Williams submitted that the second judge exercised her discretion properly in not setting aside the leave that had been granted nor striking out the fixed date claim. Mr. Williams advanced that in the judgment below, the learned judge considered all of the relevant facts and circumstances and found at paragraphs 40,46 and 47 the following:

“40. It has been said that the purpose of the requirement for leave to apply for judicial review is to filter out frivolous, hopeless and vexatious cases, and so safeguard the time and work of the court [the Civil Court Practice 2011, Note 34.21, page 454.]. In my judgment, the fact that the learned judge granted leave to file judicial review proceedings, and ordered that the judicial review proceedings already filed on 4th April 2014 was scheduled for hearing on 11th June 2014, can have only meant that the learned judge was satisfied that the Applicant had placed before the court material sufficient to found an arguable case – one that was not hopeless or frivolous – one with a reasonable prospect of success. Indeed, from what I can see from the material that was before the learned judge, and what are (sic) before me now, I am fortified in my opinion that the documents that were before the learned judge, and what are before me now, are, and were of sufficient materiality to justify granting leave as they show that there was/is at the very least an arguable case. Therefore,

having reconsidered the order made by the learned judge on 4th April 2015, I am not of the view that it was wrongly made and ought to be set aside.

“46. To my mind, this is not a plain and obvious case, because the Claimant’s claim, and affidavit, and the legal arguments, opinions and certain points of law raised in the submissions are contentious and raise issues not only of administrative law but of constitutional law involving the principles of natural justice and the scope of the power of the DPP to nolle prosequi a matter following the submission of no case to answer and then recharge an accused with a new offence, based on the same set of facts. Significantly, Mr. Williams himself stated that he does not dispute that the DPP is empowered to nolle prosequi a case at any time before judgment and without giving any reason for so doing, but Counsel says that the gravamen of Alexander’s complaint is that the reason why the DPP entered a nolle prosequi in his case was to gain an unfair advantage against Alexander to breach his constitutional right of a fair trial, and a fair procedure used against him to the point where it is contrary to the interest of justice and caused the Respondent to lose faith in the integrity of the judicial system. Seemingly, the claims have raised novel contestable issues about the course of conduct of, and the procedures employed by the DPP, that are to be canvassed at a substantive/inter partes hearing of the claim. It cannot be said at this stage, prior to filing of a Defence or affidavit in answer to the Claim, and other court procedures, that the Claimant has no reasonable ground for bringing or defending claim and had no reasonable prospects of success.

“47. After having carefully viewed the Fixed Date Claims and the supporting Affidavit, and accepting all properly pleaded primary facts as being true, I find that, on their face, the Fixed Date Claims and supporting affidavit contain sufficient material upon which an arguable case could be based, and have disclosed reasonable grounds for bringing or defending the claim, and thus ought not to be struck out. The allegations of abuse of process, improper conduct/motive on the part of the DPP and the Prosecutor, and the allegation that the purpose of the nolle prosequi was to gain an unfair advantage are allegations which are questions of fact to be decided at trial, with the aid of evidence. Facts need to be proved and evidence of those facts need to be filed and served. I am not inclined to the view that the case is a plain and obvious one for striking out at this stage when all of the facts are not yet before the court. Accordingly I propose to dismiss the application to strike out the Fixed Date Claims, and issue directions for the claim to proceed on its legal and factual merits. No doubt the applicant was expecting the court to dispose of the legal issues summarily but I am of the view that my function at this stage is not to do that, but to determine the specific application before me in accordance with applicable principles, and not to deal with substantive issues.”

[29] Mr. Williams reiterated that in view of the above, it is clear that the judge exercised

her discretion properly in not setting aside the leave that was granted to Mr. Alexander. Learned counsel Mr. Williams posited that the appellants are now asking the Court to set aside the leave that was granted and the fixed date claim, which in effect is an appeal against the exercise of the discretion of the learned trial judge. He said that the appellants would have to satisfy this Court that the judge erred in the exercise of her discretion. He purported to rely on **George Allert et al v Joshua Matheson et al**.⁸ He said that this Court laid out the appropriate test as follows:

“[38] There is no doubt that at the heart of this appeal is the question whether or not the trial judge erred in the exercise of her discretion in refusing to strike out the amended defence and counterclaim. This is in effect an appeal against the exercise of the learned judge’s case management discretion. It is the law that an appellate court will only interfere with the exercise of a judge’s discretion if it can be shown that the judge has ‘exceeded the generous ambit within which a reasonable disagreement is possible’. The test has alternatively been expressed by Lord Woolf **MR in AEI Rediffusion Music Ltd v Phonographic Newspapers Ltd** [[1999] 1 WLR 1507 at p. 1523 C-D] citing Stuart-Smith LJ in **Roache v News Group Newspapers Ltd** [[1998] EMLR 161] as follows:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale”.

“[39] The appeal court will also interfere where the judge’s decision was plainly wrong [Stuart v Goldverg Linde (a firm) and another [2008] EWCA Civ 2; Enzo Addari v Edy Gay Addari, BVIHCVAP2005/0001 (delivered 23rd September 2005, unreported)]. The general test has two limbs, the first condition was explained by Viscount Simon LC in **Charles Osenton and Company v Johnson** [[1942] AC 130 at p. 138] where the Lord Chancellor said:

“The appellate tribunal is not at liberty merely to substitute its own exercise of discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the

⁸ GDAHCVAP2014/0007 (delivered 24th November 2014, unreported).

appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified’.”

“[40] The second condition was explained by Asquith LJ in **Bellenden (formerly Satterhwaite) v Satterhwaite** [[1948] 1 All ER 343 at p. 345 B]:

“We are here concerned with judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere’.”

[30] Mr. Williams argued that in view of the principles stated above, in order for the appellants to persuade this Court to interfere with the judge’s exercise of discretion they would have to meet the threshold referred to above. He further submitted that the DPP’s right to institute fresh proceedings after entering a nolle prosequi is not an untrammelled right as is being submitted by the appellants; this right must be subject to the concept of fairness and to the operation of fair procedure against the accused. In support of his contention he referred to **Gerard O’Callaghan v Robert O HUadhaigh**.⁹

[31] Learned counsel Mr. Williams submitted orally that, even if this Court were to conclude that the second judge took into account irrelevant factors in the exercise of her discretion, this Court should exercise its discretion and dismiss the appellant’s appeal.

[32] Mr. Williams said that this Court should stay the prosecution of Mr. Alexander on the basis of abuse of power. In support of his contention, Mr. Williams referred this Court to the Australian Court of Appeal case of **R v Swingler**¹⁰ referred to in

⁹ [1977] IR 42 at pp. 52-54.

¹⁰ [1996] 1 VR 257.

The Power of A Court to stay a Prosecution as an Abuse of Process¹¹ where the Court (Winneke P. Callaway JA and Crockett AJA) stated:

“We do not say that there can never be a case where the exercise of the power to make presentment on a charge in respect of which a nolle prosequi has previously been entered will amount to an oppressive exercise of prosecutorial power and thus an abuse of the court’s process. The categories of “abuse cases”, as has often been said, are never closed. We are not, however, satisfied that this is such a case. An application of this nature is an application in which the court is asked to exercise its discretion. The criteria which govern the exercise of such a discretion have been most recently stated which govern the exercise of such a discretion have been most recently stated by the High Court in *Walton v Gardiner* per Mason CJ, Deane and Dawson JJ at 395-396 in the following terms: As was pointed out in *Jago*, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among these factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice”.

[33] Finally, Mr. Williams said that the appellants’ appeal ought to be dismissed and Mr. Alexander should be allowed to prosecute his fixed date claim.

Discussion

[34] I will now treat the relevant statutory provisions. The following subsections in section 14 of the **Firearms Act** are noteworthy:

“(1) No person may be in possession of a prohibited weapon save as authorised by statute.

“(2) No person may be in possession of a restricted weapon save as authorised by the Minister under section (6)(2).

“(3) Subject to section 15 no person may be in possession of any other firearm or ammunition without a licence or permit pursuant to section 4.

“(4) Any person who possesses a firearm or ammunition in contravention of this section commits an offence and is liable –

(a) if in possession of a prohibited weapon –

¹¹ Stephen Lawrence, *The Power of A Court to stay a prosecution as an abuse of process: Judicial Enforcement of Fundamental Values and Principles* [2012] ‘Reasonable Cause’ Criminal CLE Conference.

- i. on summary conviction to a term of imprisonment not exceeding ten years,
- ii. on conviction on indictment to a term of imprisonment not exceeding twenty years.”

[35] Rule 56.2(1) of the Civil Procedure Rules 2000 (“CPR”) states as follows:

“An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.”

[36] CPR 56.3(1) states:

“A person wishing to apply for judicial review must first obtain leave.”

[37] CPR 56.3 (3)(e) states that the application for leave must state whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.

[38] Section 64(2) of the Constitution provides as follows:-

“The Director of Public Prosecutions shall have power in any case in which he considers it desirable to do so -

...

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority...”

[39] Section 132 of the **Criminal Procedure Code** of Saint Vincent and the Grenadines restricts amendments to complaints to be permissible any time before the close of the prosecution’s case.

[40] I now turn to issue 1

Whether the learned judge erred in the exercise of her discretion in granting Mr. Alexander leave

[41] In addressing the first issue, it is necessary to examine the powers of the DPP to institute and or discontinue criminal proceedings.

- [42] In Commonwealth jurisdictions that possess the constitutional office of the DPP, it has long been settled that the DPP has the power to institute and discontinue criminal proceedings. In Saint Vincent and the Grenadines, this position is set out in section 64(2) of the Constitution. In fact, the constitutional provision underscores the point that it is within the purview of the DPPs' discretion and that this power can be exercised at any stage of the trial before the decision is given. The language of section 64(2) is clear and unambiguous. There is no doubt that the DPP can discontinue any criminal proceedings before the Court gives its decision in a trial.
- [43] Also, in Saint Vincent and the Grenadines, section 67 of the **Criminal Procedure Code** gives effect to this power of the DPP to institute or discontinue criminal proceedings at any stage of the trial.
- [44] Several judicial decisions from the Commonwealth have long given effect to the clear constitutional provisions as they relate to the power of the DPP to commence and/or discontinue criminal proceedings at any stage of the proceedings. In **Gladys Tappin v Francis Lucas**,¹² the appellant's son was shot by the respondent, a policeman, during an incident in which her son and another person was alleged to have committed the offence of robbery with violence. The appellant's son died as a result of the gunshot wounds. A coroner's inquest was held, and the jury's verdict was that no one was criminally responsible for his death. The appellant then filed an information in which she alleged that Mr. Lucas had murdered her son. Upon the matter coming before a magistrate, the latter read a letter in open court purporting to have been signed by the Director of Public Prosecutions indicating that he had discontinued the proceedings launched by the appellant. By virtue of art 47(1)(c) of the Constitution of Guyana, the magistrate made an order for the discontinuance of the criminal proceedings and discharged the respondent. The appellant appealed against the order of the magistrate to the Court of Appeal. It was held that the submission of a letter signed by the DPP was

¹² (1973) 20 WIR 229.

sufficient to comply with the Constitution which empowers him to discontinue any criminal proceedings, and he need not appear in person to do so.

[45] In **R v Louis Chen**,¹³ the applicant was charged with breach of section 205 of the **Customs Law**. He pleaded guilty and the information was endorsed to that effect. The matter was adjourned on three occasions for sentencing and on the last occasion sentence was not passed and the DPP entered a nolle prosequi in respect of that offence. The information was endorsed "with decision". Subsequently, a third information for the same offence was issued against the appellant. To this charge, the appellant pleaded autrefois convict and autrefois acquit. On a case stated by the resident magistrate the opinion of the Court of Appeal was sought on two questions namely: (1) whether a plea of guilty has the effect of an immediate conviction (2) the effect, if any, on criminal proceedings of a nolle prosequi entered after a plea of guilty and/or conviction. It was held that the relevant statute namely the **Justices of the Peace Law** made it clear that at that time the magistrate was sitting in the Court of Petty Sessions, and section 13 of that law made it clear that the conviction was effective from sentence - sentence not having been passed, the appellant had not been convicted; (ii) that the answer to the second question was that the language of section 94(3)(4) of the Constitution of Jamaica made it clear that the DPP had the authority to discontinue criminal proceedings at any time before the delivery of judgment and on the facts of this case he had acted within his constitutional authority when he entered the nolle prosequi to the information.

[46] In **Lloydell Richards v The Queen**,¹⁴ the appellant was arraigned on an indictment charging him with murder. His guilty plea to manslaughter was accepted by the prosecution with the approval of the judge, who granted defence counsel's application for an adjournment to call character witnesses in mitigation. The DPP decided to discontinue the proceedings so that the defendant could

¹³ [1966] 9 JLR 290.

¹⁴ [1993] A.C 217.

again be charged with murder. At the resumed hearing a nolle prosequi was entered pursuant to section 4(1) of the **Criminal Justice (Administration) Act**. The defendant was tried on a second indictment charging him with murder, convicted and sentenced to death. He appealed on the basis that the second indictment contravened section 20(8) of the Constitution of Jamaica which embodied that common law doctrine of *autrefois convict*. The Court of Appeal dismissed his appeal.

[47] On his appeal to the Judicial Committee, it was held that to sustain a plea of *autrefois convict* a defendant had to prove not only that he had already been found guilty of the offence charged by a court of competent jurisdiction either by the decision of the court or verdict of the jury or entry of his own plea of guilty, but also that the court had finally disposed of the case by passing sentence or making some other order; since the proceedings on the first indictment had been discontinued before sentence had been passed, there had been no final adjudication and the defendant had been properly convicted on the second indictment.

[48] Applying the above principles extrapolated from the cases, there is no doubt that the DPP has the power to institute and/or discontinue criminal proceedings at any stage of the matter, including the close of the prosecution's case. In fact, it is open to the DPP to enter a nolle prosequi before a conviction is rendered even if the defence has already led its defence. There is nothing unlawful, without more, about the DPP entering a nolle prosequi in a matter and proceeding to prosecute on a new charge. The highest law of the land, **the Constitution** of Saint Vincent of the Grenadines, empowers him to do so. This is reinforced by section 67 of the **Criminal Procedure Code** of Saint Vincent and the Grenadines.

[49] Having established that the DPP has the power to institute or discontinue criminal proceedings, it is now necessary to determine the circumstances in which the DPP's exercise of powers are reviewable. The resolution of this matter will impact

the two issues that arise for consideration.

[50] It is settled law that the exercise of the DPP's discretion is judicially reviewable. However, the law is equally clear that this review power should be used in exceptional circumstances or to put it another way should be used sparingly. In **Sharma v Browne-Antoine**¹⁵ it was held that the decision of the Deputy Director of Public Prosecutions to prosecute was in principle susceptible to judicial review. However, it was made clear that it was an exceptional remedy of last resort. Further, the Court made clear that the issue relating to the decision of the Deputy Director to prosecute should ordinarily be raised in the course of criminal proceedings. In **Sharma v Browne Antoine** it was further stated that:

“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 arguably 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 processes of the court may strengthen’”.¹⁶

[51] In **Matalulu and Another v DPP**,¹⁷ useful guidance is provided as to the circumstances in which a court would grant leave to bring judicial review proceedings against the Director of Public Prosecutions' decision to prosecute or discontinue prosecution. They are namely:

- (a) If the DPP acted in excess of his constitutional or statutory grants of power such as an attempt to institute proceedings in a court established by disciplinary law.
- (b) When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person

¹⁵ [2006] 69 W.I.R 379.

¹⁶ At pp. 378-379.

¹⁷ [2003] 4 LRC 712 at pp735-736.

or authority and to have failed to exercise his or her own independent discretion - if the DPP were to act upon a political instruction the decision could be amenable to review.

- (c) In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
- (d) In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
- (e) Where the DPP has fettered his or her discretion by a rigid policy e.g. one that precludes prosecution of a specific class of offences.

[52] It is evident that the examples that are stated above are in no way exhaustive.

[53] Further, the salutary principles that are applicable in judicial review of the exercise of prosecutorial discretion were judicially considered in **Matalulu v DPP**. In that case it was held that:

“Judicial review of the exercise of prosecutorial discretion was to be exercised sparingly. In such cases, it was sufficient to apply established principles of judicial review. These had proper regard to the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters, including policy and public interest considerations which were not susceptible of judicial review because it was within neither the constitutional function nor the practical competence of the courts to assess their merits. That approach subsumed concerns about the separation of powers. A mistaken view of the law upon which a proposed prosecution was based would not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor’s view was the court in which the prosecution was commenced. Where the DPP decided to discontinue a prosecution on the basis of a mistaken view of the law then, by definition, there was no court proceeding within which that view could be tested and it might be that a stronger case for review could be made. Decisions to initiate or not to initiate or to discontinue prosecutions might be based on judgments even though they might be wrong on the law or

mistaken of the fact. The DPP was empowered to make such judgments about the prospect of success on questions of law and fact. The DPP was empowered to make such judgments even though they might be wrong on the law or mistaken of the fact. In the instant case, the DPP based the decision in part upon a construction of s 117 of the Penal Code which had been settled in Fiji for over thirty years and upheld by the Court of Appeal, although now shown (below) to be erroneous. There was no credible basis for suggesting that in coming to that view the DPP acted other than in good faith. The decision could not have been reviewable on that ground. No other viable ground for review having been advanced by the appellants in their original application, it would have been quite proper in the circumstances to refuse leave. The fact that the DPP's view and that of the court on the point was wrong did not give rise to a ground which would have justified the grant of leave to seek judicial review in the first place."¹⁸

[54] In the case at bar, a careful review both individually and collectively, of the allegations that have been levelled against the DPP in relation to the nolle prosequi of the first offence and the institution of the second charge can be crystallised as being an abuse of process, unconstitutionality and amounting to unfair prejudice. It is unnecessary to go into detail of the thirty-one grounds of complaint. Suffice it to say that a deliberate examination of the allegations reveal that they fall very well short of the threshold requirement to satisfy either the requirement of arguable grounds and reasonable prospect of success. The matters that are complained of fall squarely within the proper exercise of discretion by the DPP. In fact, for the DPP to have acted in any other manner it could well amount to an improper exercise of his discretion. The law enables the DPP to do the things against which the complaints are made namely to discontinue and institute new criminal proceedings.

[55] In reaching the above conclusion, it is obvious to me that when Mr. Alexander sought and obtained the leave of the court in order to institute judicial review proceedings, the matters about which he was complaining were well within the DPP's discretion. There is not a scintilla of evidence provided in the affidavit in support which indicated that it is arguable that the DPP acted improperly or

¹⁸ As at p. 714.

unlawfully. It is evident that this appeal brings into sharp focus the exercise of discretion by the first learned judge in granting Mr. Alexander leave to seek judicial review of the DPP's decision to enter a nolle prosequi in relation to the first charge and to institute proceedings against him on the second charge.

[56] This brings me now to deal frontally with the learned judge's exercise in granting leave to bring judicial review proceedings. The principles upon which an appellate court will interfere with the exercise of discretion are well settled and need no repetition. They have been often repeated, applied and analysed in several judgments including **George Allert et al v Joshua Matheson et al**. In **Dufour and others v Helenair Corporation Ltd and others**,¹⁹ which for our context is regarded as the locus classicus, Sir Vincent Floissac stated that:

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

[57] While it is very unusual for reasons for decision to be given by a judge in granting leave to institute judicial proceedings and in the case before the court no reasons were provided,²⁰ this, however, in no way prevents this Court from examining the matters that were placed before the first learned judge in an effort to determine whether the judge had exercised her discretion properly in granting Mr. Alexander leave to institute judicial review. It is imperative that the learned judge's grant of leave should be examined in order to determine whether there is any merit in the DPP's complaint that it ought not to have been granted.

[58] An examination of the documents that were filed reveal that the without notice application was filed on 4th April at 1:25 p.m. and reveal that at the same time a

¹⁹ (1996) 52 WIR 188.

²⁰ It would have been useful if perhaps a few preambles were included in the order.

fixed date claim and an affidavit were also filed.

[59] Critically, in seeking the ex parte leave to institute the judicial proceedings, Mr. Alexander, at paragraph 28 of the without notice application, stated that there was no alternative form of redress to the judicial review proceedings that he had hoped to initiate. He repeated this in the affidavit that was filed together with the fixed date claim. However, as conceded by Mr. Williams during his oral submissions, there was and is an alternative means of redress within the criminal process itself. Therefore, Mr. Alexander's statement in the without notice application and the affidavit in support that there was no alternative means of redress was incorrect. It is noteworthy that the criminal trial process provides a comprehensive mechanism to properly deal with all of the matters that were raised by Mr. Alexander. This brings into question whether the first learned judge ought to have granted leave.

[60] It is settled law that the Court will refuse leave to institute judicial review proceedings 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. The question that has to be addressed is whether the first judge exercised her discretion correctly in granting leave.

[61] In **R v Director of Public Prosecutions, Ex parte Kebilene and Others**,²¹ Lord Steyn expressed himself thus:

“My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.”

[62] Also in **Sharma v Browne Antoine**, the Board clearly stated that judicial review of prosecutorial decisions though available as a matter of principle is a remedy of last resort. I will not rehearse the complaints that are stated at paragraphs 9 to 27 of the without notice application and paragraphs 7 to 29 of the affidavit in support;

²¹ [2000] 2 AC 326 at p.371.

however I have no doubt that the complaints fall squarely within the proper exercise of the DPP's powers.

[63] Had the proper sifting of the matters been undertaken by the first learned judge it would have been evident that leave ought not to have been granted since the complaints cumulatively and individually were insufficient to establish arguable grounds nor did they have any realistic prospect of success. The grant of leave to bring judicial review by the first judge is clearly open to criticism.

[64] It is clear to me that the first judge ought not to have granted Mr. Alexander leave to file judicial review. In so doing, the learned judge erred in the exercise of her discretion and committed an error of principle. Therefore, the leave to file judicial review proceedings should be set aside. Accordingly, the entire judicial review claim would have no basis.

[65] However, for completeness, I will now turn to examine issue number 2.

Whether the second judge erred in the exercise of her discretion when she failed to set aside the leave to file judicial review

[66] In **Michelle Andrews PC 16 of New Prospect v The Director of Public Prosecutions et al** ²² it was held that:

“In the absence of evidence of fraud, dishonesty, mala fides or corruption, a court will be very loath to find that the DPP's decision would be reviewable.”

[67] These above principles remain good law and I can do more that helpfully apply them to the case at bar.

[68] When one reads the evidence deposed to by Mr. Alexander, the allegations cannot sustain the charges against the DPP. Careful scrutiny of the numerous allegations would reveal that it was incumbent on the DPP and in the public

²² SVGHCVAP2008/0003 (delivered 14th July 2008, unreported).

interests to discontinue the trial in relation to the first offence and commence litigation against Mr. Alexander for the correct offence. Anything short of that may well have brought the administration of justice into disrepute, bearing in mind the serious nature of the alleged offence of which Mr. Alexander as charged.

- [69] As indicated earlier, **Matalulu v DPP** enunciates some of the relevant principles that should be taken into consideration where there is judicial review of the decision of the DPP to prosecute or discontinue a prosecution. In **Matalulu v DPP** it was clearly stated and bears repetition:

“that there may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant consideration or other unreasonably are unlikely to be vindicated, because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

- [70] In the application to set aside the leave, the second judge concluded that the first judge must have been satisfied that based on the material that was placed before her that Mr. Alexander had established an arguable case with a reasonable prospect of success. The judge went on to say that based on the material that was before her, she too was satisfied that there was an arguable case. She therefore concluded that there was no basis to find that the order granting leave was wrongly made or to set aside. It is evident that the second judge in her determination as to whether to set aside the leave did not subject the material before her to the appropriate scrutiny and failed to adhere and properly apply the relevant principles.

- [71] **Swingler v R** is very helpful. In that case, the court stated that:

“We do not say that there can never be a case where the exercise of the power to make presentment on a charge in respect of which a nolle prosequi has been previously entered well amount to an oppressive exercise of prosecutorial power and thus an abuse of court’s process. The categories of “abuse cases” as often said are never closed. We are

not however satisfied that this is such a case. An application of this nature is an application in which the court is asked to exercise its discretion.

.... The question whether criminal proceedings should be permanently stayed on abuse of process grounds, fails to be determined by a weighing process involving subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice.”

[72] In my view, bearing in mind that judicial review is an exceptional remedy or a remedy of last resort, any issue relating to the decision to prosecute should ordinarily be raised in the criminal proceedings. It is open to Mr. Alexander to take any point (that has merit) of abuse or unfair prejudice during the criminal trial. However, the allegations which he has made against the DPP do not disclose an arguable case more so that has any prospect of success.

[73] I reiterate that the matters of which he complains fall very short of the threshold for the grant of leave. More importantly, the second judge who heard the set aside application did not undertake the necessary scrutiny or sifting of the evidence as provided in the affidavit and review the without notice application together with the fixed date claim in order to ascertain whether the DPP’s complaint was well founded. The learned judge assumed the very issue that she was required to resolve. Also, the second judge failed to recognise that Mr. Alexander had a very ambitious case and did not consider that all of Mr. Alexander’s complaints could be resolved within the criminal trial process itself as has been clearly stated in **Sharma Browne-Antoine**. The learned judge failed to address this important element in a comprehensive manner. Accordingly, the second judge erred in the exercise of discretion and committed an error of principle. Her conclusion must therefore be set aside, since it falls outside of the generous ambit within which reasonable disagreement is possible.

[74] A careful examination of all of the complaints²³ that have been made against the DPP by Mr. Alexander, even if they are assumed to be true can never establish bad faith or amount to an abuse of process or unfair prejudice. Neither can any of them give rise to any constitutional breach. There is no doubt that this Court possesses inherent jurisdiction to prevent the misuse of its procedure in any way which would be manifestly unfair to a party to the litigation, or would in any way bring the administration of justice into disrepute. If any authority for this principle is needed, it can be found in **Hunter v Chief Constable of West Midlands and others**.²⁴

[75] The complaints at their highest would amount to mere technical errors that were put right by the institution of the second charge. The DPP's treatment of the application to set aside the leave that was granted has fallen on very fertile ground. Indeed, the approach taken by the learned judge is open to criticism on a number of grounds. I agree with Mr. Delves that the learned judge did not properly apply the relevant principles; she also improperly reasoned that the leave to bring judicial review can only have meant that the first learned judge was satisfied that the material that was before the court established an arguable case with a reasonable prospect of success.

[76] Even though the second judge had earlier referred to the relevant cases, she did not distil and apply the relevant principles from **Sharma, ex parte Kebiline** and **Matalulu** in the exercise of her discretion. I am of the view that the exercise of discretion by the second judge was based on a misapprehension of the law and the incorrect evidence as deposed to by Mr. Alexander in his affidavit. **Hadmor Productions Ltd. and Others v Hamilton and Others**²⁵ states:

“The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on the misunderstanding of the law or of the evidence before him or

²³ In so far as I have already indicated the general nature of the complaints, it is unnecessary to repeat their details.

²⁴ (1982) AC 529.

²⁵ [1982] 1 All E R 1042.

on an inference that particular facts existed or did not exist.”

- [77] On this basis, I have no doubt that the exercise of the second judge’s discretion must be set aside and I so do. In addition, the learned second judge’s treatment of the application to strike out the fixed date claim at paragraphs 47 of the judgment can also be assailed. Should the DPP refuse to prosecute Mr. Alexander on the second charge since to disallow him to do so would be to allow Mr. Alexander to prevail on the basis of a mere technicality. I have earlier reproduced what the learned judge said in paragraph 47 of the judgment and nothing will be gained from repeating it. However, I must indicate that the issues that Mr. Alexander raised were neither novel nor new. In fact, **Sharma v Browne-Antoine** is very instructive and supports the view that the leave should have been set aside by the second judge.
- [78] The learned second judge committed errors of principle in not setting aside the leave that was granted to institute judicial review proceedings and failing to strike out the fixed date claim and it now falls to this Court to exercise its discretion afresh.
- [79] In the exercise of this Court’s discretion afresh, and considering the circumstances of the alleged offence, the conduct of the DPP and the countervailing circumstances of Mr. Alexander together with the relevant legal principles that were enunciated in **Sharma, Kebiline** and **Matalulu** when read together with the statutory provisions, the only conclusion that can be properly reached is that the present case was totally unsuitable for judicial review proceedings. I have no doubt that the numerous allegations that are made against the DPP, even if true, without more, would present Mr. Alexander with an impossible task in sustaining the complaints of unfair prejudice, unconstitutionality or abuse of power (so as to give rise to a claim for judicial review).
- [80] In my view, there is nothing in the factual allegations that have been levelled against the DPP, even if for present purposes only were to be treated as correct,

that would bring them within the threshold requirement of exceptionality so as to make the DPP's decision properly amenable to judicial review. The principles that are set out in **Sharma v Browne-Antoine** are applicable. It therefore follows that the leave to institute judicial review must be set aside and the fixed date claim would inevitably fall away. In a word, judicial review should not be permitted.

Costs

- [81] This is not the sort of appeal in which costs should be awarded against the unsuccessful party - Mr. Alexander. I am not of the view that that Mr. Alexander has acted unreasonably in making the application or in the conduct of the application and the appeal. Accordingly, I would order each party to bear their own costs pursuant to CPR 56.13 (6).

[82] Conclusion

- (1) The appellants' appeal against the decision of the first learned judge in granting Mr. Alexander leave to bring judicial review proceedings is allowed.
- (2) The appellants' appeal against the decision of the second learned judge's refusal to set aside the leave that was granted is allowed. The leave to institute judicial review is set aside.
- (3) Each party is to bear their own costs.

[83] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar