

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S-868/2004

SUSAN CHARLEAU

Plaintiff

AND

COMMISSIONER OF POLICE

First Defendant

CORPORAL JOHN MORRISON

Second Defendant

SERGEANT FITZROY GRAY

Third Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Plaintiff: Mr. A. Ramlogan S.C leads Mr. K. Ramkissoon

For the Defendant: Mr. R. Martineau S.C. leads Mrs. Gibbons-Glen
Instructed by Ms. K. Mark & Ms. A. Ramroop

Date of Delivery: 13th April 2017

JUDGMENT

[1] This case arose out of an incident that occurred on the 6th February, 2004. On that day two Barbadian fishermen, Joseph Mason the Master of ‘El Retes’ and Samuel Firebrace the Master of ‘De Boys’, were allegedly engaged in fishing in the Exclusive Economic Zone of Trinidad and Tobago (EEZ). Both men and their vessels were intercepted and detained by officers of the Trinidad and Tobago Coast Guard. They were subsequently charged on the 9th February, 2004 by an officer of the Trinidad and Tobago Police Force attached to the Scarborough Police Station, Tobago for fishing in the EEZ without a licence contrary to section 26 (1) of the Archipelagic Water and Exclusive Zone Act, No. 24 of 1986.

[2] The Complainant in both charges was Police Constable Dean Cipriani. In both charges the witnesses cited on the complaints for the Complainant were (i) Lt. Kelshall and (ii) Seaman Taylor. On the very 9th February, 2004 the matters were both called in the Scarborough Magistrates’ Court before Magistrate Eversley – Gill. Both defendants pleaded not guilty when called upon to plead. On both complaints the following endorsement was recorded:

“9. 2. 03

Complainant appears defendant appears Mr. Gibbs.

Prosecutor – no evidence offered leave to withdraw granted.

Dismissed.”

[3] The entry in the extract from the Magistrate’s Case Book with respect to the case against Mason (Information No 410/04) stated (in the column “How Disposed”): “NO APPEARANCE COMPLAINANT 11:30 AM DEFENDANT APPEARS ON WARRANT MR. GIBBS NO EVIDENCE OFFERED DISMISSED.” This endorsement was signed by the Magistrate and dated 9th February, 2004.

[4] The decision by the police prosecutor to offer no evidence and to seek leave to withdraw both complaints and/or the dismissal of the complaints by the Magistrate led to quite a furor in Trinidad and Tobago. This was, in part, because it was being reported widely in the media that the police prosecutor (Cpl. Morrison) had indicated to the presiding magistrate that the police would be offering no evidence in the matters and that **“he was acting on instructions from a Government Minister”**.

[5] Further, the Director of Public Prosecutions (DPP) issued a Press Release indicating that he had launched an investigation into the matter which stated, in part, as follows:

Both accused appeared before a Magistrate and pleaded not guilty, whereupon the police prosecutor informed the Magistrate that the Prosecution was offering no evidence. As a consequence, charges against the fishermen were dismissed. No instructions were given by me to have this matter discontinued. There is no person other than the Director of Public Prosecutions authorised under the Constitution to discontinue criminal proceedings.

[6] In light of the above the Plaintiff, on the 2nd May, 2004, sought leave to review the decisions and/or actions of Cpl. Morrison to offer no evidence in the matters and/or to have them both withdrawn (discontinued), resulting in their dismissal.

[7] The application for leave was supported by two affidavits of the Applicant, two affidavits of Carol Cuffy Dowlat attorney at law, and affidavits of Jacqueline Sampson, Clerk of the House of Representatives and Kemchan Ramdath attorney at law, both filed on the 3rd June, 2004.

[8] On the 4th June, 2004, Gobin J. granted leave to the Plaintiff to apply for Judicial Review for:

- a. A declaration that the decision of Police Prosecutor Cpl. Morrison, the servant and or agent of the Commissioner of Police, in failing and or refusing to offer evidence against the two fishermen and informing the presiding magistrate in the Scarborough Magistrates Court that the prosecution would be offering no evidence and or failing to offer any evidence in the prosecution of cases against the said fishermen resulting of the dismissal of the said cases, is an omission to perform a duty and or in breach of duty and is accordingly unlawful and illegal;
- b. A declaration that the aforesaid decision and or action of Police Prosecutor John Morrison was in excess of jurisdiction an abuse of power unauthorized and or contrary to law and illegal;
- c. A declaration that the aforesaid decision of Police Prosecutor John Morrison is contrary to the provision of Section 90 of the Constitution and illegal;
- d. A declaration that the decision of Police Prosecutor Sgt. Fitzroy Gray to instruct Police Cpl. John Morrison to refuse to offer evidence and or to inform the presiding magistrate that the prosecution would be offering no evidence and or to offer no evidence in the prosecution of the cases against the Barbadian fishermen resulting in the dismissal of the said cases is unlawful and illegal, in excess of jurisdiction, an abuse of power, illegal and contrary to the provision of Section 90 of the Constitution.

[9] On the 3rd September, 2004 the State filed affidavits by the following persons in response to the application for Judicial Review:

- a) Patrick Edwards, Permanent Secretary in the Office of the Prime Minister;
- b) Maurice Dillon, Assistant Superintendent of Police;
- c) John Morrison, Corporal of Police;
- d) Fitzroy Gray, Sgt. of Police.

[10] Several interlocutory applications were filed by both sides. The Plaintiff filed two applications, both on the 30th November, 2005. One sought leave to cross-examine Acting Superintendent of Police Dillon, Cpl. Morrison and Sgt. Gray. The other sought leave to issue subpoenas directing Lieutenant Kelshall, attorney at law Cristo Gift and the Chief Executive Officer (CEO) of the Telecommunications Services of Trinidad and Tobago (TSTT) attend court and give evidence as to the incoming and outgoing calls to the Scarborough Police Station on the 9th February, 2004.

[11] The essence of the Plaintiff's case is that the decision by the Prosecutor, Cpl. Morrison, on the 9th February, 2004, in refusing and/or failing to offer any evidence and/or in seeking to withdraw the charges against either or both Mason or Firebrace (culminating in the dismissal of the charges against them) was an abuse of power, unlawful and/or illegal. This was allegedly so, primarily because the decision was improperly and/or unlawfully and/or unconstitutionally influenced by instructions and/or directives emanating from the political arm of the State, and also in circumstances where on the first hearing of the matters the accused having pleaded not guilty, at least one witness cited on the complaint was available to give evidence and/or no application was made to seek an adjournment to either get proper instructions or duly proceed with the matter. The Plaintiff's challenge was therefore based on the ground that

the decision of Cpl. Morrison was an abuse of power, improper, contrary to law and accordingly illegal.

[12] Carol Cuffy Dowlat, Attorney at Law, swore an affidavit¹ in which she deposed as follows:

I am informed by Attorney-At-Law Christo Gift and verily believe that he was present at the Scarborough Magistrate's court on the 9th February 2004 before cases 410 and 411 against John Mason and Samuel Firebrace were officially being heard, during the time same were being heard and after same were determined by Presiding Magistrate Her Worship J. Eversley-Gill and that on that day:

(a) He saw Lieutenant Kelshall and two other coastguardsmen in the precincts of the court before the cases were dealt with and after same were determined;

(b) Before the said cases were officially called he saw Corporal Morrison in conversation with Sergeant Grey and thereafter he saw and heard Corporal Morrison address the Presiding Magistrate and heard Corporal Morrison indicate to the court that he would not be proceeding with the cases;

(c) He saw and heard Corporal Morrison address the Presiding Magistrate when the cases were being officially dealt with and heard Corporal Morrison tell the court that he (Corporal Morrison) would be offering no evidence in the cases;

¹ Affidavit of Carol Cuffy Dowlat filed on 7th May 2004, para 4

(d)He heard Corporal Morrison say that he (Corporal Morrison) acted as he did because he (Morrison) believed that instructions had come from a government minister.

- [13] Also before Aboud J. (Ag.) (and the trial judge) was a statement of the Minister of National Security, made in the House of Representatives on the 2nd May, 2004, in which he had stated in relation to the withdrawal and/or dismissal of both cases:

On February 09, 2004, Mr. Joseph Mason and Samuel Firebrace appeared before the Scarborough Magistrates' Court to answer the said charges. The cases were dismissed by the presiding magistrate because the court prosecutor offered no evidence against the accused. The Commissioner of Police has advised that the action taken by the court prosecutor was based on advice given to him by the senior court prosecutor, his supervisor.

- [14] The DPP had also written to the Commissioner of Police first requesting and then demanding that an investigation be conducted to determine who authorized the discontinuance of this case.

- [15] The sequence of events was that ASP Dillon was in the Scarborough Police Station on the morning of the 9th February, 2004 when he received a telephone call purporting to be from a senior officer from the Ministry of Foreign Affairs (MOFA). ASP Dillon deposed that he could not recall the

conversation verbatim, but that he did recall that the caller expressed concern about the matter involving the fishermen from Barbados².

[16] As a consequence of this conversation and these “concerns”, which were not particularized by ASP Dillon, the latter went to the Scarborough Magistrates’ Court and spoke to the senior prosecutor there, Sgt. Gray. He informed Sgt. Gray of the “concerns that were raised”. He insisted that he had neither received instructions as to how to proceed from the senior official of the MOFA nor did he give any instructions to Sgt. Gray not to proceed or to offer no evidence in the matters³. ASP Dillon stated that he did not discuss the matter in detail with Sgt. Gray and spoke to no one else about it in court that day.

[17] In his principal affidavit ASP Dillon deposed further that:

“I do not recall if the person with whom I spoke was male or female and I also cannot recall the name of the person⁴”.

[18] Sgt. Gray confirmed that ASP Dillon had spoken to him in court. He stated⁵:

I was informed by ASP Dillon that he received a telephone call from someone purporting to be an “official” of the Ministry of Foreign Affairs who informed ASP Dillon that the matter involving the Barbadian fishermen was “a sensitive one”.

[19] Sgt. Gray then explained that he informed Prosecutor Cpl. Morrison of his conversation with ASP Dillon and that Cpl. Morrison then told Magistrate

² Affidavit of ASP Dillon filed on 3rd Sep 2004 para 5

³ Affidavit of ASP Dillon filed on 3rd Sept 2004 para 9

⁴ Affidavit of ASP Dillon supra

⁵ Affidavit of Sgt. Gray filed on 20th Sept 2006 para 8

Eversley – Gill that he would not proceed with the complaints against Joseph Mason and Samuel Firebrace, and as a result, the complaints were dismissed. Sgt. Gray also denied that Cpl. Morrison informed Magistrate Eversley – Gill that he was acting on instructions from a government minister.

[20] Sgt. Gray in his principal affidavit deposed⁶:

*“I was informed by ASP Dillon that he received a telephone call from **someone** purporting to be an “official” of the Ministry of Foreign Affairs who informed ASP Dillon that the matter involving the Barbadian fishermen was a sensitive one”.*

[21] However, Sgt. Gray in his supplemental affidavit deposed⁷:

My conversation with ASP Dillon lasted about 2 to 3 minutes. ASP Dillon informed me that the purported official of the Ministry of Foreign Affairs had identified himself as one “Patrick Edwards”. He also stated that the purported official claimed to be the Permanent Secretary of the Ministry of Foreign Affairs. ASP Dillon did not claim to have received any instructions from the purported official of the Ministry of Foreign Affairs and he gave me no directive in respect of the magisterial court proceedings involving the Barbadian fishermen. ASP Dillon merely indicated that the purported official of the Ministry of Foreign Affairs had stated that the matter

⁶ See footnote 5

⁷ Supplemental Affidavit of Sgt Gray filed on 20th Sept 2006, para 4

involving the Barbadian fishermen was a sensitive one and that they would not like it to escalate.

[22] Patrick Edwards, a Permanent Secretary in the Office of the Prime Minister (and former Permanent Secretary in the Ministry of Foreign Affairs), deposed to an affidavit⁸ stating that he never telephoned anyone at the Scarborough Police Station neither had he authorized any official of the Ministry of Foreign Affairs to telephone the Scarborough Police Station in relation to this matter.

[23] Cpl. Morrison deposed to the following⁹:

*I was still standing at the table prosecuting other matters before Her Worship when Inspector Gray, who was seated at the prosecutor's table immediately behind me, beckoned to me. I drew close to him and he informed me that he had a conversation with ASP Dillon concerning the Mason/Firebrace matter. **I was informed by Inspector Gray and verily believe that ASP Dillon received a telephone call purportedly from an official of the Ministry of Foreign Affairs who allegedly stated that the Mason/Firebrace matters should be treated 'gently' and not be allowed to escalate further.** I asked Inspector Gray what he meant by the term, 'gently'. In response, Inspector Gray said 'go easy'.*

*On the said 9th February, 2004, the Mason/Firebrace matters were called between 11:00 a.m. and 11:30 a.m., **at which time I informed Her Worship of my conversation with***

⁸ Affidavit of Patrick Edwards filed on the 3rd Sept 2004 para 7

⁹ Affidavit of Cpl. Morrison filed on 3rd Sept 2004 para 6-11

Inspector Gray. *I also stated that if the Defendants pleaded 'guilty' I would have asked for them to be discharged under section 71 of the Summary Courts Act, Chap. 4:20. The charges were then read to Joseph Mason and Samuel Firebrace ("the Defendants") and they, through their attorney, pleaded 'not guilty'. I was surprised by their plea since, in my experience, foreign fishermen charged with fishing illegally in the waters of Trinidad and Tobago usually pleaded 'guilty'. In such cases the foreign fishermen would then be released after payment of fines and their catches confiscated. During my 3 years of service as a prosecutor this was the first and only instance wherein I had to prosecute fishermen charged with offences of this nature who pleaded 'not guilty'.*

In view of the unexpected 'not guilty' plea, I was placed in a difficult position. I could not offer evidence at the material time as the complainant, regimental number 12578 Police Constable Dean Cipriani, and the witnesses, Lieutenant Kelshall and Leading Seaman Taylor, were not present when the matters were called. In the circumstances, I would have had to seek an adjournment of the Mason/Firebrace matters and the Defendants would have been detained inevitably in Trinidad and Tobago for a prolonged period. The Defendants were already in custody since Friday 6th February, 2004.

After the Defendants pleaded 'not guilty' through their attorney, Her Worship then asked me, "now that the men have pleaded 'not guilty' what is the next step?" In response, I told Her Worship that based on the conversation that I had with Inspector Gray, I would not proceed and the matter was in her hands. Her Worship

then asked, ‘where would that leave us (court)?’ I replied that, based on the conversation that Inspector Gray allegedly had with ASP Dillon, I would not be expected to proceed. Her Worship then said that the Mason/Firebrace matters were out of her hands and dismissed them. The Defendants were therefore released with their catches. Inspector Gray was still present at the 2nd Magistrate’s Court during the hearing of the Mason/Firebrace matters when I indicated to Her Worship that I would not be proceeding.

*As to paragraph 4 of the principal affidavit of Carol Cuffy-Dowlat sworn to on 7th April, 2004 and filed herein on 7th May, 2004, sub-paragraph ‘a’ is incorrect. I did not see Lieutenant Kelshall at the 2nd Magistrate’s Court on the said 9th February, 2004. I did see 2 coast guard officers entering the Scarborough Magistrate’s Court after the dismissal of the Mason/Firebrace matters but Lieutenant Kelshall was not one of them. Sub-paragraph ‘c’ of the said affidavit is also incorrect. **I did not say that I would be offering no evidence. I said that I would not proceed.** Sub-paragraph ‘d’ of the said affidavit is also incorrect. **I did not say to Her worship or to anyone else that instructions had come from a Government Minister regarding the Mason/Firebrace matters.***

It is not true that I indicated at any time that I was acting on instructions from a Government Minister. I never so indicated contrary to the report in “SC 3” and paragraph 7 of the affidavit of Susan Charleau filed herein on 7th May, 2004.

[24] In his supplemental affidavit Cpl. Morrison deposed¹⁰:

At paragraph 6 of my principal affidavit, Inspector Gray told me that one Patrick Edwards of the Ministry of Foreign Affairs spoke to ASP Dillon on the telephone. Further, I was never instructed by Inspector Gray or by ASP Dillon to have the case dismissed or to offer no evidence. I believe that by telling me to treat the matter gently and to “go easy”, I was not supposed to proceed with it in an aggressive manner. I also understood it to mean that the Ministry of Foreign Affairs wanted the matter treated gently.

[25] Sgt. Gray in his supplemental affidavit deposed¹¹:

My conversation with ASP Dillon lasted about 2 to 3 minutes. ASP Dillon informed me that the purported official of the Ministry of Foreign affairs had identified himself as one “Patrick Edwards”. He also stated that the purported official claimed to be the Permanent Secretary of the Ministry of Foreign Affairs. ASP Dillon did not claim to have received any instructions from the purported official of the Ministry of Foreign Affairs and he gave me no directive in respect of the magisterial court proceedings involving the Barbadian fishermen. ASP Dillon merely indicated that the purported official of the Ministry of Foreign Affairs had stated that the matter involving the Barbadian fishermen was a sensitive one and that they would not like it to escalate.

¹⁰ Supplemental Affidavit of Cpl. Morrison filed on 20th Sept 2006 para 3

¹¹ Supplemental Affidavit of Sgt. Gray filed on 20th Sept 2006 para 4

[26] Pursuant to an application filed by the Plaintiff earlier in these proceedings About J granted the Plaintiff leave to cross examine the following witnesses for the Defendant on their affidavit: ASP Maurice Dillon, Sgt. Fitzroy Gray and Cpl. John Morrison. The cross examination of these witnesses were to be limited to the following matters:

1. ASP Maurice Dillon
 - a. Paragraph 5 (the conversation with the caller but restricted to the first, second and third sentences of that paragraph)
 - b. Paragraph 6 (the identity of the caller)
 - c. Paragraph 9 and 10 (the conversation with Sgt. Gray)
2. Sgt. Fitzroy Gray
 - a. Paragraphs 8, 9 and 10 (the conversation with ASP Dillon)
 - b. Paragraph 12 (the conversation with Cpl. Morrison)
3. Cpl. John Morrison
 - a. Paragraph 6 (the conversation with Sgt. Gray)
 - b. Paragraph 7 (the account of what was said to the learned Magistrate when the matter was called, but restricted only to the first two sentences of this paragraph)
 - c. Paragraph 9 (the account of what was said to the learned Magistrate after the fishermen entered a plea of “not guilty”, but restricted to the first, second, third and fourth sentences of this paragraph.

[27] It is to be noted that no subpoenas were issued to Mr. Gift and Lieutenant Kelshall to attend court and give evidence to substantiate the allegation that the coastguardsmen were present in court at the time that the complaint was dismissed by the Magistrate.

[28] Officers ASP Dillon, Gray and Morrison were cross examined before me.

SUMMARY OF CROSS EXAMINATION

Cpl. John Morrison

[29] In cross examination he testified that Sgt. Gray informed him that Mr. Patrick Edwards had told ASP Dillon that the matter should not be allowed to escalate further. He confessed that he was concerned by what Sgt. Gray told him and he asked the latter what was meant by the advice that the matters should be treated gently and not allowed to escalate. He also stated that he did not ask Sgt. Gray what “go easy” meant because he knew that it meant that he “should not take a heavy stand in the matter”. He admitted that he knew that as Prosecutor that he ought not to take instructions from anyone to go easy on a matter but that his responsibility was to treat with the matter as befitting the facts of the case.

[30] This witness later admitted that what Sgt. Gray told him was not in keeping with his duty as a Prosecutor in that his actions in relation to the case against the Barbadian fishermen was as a result of influence emanating from what Sgt. Gray told him about the call and the instructions received from the Permanent Secretary in regard to this case. He stated quite clearly that his decision to offer no evidence was influenced by what he believed to be a call from the Permanent Secretary of the Ministry of Foreign Affairs as reported by Sgt. Gray. He could not recall telling the Magistrate that a telephone call was received by ASP Dillon from one Patrick Edwards of the Ministry of Foreign Affairs or that Mr. Edwards had instructed ASP Dillon that the matter was to be treated gently. He admitted that he deviated from procedure by advising the Magistrate that the prosecution was willing to offer a Section 71 discharge before the Defendants had pleaded. He testified further that he adopted this course because of the conversation with Sgt. Gray and the fact that he was influenced by that conversation. He acknowledged that he had never done this before and that it was unprecedented. After the plea was entered by

the Defendants he again referred the Magistrate to his conversation with Sgt. Gray and indicated that he would not proceed; however, he did not tell her that the witnesses were absent. He admitted further that he told the Magistrate that he could not proceed because he believed that that was what Sgt. Gray expected of him.

Sgt. Fitzroy Gray

[31] This witness was not very helpful in that he indicated that he could not recall much of his evidence because he was diagnosed in 2012 with an illness that affects him mentally. However, he did say that “he did not think” that ASP Dillon told him to speak to Cpl. Morrison about the former’s conversation with Mr. Edwards from the Ministry of Foreign Affairs. He also indicated that he couldn’t remember what he said or did not say to ASP Dillon but that he advised Cpl. Morrison of some aspects of his conversation with Dillon. Sgt. Gray could not recall telling Cpl. Morrison that the matter should be treated gently neither could he recall if Cpl. Morrison asked him what ‘gently’ meant.

[32] I did not find these witnesses to be either reliable or creditworthy. They were generally evasive and not minded to be helpful to the court.

ISSUES

- a. *Whether Cpl. Morrison acted unlawfully/improperly and/or failed in his duty as a Prosecutor by offering no evidence in this case*
- b. *Did Morrison’s withdrawal of the case by offering no offence amount to a discontinuance? If so, was it a proper exercise of his authority as prosecutor*

- c. *What is the scope of the prosecutorial discretion to be exercised by the police vis a vis the Director of Public Prosecution's powers under s.90 of the Constitution*
- d. *What remedy, if any, is available if the actions of Cpl. Morrison and or Sgt. Gray are found to be unlawful and or in breach of duty*

PLAINTIFF'S SUBMISSIONS

[33] The Plaintiff submitted that the DPP is the sole repository of the power of discontinuance of proceedings. The police acted illegally in the purported exercise of their powers¹² when they discontinued the case against the Barbadians.

[34] The Plaintiff also submitted that the Second Defendant acted outside his remit when he offered no evidence and withdrew the charges. He was not entitled to depart from his duty to prosecute unless given specific instructions by the D.P.P. The Second Defendant exercised a purported power which he did not have to withdraw the case. He usurped the functions of the D.P.P. thereby 'creating an illegality'. The Plaintiff relied upon the case of **R v Secretary of State ex parte World Development Movement**¹³ where Lord Hobhouse opined:

"It is common ground that a power exercised outside the statutory power is unlawful. This may be the consequence of an error of law in misconstruing the limits of the exercise of the power, or because the exercise is ultra vires, or because irrelevant factors were taken into account."

¹² Attorney General's Reference No. 2 of 2001[2003] UKHL 68

¹³ 1995 1 AER 611

- [35] The Plaintiff argued that a public officer must operate within the powers conferred on him by taking into account only relevant considerations in the exercise of his discretion¹⁴.
- [36] The Plaintiff argued further that Cpl. Morrison allowed himself to be influenced by Sgt. Gray and the Permanent Secretary Mr. Patrick Edwards in the exercise of his Prosecutorial function. He therefore took into account irrelevant considerations in the performance of his duty; as a result, his decision to offer no evidence against the fishermen was illegal, in excess of jurisdiction and an abuse of authority.
- [37] The Plaintiff submitted further, that Cpl. Morrison failed to discharge his duty ‘fearlessly, professionally, independently, impartially’ because, as he admitted in cross examination, he was influenced by what Sgt Gray told him – “to go easy on the Defendants”.
- [38] The Plaintiff relied upon the decision in **Sanatan Dharma Maha Sabha v The Director of Public Prosecutions (Intended Respondent)**¹⁵ in which Justice Kokaram recited the duties of the Prosecutor thus,

“It is fitting to recite an extract from the DPP’s “Code for Prosecutors”¹⁶ as to the special role discharged by him or her:

“The modern prosecutor is expected to have and to display several qualities including good judgment, integrity and a keen sense of fair play. Fearlessness is also an essential quality, for prosecution decisions are often controversial and the prosecutor must have the strength of character to resist criticism from whatever quarter. No matter how strident or

¹⁴ Padfield V Ministry of Agriculture 1968 AC 997 para 31

¹⁵ CV 2013-02358 paragraph 2

¹⁶ The Code for Prosecutors – Trinidad and Tobago 26th March 2012

painful. The judgment of the prosecutor on a case must never be overborne by political, media or public pressure. The profession of prosecutor is an honorable one but is not for the faint-hearted. The prosecutor occupies a formidable position in the administration of criminal justice. The decisions taken may profoundly affect the lives of others. In each case, the prosecutor must carefully evaluate the evidence and apply the law and decide if a prosecution is appropriate. The prosecutorial discretion should be exercised in a manner that is consistent, fair and objective. Difficult decisions must be confronted, not be side- 1 *The Code for Prosecutors – Trinidad and Tobago 26th March 2012 Page 3 of 35 stepped, and in deciding the way forward the prosecutor will apply professional judgment, legal competence and practical life experience.*

DEFENDANTS' SUBMISSIONS

- [39] The Defendants submitted that there was no breach of s.49 of the **Police Service Act** since no witnesses were produced for examination before the Magistrate. The Defendants argued that Cpl. Morrison, in the proper exercise of his prosecutorial privilege, informed the Magistrate that there was no evidence to be adduced.
- [40] It was further argued by the Defendants that there was no evidence that the witnesses were present at the time the case was called. Neither Mr. Gift nor Lieutenant Kelshall was called to give evidence in support of the Plaintiff's allegation that witnesses were present in court. On the other hand it was Morrison's evidence that he saw two Coastguardsmen enter the court after the dismissal of the case. The Defendants therefore submitted that this is not a case of failure to prosecute but to offer no

evidence. Since no witnesses were available Sgt. Morrison did not act unlawfully.

[41] The Defendants argued that a discretion is exercisable by the police as to whether they prosecute a case which is independent of the Director of Public Prosecution's powers as outlined in Section 90 of the Constitution; this discretion must be properly exercised by the police. It was contended that it is wrong to say that the police cannot withdraw a case except the Director of Public Prosecution so authorizes. Concomitant with the police's duty to prosecute is a discretion whether to do so in any given case.

[42] It was also argued on behalf of the Defendants that there is no law that requires the police not to offer no evidence in a case unless the Director of Public Prosecution so instructs. In support of their contention the Defendants relied upon the case of **R v Metropolitan Police Commissioner ex parte Blackburn**¹⁷ and the judgment of Denning LJ¹⁸ where he opined:

"I have no hesitation ... in holding that, like every constable in the land, he (the Commissioner of Police) should be and is, independent of the executive. ... I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. ... No minister of the Crown can tell him that he must or must not keep observation of this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

"Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with

¹⁷ 1968 1 AER 763

¹⁸ Page 769 paragraphs D-F and G-H

which the law will not interfere. For instance, it is for the Commissioner of Police or the chief constable as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction in such a matter.”

- [43] The Defendants submitted in the round that the police have a wide discretion whether or not they will prosecute in any particular case. It is only where there was such a clear breach of duty such as policy decision that the police would take no steps to prosecute a particular type of offender that the action would be “so improper that it could not amount to an exercise of discretion”¹⁹. They distinguished the instant case and submitted that the non prosecution of the Barbadian fishermen could not be described as so improper that it could not amount to an exercise of discretion since there was no evidence of policy inaction by the police not to prosecute foreign fishermen found in our exclusive economic zone.
- [44] The Defendants submitted further that the relevant power of the D.P.P is the power to discontinue criminal proceedings which is a different power from that of offering no evidence. It was contended that to offer no evidence is not a trespass on the province of the DPP. They argued that the police is not in violation of Section 90 of the Constitution when they no offer no evidence.

¹⁹ Page 771 – D per Salmon LJ

ANALYSIS

[45] For the sake of convenience, having regard to the overlap of these issues I propose to deal with Issues (b) and (c) together.

[46] **Section 35** of the **Police Services Act Chap 15:01** provides that a police officer may:

(c) Summon before Justices and prosecute persons reasonably suspected of having committed offences in the following cases, namely,

- i. In all cases of offences punishable on indictment where the alleged offence is of a serious nature, and it is, in the opinion of a police officer, desirable in the public interest that the prosecution should be undertaken by the Police Service; and*
- ii. In all cases of offence, whether punishable on summary conviction or on indictment, where an order to that effect is made by the President of the Director of Public Prosecutions;*

[47] **Section 49** of the **Police Services Act Chap 15:01** provides:

“Where any police officer lays any information or makes a complaint against any person, any police officer may appear before the Magistrate or Justice who is trying or enquiring into the matter of the information or complaint, and shall have the same privileges as to addressing the Magistrate or Justice, and as to examining the witnesses adduced in the matter, as the police officer who laid the information or made the complaint would have had.”

[48] **Section 90** of the **Constitution of Trinidad and Tobago** provides:

1. *The provisions of this section shall, subject to section 76(2) have effect with respect to the conduct of prosecutions.*
2. *There shall be a Director of Public Prosecutions for Trinidad and Tobago whose office shall be a public office.*
3. *The Director of Public Prosecutions shall have power in any case in which he considers it proper to do so—*
 - i. *to institute and undertake criminal proceedings against any person before any Court in respect of any offence against the law of Trinidad and Tobago;*
 - ii. *to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; 91 The Constitution LAWS OF TRINIDAD AND TOBAGO The Constitution 92 LAWS OF TRINIDAD AND TOBAGO L.R.O. 1/2009 Appointment and conditions of office.*
- b. *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*
4. *The powers conferred upon the Director of Public Prosecutions by subsection (3)(b) and (c) shall be vested in him to the exclusion of the person or authority who instituted or undertook the criminal proceedings, except that a person or authority that has instituted criminal proceedings may withdraw them at any stage before the person against whom the proceedings have been instituted has been charged before the Court.*
5. *For the purposes of this section a reference to criminal proceedings includes an appeal from the determination of any Court in criminal proceedings or a case stated or a question of law reserved in respect of those proceedings.*

6. *The functions of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.*

[49] I agree with the Defendants' submissions that a distinction must be drawn between the power of the DPP to discontinue criminal proceedings and the discretion of the police prosecutor to offer no evidence in a suitable case. The power of the DPP as set out in Section 90 of the Constitution is a power to discontinue proceedings in any court. The DPP is the only authority which can issue a *nolle prosequi* to discontinue indictable proceedings after a preliminary inquiry as concluded. The power of discontinuance includes the power of a *nolle prosequi* but is wider since it extends to all courts and to any stage of criminal proceedings in any court.

[50] This power does not, in my view, prohibit a prosecutor from indicating an intention to offer no evidence where the circumstances warrant, and a Magistrate, before whom such a submission is made, if satisfied with the grounds submitted by the prosecutor from dismissing the case. Those grounds may include the non appearance of witnesses and the fact that the prosecutor has no explanation of their non attendance, or the inability of the prosecutor to adduce a critical item of evidence necessary to sustain the charge. This is not to say that police prosecutors are not subject to the overall control and direction of the DPP and his officers in the institution, conduct and continuation of criminal proceedings.

[51] Where proceedings have been instituted by the DPP, only he may discontinue those proceedings. Similarly, where in the exercise of his constitutional powers, the DPP takes over or continues any proceedings, only he may discontinue those proceedings.

[52] On the facts of this case the witnesses were not present at the time when the matter was called before the Magistrate. Had Cpl. Morrison, without

any outside influence, independently assessed all the facts before him and determined that he could not proceed, then I may have been persuaded that it was a mere exercise of Prosecutorial discretion whether rightly or wrongly. However, as discussed in more detail below, these are not the facts of this case. Cpl. Morrison admitted before this court that his decision not to proceed with the case was influenced by what Sgt. Gray told him – that a senior official of the MOFA did not want the matter to escalate and he, Cpl. Morrison, should “go easy”; and that he understood this to mean that he should not offer any evidence in the case.

[53] In light of that admission, I have concluded that the withdrawal of the case by Cpl. Morrison amounted to a discontinuance of the matter. This clearly is a breach of Section 90 of the Constitution in that the decision not to proceed amounted to a usurpation of the DPP’s powers to discontinue a criminal case. There were several options open to Cpl. Morrison if he were in doubt as to what he should do in the circumstances when the matter was called, the witnesses were not present, the Defendants pleaded not guilty and he had received the communication from Sgt. Gray. He could have sought an adjournment of the matter, despite the improper and unlawful interference in the conduct of his Prosecutorial duties by his Seniors. Advice could have been sought from the DPP. He failed to do this and I therefore hold that it was an improper exercise of his authority as prosecutor.

Issue (a)

Whether Cpl. Morrison acted unlawfully/improperly and/or failed in his duty as a Prosecutor by offering no evidence in this case

- [54] Cpl. Morrison did not discharge the duty of a prosecutor; he was neither fair, fearless, objective nor professional. He allowed himself to be influenced by Sgt. Gray regarding communication between ASP Dillon and an unknown official from the MOFA.
- [55] Cpl. Morrison failed to uphold the principles of Prosecutorial office by his conduct. He breached one of the fundamental tenets of that office by his admission of outside influence in the performance of his duties.
- [56] Sgt. Gray, by relaying what was clearly an improper communication to his junior officer, also acted unlawfully in seeking to influence a police prosecutor in the performance of his Prosecutorial function. Despite his alleged inability to recall events, I came to the conclusion that Sgt. Gray's actions were calculated to influence Cpl. Morrison to offer no evidence against the Defendants and achieve a desired outcome – the dismissal of the complaint.
- [57] The acts of these officers were calculated to undermine the office of prosecutor by Cpl. Morrison failing to objectively evaluate the evidence as well as the options open to him and make an impartial decision whether to prosecute the Defendants. The decision by Sgt. Gray to influence the outcome of this case and the acquiescence by Cpl. Morrison in this interference with the independent exercise of his Prosecutorial duty, served to undermine an important pillar of the criminal justice system – the competent discharge of the Prosecutorial duty without 'fear or favour, malice or ill will'.
- [58] While the evidence does not support the allegation that Sgt. Gray instructed Cpl. Morrison to adduce no evidence in the case, his intention in communicating a message from a Permanent Secretary in the MOFA regarding the disposition of the case to a junior officer was clear – to achieve an outcome consistent with the illegal directive to "go easy".

[59] In the absence of circumstances outlined above which would enable a prosecutor in the independent and the proper exercise of his discretion to adduce no evidence, only the DPP can order the discontinuance of a criminal case. Indeed, this was a case in which the DPP's advice should have been obtained before offering no evidence, given that the witnesses were available or could have been made available at short notice. In fact Cpl. Morrison stated that he saw two coastguardsmen after the matter was dismissed that same morning. The matter had generated public interest even though the charges had been laid summarily. In my view the issues involved necessitated the advice of the DPP with respect to the continuance of the matter especially in circumstances where there was an improper and illegal attempt to interfere with the disposition of the matter by a third party.

[60] It should be noted that there was no evidence of the involvement of the Commissioner of Police in these very unfortunate events and therefore no blame can be ascribed to him. There was no evidence, as well, of any decision by the police not to prosecute in cases where foreign fishermen were caught illegally fishing in our exclusive economic zone. I should clearly state as well that there was no evidence before me that a government minister had communicated with ASP Dillon or given any instruction that the prosecution should not proceed with the case.

Issue (d)

What remedy, if any, is available if the actions of Cpl. Morrison and or Sgt. Gray are found to be unlawful and or in breach of duty

[61] In *Zamir and Woolf*, the Declaratory Judgment²⁰ the Authors opined:

“The courts have jurisdiction to grant a declaration if there is a need for clarification of the law on an issue of general importance even if the need for a remedy in the particular case has now passed and there is no live issue between the parties. The discretion to hear such disputes, even in public law matters, is to be exercised with caution...”

[62] The court’s jurisdiction to give advisory declarations are usually exercised in a defined set of circumstances:

- a) where there is need for the law to be clarified on an important issue for example a matter of statutory interpretation;
- b) where there are numerous similar cases in the pipelines and there will be a need for the issue to be resolved in the future;
- c) where there is some uncertainty as to the legality of administrative action;
- d) the Judicial Review court is slow to exercise its discretion to grant declaratory reliefs outside of these exceptional circumstances.

[63] I have carefully considered the usefulness of an advisory declaration. Bearing in the mind the guidelines outlined above, I do not consider that there are numerous, similar cases in the pipeline in Trinidad and Tobago. The police generally cooperate with the DPP in matters involving the investigation and prosecution of offences especially serious offences. In this jurisdiction the police usually submit to the jurisdiction and supervision of the DPP. This case, in my view, was not the norm and therefore I do not consider that there is need for an advisory declaration on this ground.

[64] There can be no uncertainty as to the provisions of Section 90 of the Constitution; it is only in the case where individual police officers such as

²⁰ Paragraph 7050 2002 Ed

these make a decision to deliberately flout the law that a situation such as this can arise. I note that Cpl. Morrison acknowledged that he was in breach of his duty as a prosecutor in offering no evidence as a result of the unlawful influence of a third party. The evasiveness and dishonesty of both ASP Dillon and Sgt. Gray also indicates that they knew that their action in receiving and relaying the information to Cpl. Morrison was wrong and against established practice and the law. For the reasons cited above, I do not consider that the jurisdiction of the DPP and police prosecutors with respect to the institution, continuation or discontinuance of criminal cases needs to be clarified and therefore in the circumstances I will not grant declaratory relief.

CONCLUSION

[65] In the circumstances I hold that:

- i. Cpl. Morrison's decision not to offer any evidence in the case against the Barbadian fishermen was in breach of his duty as prosecutor and illegal and in breach of Section 90 of the Constitution;
- ii. That the action of Sgt. Gray in informing Cpl. Morrison of the unlawful communication by an official of the MOFA calculated to cause Cpl. Morrison to offer no evidence was in illegal, contrary to the provision of Section 90 of the Constitution and an abuse of power;
- iii. The parties will file their submissions on costs.

Joan Charles

Judge