REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 106 of 2007

BETWEEN

SUSAN CHARLEAU — APPELLANT

AND

COMMISSIONER OF POLICE
CORPORAL JOHN MORRISON
SERGEANT FITZROY GRAY — RESPONDENTS

PANEL: **P. JAMADAR, J.A.**
C.V.H. STOLLMEYER, J.A.
G. SMITH, J.A.

APPEARANCES:

Mr. A. Ramlogan, Ms. C. Bhagwandeen and Ms. M. Ramsundar for the Appellant.

Mr. R. Martineau S.C., Ms. T. Gibbons and Ms. R. Thurab for the Respondents.

DATE OF DELIVERY: 29th October, 2010.

Delivered by P. Jamadar, J.A.

JUDGMENT

INTRODUCTION

1. This appeal arises 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[1] 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]

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 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 furore 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**".[3]

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[1] By Complaints No. 410 of 2004 and No. 411 of 2004.

[2] Both charges were summary charges pursuant to the Summary Courts Act, Chapter 4:20.

[3] Trinidad and Tobago Express Newspaper, Sunday February 15th 2004: "DPP probes Bajan release".

4. Further, the Director of Public Prosecutions (DPP) issued a Press Release[4] indicating that he had launched an investigation into the matter and 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.[5]

5. Also, on the 7th May, 2004 the Minister of National Security made specific statements in the House of Representatives with respect to the withdrawal and/or dismissal of the charges against the two Barbadian fishermen as follows:

> 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.[6]

6. In light of the above, and frustrated by the fact that there was no further explanation from any of the authorities as to who gave the instructions to have the two charges withdrawn and the circumstances surrounding Cpl. Morrison's decision to offer no evidence and/or to withdraw them, the Appellant, 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.

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[4] Released on or about the 28th April, 2004.
[5] See page 45, Record of Appeal.
[6] See page 62, Record of Appeal.

7. The application for leave was regularly issued and duly supported by two affidavits of the Applicant,[7] two affidavits of Carol Cuffy Dowlat attorney at law,[8] 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 Appellant to seek judicial review with respect to the alleged decision of the police prosecutor to offer no evidence in and/or to seek leave to withdraw (discontinue) both matters. Several declarations were sought, all premised on the assertion that the said decision and the instructions for same were in breach of duty, an abuse of power, contrary to law and illegal.

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 (ASP Dillon);
(c) John Morrison, Corporal of Police (Cpl. Morrison); and
(d) Fitzroy Gray, Sergeant of Police (Sgt. Gray).

10. Several interlocutory applications were also taken out by both sides. Both sides took out applications seeking to have certain parts of the affidavits filed in the proceedings struck out. The Appellant also issued two additional applications, both filed on the 30th November, 2005. One sought leave to cross-examine ASP Dillon, Cpl. Morrison and Sgt. Gray. The other sought leave to issue subpoenas directing Lieutenant Kelshall and attorney at law Cristo Gift to attend court and give evidence and to have 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. These latter interlocutory applications brought by the Appellant were all heard and determined by Aboud J. (Ag.) on the 11th April, 2006 and a written judgment delivered with

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[7] Filed on the 7th May, 2004 and the 4th June, 2004.
[8] Filed on the 7th May, 2004 and the 4th June, 2004.

respect to them on the 31st July, 2006. There was no appeal against the findings and decisions of Aboud J. (Ag.).

12. The orders and reasoning of Aboud J. (Ag.) are examined in greater detail later on in this judgment. For now it is only important to note that Aboud J. (Ag.) granted leave to have all three of the State's police witnesses cross-examined, albeit on carefully circumscribed issues and matters.

13. Following the decisions of Aboud J. (Ag.) the State filed further affidavits of Cpl. Morrison and Sgt. Gray, and also an affidavit of Neville Gibbs attorney at law.

14. The matter then came up before the trial judge on the 21st September, 2006, who it seems of her own volition raised and posed two issues to be addressed by the parties, to wit:

(a) What is the basis of the allegation of illegality contained in paragraphs (a), (b), (c) (d) and (e) of the order for leave?

(b) Is this a suitable action for the relief of a declaration?[9]

15. On the 14th June, 2007, the trial judge determined these issues and ordered that the Appellant's application for judicial review be dismissed, and that the Appellant pay the Defendant's costs certified fit for senior and junior counsel. The trial judge came to these decisions without receiving any evidence in cross-examination or pursuant to subpoena.

16. It is against this decision of the trial judge that the Appellant appealed on the following grounds:

(a) The learned judge erred in refusing to determine this case on its merits after a full trial in light of the orders for cross-examination made by Aboud J. on 31st day of July, 2006. She deprived the Applicant/Appellant of the opportunity to ascertain the true facts via

[9] See the notes of evidence, September 21st, 2006. The trial judge also gave directions for the filing of written submissions with respect to the two issues. See in particular, notes of evidence, page 2; written submissions filed by the parties; paragraphs 5 and 22 of the judgement of the trial judge; and note that the order for leave was not limited to an allegation of illegality.

cross-examination and dismissing the case for want of evidence knowing fully well that the relevant pertinent evidence resided with the Respondents;

(b) The learned judge erred in finding that there was no breach of either section 35 or 49 of the Police Service Act or section 90 of the Constitution;

(c) The learned judge erred in focussing on the decision of the Magistrate to dismiss the case in a vacuum, without reference to the factual context of the case;

(d) The learned judge erred in holding that it must be presumed that Sgt. Morrison validly exercised his discretion because no evidence was led to rebut this presumption. She ignored the fact that such evidence could have emerged under cross-examination pursuant to the order of Aboud J. which she wrongly pre-empted and/or frustrated in the absence of any appeal against that order for cross-examination by the Respondents;

(e) In holding that the case was dismissed by the Magistrate as a court of competent gives direction that the learned judge ignored or failed to appreciate the nature of the evidence before her as to what led to this eventual result;

(f) The learned judge erred in holding that there was no need to trouble the Director of Public Prosecutions Constitutional power to discontinue proceedings in circumstances where the evidence disclosed possible collusion with the executive to terminate this prosecution and/or influence and/or interfere with the administration of the criminal justice system;

(g) The learned judge was wrong to hold that the Applicant/Appellant had failed to establish that there was an illegality upon which to base her request for relief;

(h) The learned judge erred in finding that no useful purpose would/could be served by the grant of declaratory relief in this matter because any decision or declaration would be of purely academic interest. The learned judge should have had regard to the wider need to vindicate the rule of law and the importance of the issues raised by the Applicant/Appellant in the public interest.

(i) The Applicant/Appellant reserves the right to amend this Notice of Appeal to add further grounds upon receipt of the complete judgment/reasons for the decision by the High Court.

DISPOSITION

17. In my opinion and in the particular circumstances of this case the trial judge was wrong in dismissing the Appellant's application for judicial review without allowing the Appellant to avail herself of the opportunity to cross-examine the State's police witnesses as ordered by Aboud J. (Ag.) and/or of eliciting the evidence she intended to call by way of subpoenas. In so doing the judge denied herself the opportunity to have before her all of the potentially relevant evidence necessary to make a proper decision on the issues raised in this matter.

ANALYSIS

18. The context in which the applications by the Appellant to cross-examine the three police officers and to issue subpoenas for Lt. Kelshall, Mr. C. Gift, and the CEO of TSTT is important to understanding the decisions of both Aboud J. (Ag.) and the trial judge.

19 The essence of the Appellant'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 complaints 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 Appellant's challenge was therefore based on the assertion that the decision of Cpl. Morrison was an abuse of power, improper, contrary to law and accordingly illegal.

20. On the affidavits and exhibits that were before Aboud J. (Ag.) (and the trial judge) the following was undisputed:

(a) The endorsements on both complaints for the 9th February indicated: "Complainant appears defendant appears Mr. Gibbs. Prosecutor – no evidence offered leave to withdraw granted. Dismissed."

(b) Both complaints cite as witnesses for the Complainant: Lt. Kelshall and Seaman Taylor.

(c) The entry on 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.

(d) In another document exhibited in the proceedings the following appears[10]:

Prosecutor: Cpl. Morrison #11378

Cases Nos. 410/2004 – 411/2004: Complainant appears. 1 & 2 defendant appears

Mr. Gibbs

Prosecutor – Leave to withdraw granted

DISMISSED

/s/ J. Eversley – Gill

Magistrate

Tobago

9. 2. 2004

21. From these contemporaneous documents the following facts are reasonably capable of being extracted:

(a) On the 9th February, 2004 both cases were called before Magistrate Eversley – Gill in the Scarborough Magistrates' Court, Tobago.

(b) The Prosecutor was Cpl. Morrison.

(c) The endorsement on both complaints indicate that the Complainant appeared on the 9th February, 2004 as did both defendants (represented by Mr. Gibbs). The extract from the Magistrate's Case book only differs in that it indicates that at 11:30 a.m. there was no appearance of the Complainant.

[10] See page 39, Record of Appeal.

(d) Both complaints and the Extract from the Magistrate's Case Book indicate that on the 9th February, 2004 the Prosecutor offered no evidence and that both cases were dismissed.

(e) Both complaints and the other document indicate that the Prosecutor sought leave to withdraw both cases prior to any dismissal.

22. There was also an affidavit of Carol Cuffy Dowlat, attorney at law, in which (at paragraph 4) she deposed as follows[11]:

4. 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 coastguards men 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;

   (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.

23. These alleged statements made by Mr. Gift, if true, placed Lt. Kelshall and two other coastguardsmen as present in the precincts of the Scarborough Magistrates' Court on the morning of the 9th February, 2004. They also portray Cpl. Morrison (the Prosecutor) offering the

[11] See pages 54 – 55, Record of Appeal.

Court as an explanation for calling no evidence in both cases, the fact that he "believed that instructions (to do so) had come from a government minister".

24. 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.[12]

25. By this statement the Minister identified the decision by the Prosecutor (on advice received from his supervisor) to offer no evidence on the 9th February, 2004 as the reason for the withdrawal and/or dismissal of both cases.

26. Further, in his statement the Director of Public Prosecutions had stated that neither he nor anyone authorized by him gave any instructions for the discontinuance of the two cases.[13]

27. 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". From these statements it is reasonable to infer that the DPP was clear that it was the decision of the Prosecutor to offer no evidence that led to the withdrawal and/or dismissal of both cases, and that in effect they were both discontinued.

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[12] See page 62, Record of Appeal.

[13] See page 45, Record of Appeal: "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".

28. In light of all of the above, it is clear that at the heart of this matter and the issues raised by the Appellant was the question why had the Prosecutor, Cpl. Morrison, decided to offer no evidence in these cases. Other questions raised were, did Cpl. Morrison seek leave to withdraw both cases and was leave granted? Were the Complainant and/or the witnesses cited present in the precincts of the Scarborough Magistrates' Court on the morning of the 9th February, 2004? And, were these cases in effect and/or in fact discontinued?

29. Indeed, it was largely in an attempt to answer these questions of fact that the affidavits filed on behalf of the State were filed. Thus, Patrick Edwards, Permanent Secretary in the office of the Prime Minister had deposed that:[14]

> 7. I never telephoned the Scarborough Police Station personally, neither did I authorize any "official" of the Ministry of Foreign Affairs, to telephone the Scarborough Police Station in relation to this matter.
> 8. To the best of my knowledge and belief, no official of the Ministry of Foreign Affairs, including the Minister of Foreign Affairs, gave any instructions to the police in the conduct of this matter.

30. This was clearly an attempt to answer, at least in part, the assertion attributed to Mr. Gift that the Prosecutor had acted on the instructions of a government minister. And equally clearly, the application to subpoena both Mr. Gift and the CEO of TSTT was in order to substantiate this allegation.

31. The affidavits of ASP Dillon, Cpl. Morrison and Sgt. Gray were all filed in order to explain the circumstances in which the Prosecutor, Cpl. Morrison, decided to offer no evidence and/or to seek leave to withdraw both cases. Little wonder that the Appellant made an application to cross-examine them.

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[14] See paragraphs 7 – 8 of his affidavit filed on the 3rd September, 2004.

(a) Aboud J (Ag).

32. It is in this context that Aboud J. (Ag.) permitted cross-examination of all the police witnesses.

33. However, before Aboud J. (Ag.) dealt with the issue of cross-examination, he dealt with the application to issue subpoenas. In this regard the judgment of Aboud J. (Ag.) stated[15]:

> On that day (the 11th April, 2006 when the applications were heard) leave was granted to the applicant to withdraw the subpoena summons. It was the court's view that the issuance of the subpoena did not require the leave of the court. The applicant elected to issue these subpoenas as of right in advance of the hearing of the motion.

34. Clearly therefore, the intention of the Appellant and the expectation of the court was that subpoenas would be issued as was being sought by the Appellant. Indeed, this intention and expectation were made even more explicit in relation to the issue of cross-examination.

35. At paragraph 23 of his judgment, Aboud J. (Ag.) identified what he considered to be the issues of fact to which the evidence of the police officers was directed and to which the orders for cross-examination were being sought. These issues were:[16]

(a) Whether the person who called ASP Dillon, can be identified;
(b) Whether the caller gave any instructions to ASP Dillon;
(c) Whether ASP Dillon conveyed any instructions to Sergeant Gray;
(d) Whether Sergeant Gray conveyed any instructions to Corporal Morrison;
(e) Whether Corporal Morrison's conduct inside the Magistrates Court was solely the result of what was told to him;
(f) Whether Corporal Morrison, either in furtherance of his conversation with Sergeant Gray, or acting independently, made a statement to the presiding magistrate that a government minister had issued certain instructions;

[15] At paragraph 3 of his judgment.
[16] See pages 243 – 245, Record of Appeal.

(g) Whether, at the time that Corporal Morrison told the Magistrate that he was not proceeding with the matter, Lieutenant Kelshall and the other Coastguardsman ("the witnesses") were in the precincts of the court.

36. Aboud J. (Ag.) then went on to deal with the application for cross-examination with respect to issues (f) and (g) as identified by him, as follows[17]:

> 24. The issues at paragraph 23 (f) and (g) arise out of a conflict between the evidence of Sergeant Gray and Corporal Morrison on the one hand and the Christo Gift evidence contained in the affidavit of Mrs. Cuffy-Dowlat on the other hand. **The respondents intend to make an application at the trial to strike out the Christo Gift evidence on the grounds that it is hearsay. As previously mentioned, they have filed a notice on 9 September 2004 to that effect. That application was not brought forward and today remains undetermined.** In deciding whether to allow cross-examination, and if so, on which paragraphs of the respondents' affidavits, the court has been directed to several authorities, both judicial and scholastic.
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> 25 No authority has been cited which would permit cross-examination of a deponent whose evidence is in conflict with other evidence that is hearsay. Hearsay evidence is inadmissible at the trial. It stands to reason that it cannot be in conflict with admissible evidence. In order for it to provide a valid conflict it must conform to the rules of evidence. **The applicant's Counsel has already indicated that she intends to issue a subpoena for Mr. Gift to attend the trial.** The intended issuance of a subpoena for Mr. Gift cannot by itself validate his hearsay statements to Ms. Cuffy-Dowlat so as to set up a conflict with the affidavits of Sergeant Gray or Corporal Morrison. This is so because a subpoena is always capable of being set aside. In the circumstances, in order to permit the cross-examination of Sergeant Gray and Corporal Morrison on issues identified at paragraph 23 (f) and (g) the

[17] See paragraphs 24 and 25 of his judgment; emphasis added.

> applicant must issue a subpoena ad testificandum addressed to Mr. Gift, cause it to be served on him, ensure that he attends the trial and (subject to any application to set aside the subpoena) give viva voce evidence. Alternatively, the applicant could read and use an affidavit sworn by Mr. Gift, subject, of course, to the grant of leave by the trial court. **Once Mr. Gift's evidence is adduced in an admissible form then a conflict could properly by said to exist. At this stage, therefore, leave to cross-examine Sergeant Gray and Corporal Morrison on issues (f) and (g) is refused.**

37. What is significant, is that this aspect of the application for cross-examination with respect to resolving the issues stated at (f) and (g) was effectively left open by Aboud J. (Ag.), to be pursued and decided "once Mr. Gift's evidence is adduced in an admissible form". Thus, only if Mr. Gift was subpoenaed and gave this evidence orally or did so by way of affidavit, would the issue of cross-examination arise. The relevance and importance of both issues (f) and (g) to the alleged unlawfulness and/or illegality of Cpl. Morrison's decision to not offer any evidence and/or to seek leave to withdraw the two cases cannot be overstated. Indeed, it was accepted in principle before this court, that if a prosecutor makes a decision not to prosecute for improper reasons or in bad faith or for corrupt motives then such a decision may be reviewable. Clearly, it will always be that such cases are fact and context dependent, to be determined in their particular circumstances.

38. Indeed, it was precisely this awareness that led Aboud J. (Ag.) to effectively leave open the issue of cross-examination with respect to issues (f) and (g) and to only order cross-examination as follows:

> 36. In the circumstances I order the cross-examination of the deponents but restricted to the events narrated in the following paragraphs of their affidavits:
>
> (a) ASP Maurice Dillon
>
> Paragraph 5 (the conversation with the caller but restricted to the first, second and third sentences of that paragraph).

Paragraph 6 (the identity of the caller).

Paragraphs 9 and 10 (the conversation with Sergeant Gray).

(b) Sergeant Fitzroy Gray

Paragraphs 8, 9 and 10 (the conversation with ASP Dillon).

Paragraph 12 (the conversation with Corporal Morrison).

(c) Corporal John Morrison

Paragraph 6 (conversation with Sergeant Gray)

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).

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.

39. It is important to keep in mind the State's account of what led Cpl. Morrison to his decision not to offer any evidence and/or to seek leave to withdraw both cases. 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". Assistant Superintendant 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 Barbados".[18]

40. As a consequence of this conversation and these "expressed concerns", which were not particularized by ASP Dillon, ASP Dillon went to the Scarborough Magistrates' Court and spoke to the senior prosecutor there, Sgt. Gray. There 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 caller that had expressed the concerns nor did he give any instructions to Sgt. Gray not to proceed or to offer no evidence in the matters. 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.

[18] See paragraph 5, affidavit of ASP Dillon.

41. Sgt. Gray confirmed that ASP Dillon had spoken to him in court. He stated:[19]

> 8. 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".

42. Sgt. Gray then explained that he "informed him (Prosecutor Cpl. Morrison) of my conversation with ASP Dillon" and that "Corporal Morrison informed Magistrate Eversley – Gill that he would not proceed with the complaints against Joseph Mason and Samuel Firebrace. As a result, the complaints were dismissed".[20] Sgt. Gray also denied that "Corporal Morrison informed Magistrate Eversley – Gill that he was acting on instructions from a government minister".

43. Cpl. Morrison's account, though last in the sequence, is perhaps the most relevant since it was he who made the impugned decisions. He deposed to the following[21]:

> 6. 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'.

[19] At paragraph 8, affidavit of Sgt. Gray.
[20] See paragraph 15, affidavit of Sgt. Gray.
[21] See paragraphs 6 – 11, affidavit of Cpl. Morrison; emphasis added.

7. 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 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'.

8. 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.

9. **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**.

10. 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.**

11. 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.

44. In relation to this evidence of Corporal Morrison, Aboud J. (Ag.) commented as follows:[22]

5. The exact purpose and content of the conversation between Sergeant Gray and Corporal Morrison is one of the live issues before the Court. The Court is left in the dark as to what exactly Corporal Morrison told the Magistrate, whether it was the whole or a part of what Corporal Morrison recalled that Sergeant

[22] At paragraph 5 of his judgment.

Gray told him. Obviously, Sergeant Gray's recollection of what he told Corporal Morrison ought to shed light on whether Corporal Morrison's recollection is accurate.

45. And then commenting on paragraph 9 of the affidavit of Cpl. Morrison, the judge stated:[23]

> 7. Corporal Morrison says in this paragraph that he "would not be expected to proceed". This is unusual language for an experienced police officer to use. When someone says that he is not expected to do a particular act, it suggests that he is deliberately electing not to depart from sort of rule or norm or request, whether real or imagined. It is therefore critical to establish (a) what Sergeant Gray told him and (b) what ASP Dillon told Sergeant Gray. Clear evidence of these conversations might reveal why Corporal Morrison felt he was not expected to proceed.

46. Commenting on the evidence of Sgt. Gray Aboud J. (Ag.) stated:[24]

> 12. At paragraph 12 of his affidavit Sergeant Gray recalls these facts: "When Corporal Morrison was finished with [the previous] matter, and after ASP Dillon left I beckoned [Corporal Morrison] to me. When he came closer, I informed him of my conversation with ASP Dillon." Sergeant Gray does not disclose what words he used in his conversation with Corporal Morrison. Did he repeat exactly what he recalled of the words used by ASP Dillon (namely that ASP Dillon said he had "received a telephone call from someone purporting to be an 'official' of the Ministry of Foreign affairs who said that the matter was 'a sensitive one'")? Did he embellish what was said to him in his discussion with Corporal Morrison? Did he exclude some part of the conversation? In light of the grounds of the motion, Sergeant Gray ought to have repeated exactly what he told Corporal Morrison, instead of using the general language, "I informed him of my conversation with ASP Dillon." The

[23] At paragraph 7 of his judgment.
[24] At paragraph 12 of his judgment.

Court needs to know exactly what was said, because the words used by each of the deponents are at the root of this application. Instead of recalling in paragraph 12 exactly what he told Corporal Morrison, Sergeant Gray recalls in paragraph 13 what he did not tell him. This will not be helpful to the trial court.

47. And, commenting on the evidence of ASP Dillon Aboud J. (Ag.) stated:[25]

13. Tracing further backwards we come to the affidavit of ASP Dillon, the highest officer in the chain of command in this narrative and the fountainhead of all the alleged information from which all further conversations and courtroom submissions flow. It is here that the court must look for the greatest clarity and precision in the powers of recall. Sadly, ASP Dillon's memory is not pellucid. He recalls that on the morning of 9 February 2004 he received a telephone call at the Scarborough Police Station where he was the most senior officer on duty.

14. At paragraph 5 of his affidavit ASP Dillon declares out that he "cannot recall the [telephone] conversation verbatim." This is what he actually recalls about the events inside the Scarborough Police Station on that morning:

(a) "The caller purported to be a senior official calling from the Ministry of Foreign Affairs".

(b) "... the caller expressed concerns about the matter involving the Barbadian fishermen".

(c) The caller made no reference to a Government Minister nor did he give me any instructions as to how to ... [prosecute] the matter.

(d) He did not record the telephone call in the official register.

16. ASP Dillon does not say what concerns were expressed by the caller, or for how long they spoke, or what he said in reply, (if he said anything at all). It is

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[25] At paragraphs 13, 14 and 16 of Aboud J. (Ag) judgment.

also possible that the caller simply said, "I am calling to express concerns". It is also possible that the caller identified his concerns. The word 'express' is a transitive verb and its object is the noun 'concerns'. The court is left in the shadows as to what concerns were expressed, and this darkness is the result of either the wilful design of ASP Dillon or the shortcomings of his memory.

48. Finally, in concluding his judgment Aboud J. (Ag.) had this to say:[26]

37. I have taken the following further matters into account in ordering cross-examination:

(a) ASP Dillon omitted to give a complete account of his conversation with the caller and Sergeant Gray. His memory of his conversation with the caller might be resuscitated under cross-examination. In addition he will be able to provide a complete account of his conversation with Sergeant Gray.

(b) Sergeant Gray recalled his conversation with ASP Dillon but his version contained more detail about the telephone call than ASP Dillon's version of the conversation. Cross-examination may provide a better account of his conversation with ASP Dillon and Corporal Morrison.

(c) Corporal Morrison recalled his conversation with Sergeant Gray but his version contained even more detail about the telephone call than the versions of ASP Dillon and Sergeant Gray. Cross-examination will clarify what (if anything) was operative in his mind.

(d) Further, Corporal Morrison does not say specifically what he told the learned Magistrate at the Scarborough Magistrate's Court. Cross-examination will provide the trial court with a fuller account of his submissions to the Magistrate.

Cross-examination may have the effect of loosening the restraints that time has placed on the memory of these deponents and, if that occurs,

[26] At paragraph 37 of his judgment; emphasis added.

> **the trial court will be better placed to adjudicate the matter, because its view of the events will be panoramic.**

49. The detail in which the analysis and reasoning of Aboud J. (Ag.) is set out above, is in order to show that he was of the opinion that cross-examination as permitted by him was an essential preliminary step in the fact finding process that was necessary to determine the merits of the Appellant's case. In addition, Aboud J. (Ag.) left open the possibility of revisiting the question of cross-examination in relation to issues (f) and (g) as identified by him and that were both material to the Appellant's case.[27]

(b) <u>The Errors of the Trial Judge</u>

50. The trial judge erred in the circumstances of this case: first, in not hearing the cross-examination ordered by Aboud J. (Ag.) and, second, in not allowing the Appellant an opportunity to lead the evidence intended to be subpoenaed by the Appellant, before determining the substantive matter.[28]

51. In this Court's opinion, the subsequent evidence filed by the State (at paragraph 14 above) did not negate the need for cross-examination ordered by Aboud J. (Ag.) either in law or in the circumstances.

52. Indeed, this further evidence made cross-examination more necessary. For example, in the affidavit of Mr. Gibbs, the attorney who appeared for the two Defendants, he stated, at paragraph 6 of his affidavit:

> 6. After the Barbadian fishermen pled "not guilty", **Corporal Morrison indicated to the Magistrate that he would be offering no evidence.** Corporal Morrison did not say to the Magistrate that he got instructions from a Government Minister or any other person to discontinue the prosecution of the matter involving the Barbadian fishermen.

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[27] This possibility was, as already stated, linked to the calling of further evidence by the Appellant by the issuance of subpoenas.

[28] This second error had the potential to result in the Appellant being denied the opportunity to further cross-examine the State's witnesses, depending on what evidence may have been received by way of subpoena.

53. However, in Cpl. Morrison's principal affidavit he stated[29]: "I did **not** say I would be offering no evidence. I said I would not proceed." Yet Mr. Gibbs swears that Cpl. Morrison "indicated to the Magistrate that he would be offering no evidence".

54. Then, in his further affidavit Corporal Morrison stated:[30]

> 3. 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.

55. However, in his principal affidavit ASP Dillon stated[31]: "I do not recall if the person with whom I spoke was male or female and I also cannot recall the name of the person". How then could Sgt. Gray have told Cpl. Morrison that it was one Patrick Edwards, especially when Sgt. Gray in his principal affidavit[32] stated: "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 ...". Of even greater concern, is that one 'Patrick Edwards' a Permanent Secretary in the Office of the Prime Minister (and former Permanent Secretary in the Ministry of Foreign Affairs) had already deposed to an affidavit stating that he had never telephoned anyone at the Scarborough Police Station on the 9th February, 2004.

56. To compound the apparent intrigue surrounding who called ASP Dillon, and in light of ASP Dillon's inability to recall who that person was, even whether the person was a man or a woman, Sgt. Gray in his further affidavit stated[33]:

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[29] At paragraph 10.
[30] At paragraph 3.
[31] At paragraph 6.
[32] At paragraph 8
[33] At paragraph 4.

4. 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.

57. It would seem therefore, in light of the reasons given by and orders of Aboud J. (Ag.) for cross-examination and the further affidavits subsequently filed on behalf of the State, that the need for cross-examination was even greater after the orders of Aboud J. (Ag.) than when he had made them.

58. In this Court's opinion, the state of the evidence in this case simply did not permit a determination of the issues unless and until the Appellant had the opportunity to cross-examine the police witnesses, to receive the evidence intended to be elicited by subpoenas, and to consider further cross-examination depending on the nature of the evidence elicited by subpoena.

59. The consequence of this failure by the trial judge is best demonstrated by an examination of the judgment.

60. The trial judge clearly appreciated that this case was fact dependant. For example, at paragraph 8 of her judgment the judge stated (emphasis added)[34]:

[34] See also paragraph 13: "There must be clear and cogent evidence to support these grounds"; paragraph 30: "These are the facts of the matter"; and paragraph 37: "At the foundation of the prayer for this relief is evidence, sufficient and cogent."

> 8. There must be a clear defined illegality in order to succeed on an argument that a decision taken by a decision maker is so tainted that it ought to be struck down. If the illegality is not defined and illustrated **and proved by cogent evidence** the decision, irrespective of how much you disagree, cannot be interfered with by a Court. **This has not happened**. **There is no proof** of any breach of either Section 35 or 49 of the Police Service Act or Section 90 of the Constitution. **It is shown that the Magistrate's decision to dismiss was on the facts, in pursuance of Section 59 of the SUMMARY COURTS ACT.** Unless Ms Charleau **could have proved** that Cpl. Morrison exceeded his authority or acted for an improper purpose, **which she has not,** then this action cannot be maintained and must be dismissed with costs.

61. Yet, it was exactly in order to permit the Appellant an opportunity to prove that Cpl. Morrison had "exceeded his authority or acted for an improper purpose" or otherwise unlawfully, that cross-examination had been ordered and the approach to the issuance of the subpoenas and the possibility of further cross-examination taken by Aboud J. (Ag.).

62. Furthermore, in the judge's determination that "there was no basis for the allegations of illegality as claimed,"[35] the trial judge stated in relation to section 49 of the Police Service Act[36]:

> 30. Section 49 clothes a police officer with the power to appear before and address the Presiding Magistrate and to examine witnesses notwithstanding that he/she is not the police officer who made the complaint. There were no witnesses present in court on the day in question. There could have been no examination of them. This was made known (quite correctly) to the Magistrate. These are the facts of this matter. Sgt. Morrison presented himself in court to fulfill his function. He was frustrated by the non-appearance of his witnesses, the arresting officer, the complainant and two other witnesses. He could offer no explanation for their absences. It cannot be said that he was in breach of Section 49. He exercised his prosecutional

[35] See paragraphs 23 et seq of the judgment.
[36] At paragraph 30 of her judgment.

discretion to offer no evidence in light of the circumstances.[37] It must be presumed that he validly exercised his discretion.[38] There is no evidence led to rebut this presumption.

63. In this Court's opinion the trial judge clearly fell into error in asserting as undisputed facts the following:

(a) That there were no witnesses present in court on the day in question. The agreement that subpoenas were to be issued by the Appellant to have Mr. Gift and Lt. Kelshall attend, and give evidence, in light of the allegation on the record that Lt. Kelshall and two other seamen were in court on the 9th February, 2004, rendered any conclusion that there were no witnesses present at least premature. To have done so in the context of this case, was also to deprive the Appellant of a legitimate opportunity to prove her assertions and to deprive the court of all the facts before determining the issues.

(b) That Cpl. Morrison: "presented himself in court to fulfil his function" and "was frustrated by the non-appearance of his witnesses, the arresting officer, the complainant and two other witnesses" and "could offer no explanation for their absences".

64. These conclusions about Cpl. Morrison are open to question on the evidence that was before the court and could and should have been tested by cross-examination as ordered.

65. The record shows that the first thing that Cpl. Morrison did when the matter was called, was to inform the magistrate of his communication with Sgt. Gray.[39] If that is true, then what Cpl. Morrison told the magistrate should have been what ASP Dillon told Sgt. Gray.[40] Any

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[37] Citing: **R v Commissioner of Police of the Metropolis ex parte Blackburn** [1968] 2 W.L.R. 893.

[38] Citing: **Mohanlal Bhagwandeen v Attorney General of Trinidad and Tobago**, Privy Council Appeal No. 45 of 2003 para. 22.

[39] See paragraph 7 of his affidavit.

[40] See paragraph 12 of the principal affidavit of Sgt Gray and paragraph 9 of the principal affidavit of ASP Dillon; and also paragraph 4 of the further affidavit of Sgt. Gray and paragraph 3 of the further affidavit of Cpl. Morrison – which would imply that Cpl. Morrison told the magistrate that an official of the Ministry of Foreign Affairs had stated that the matter was a sensitive one that they would not like to escalate!

frustration with the alleged non-appearance of witnesses was certainly not uppermost on Cpl. Morrison's mind from his own account of what transpired.

66. Indeed, faced with the 'surprise' not-guilty plea, Cpl. Morrison explained his position as follows[41]:

> 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.

67. Clearly what appeared to be uppermost in Cpl. Morrison's mind, was the conversation his senior prosecutor had had with him and his perception (based on what ASP Dillon had told Sgt. Gray and which was conveyed to him) of the expectation that he should not proceed with the matter, because this would have been the course of action most consistent with the desire of the Executive that had been transmitted to him.

68. Whether Cpl. Morrison's perception of what was expected of him was correct or not, and whether he acted in an honest belief of what was expected of him or not, are not the issues in this appeal.

69. What is relevant is the fact that the trial judge acted on an interpretation of the evidence that on balance was open to question, and in any event the judge did so without the benefit of any

[41] See paragraph 9 of his principal affidavit.

cross-examination on it. The result was her conclusion that Cpl. Morrison could not have been in breach of Section 49 because: "He exercised his prosecutional discretion to offer no evidence in light of the circumstances." Yet, it is exactly this that the cross-examination ordered by Aboud J. (Ag) and his other observations were intended to test and verify: whether Cpl. Morrison lawfully exercised his discretion to offer no evidence in light of the circumstances of this case.

70. Unfortunately, the approach taken by the trial judge to determine this case completely at this stage, on the two issues she posed,[42] did not permit a full and fair exploration of the relevant and underpinning facts as raised by the Appellant and on the evidence.

71. Indeed, even in considering section 90 of the Constitution and the DPP's power to initiate and discontinue prosecutions, the trial judge stated[43]:

> 31. Section 90 of the Constitution empowers the Director of Public Prosecutions to initiate prosecutions, and discontinue them when charges are laid and a plea is entered. In this case, the plea was entered. Ms. Charleau naturally thought that the Director of Public Prosecutions should discontinue the matter. This is correct. However, is it a correct premise in this case and on these facts? In this case, the Magistrate under her independent powers conferred by Section 59 of the Summary Courts Act dismissed the case, since the prosecution could offer no witnesses to provide evidence and no reasonable explanation for their absence. There was no need to trouble the Director of Public Prosecutions constitutional power at all to discontinue these proceedings. Therein lies the difference. This case was dismissed by the competent authority not discontinued by the Police Prosecutor.

72. Here the trial judge seemed to have agreed that it is the DPP who should discontinue proceedings once a plea is entered. But she questioned whether this "is a correct premise in this case and on these facts?" She decided, on the facts, that this case was different because the

[42] See paragraph 15 above.
[43] At paragraph 31 of her judgment.

magistrate had to exercise her independent powers under section 59 of the Summary Courts Act and in so doing dismissed the cases. That is, the trial judge determined that on the facts there was no discontinuance therefore section 90 of the Constitution could not apply.

73. Without deciding whether the trial judge was correct in the interpretation and scope of section 90 of the Constitution, what is clear is that the judge found as a question of fact that: “This case was dismissed by the competent authority **not** discontinued by the Police Prosecutor”. Therefore she concluded that there could be no illegality upon which to base any relief.

74. Once again, it is exactly this issue of fact, whether the cases were discontinued (actually and/or in effect), that prompted the order for cross-examination made by Aboud J. (Ag.).

75. In this case there was prima facie evidence that Cpl. Morrison informed the magistrate that he was offering no evidence and that he sought leave to withdraw both cases and that such leave was granted. The endorsements on the two complaints and the further document signed by the magistrate support this. In addition, all of the official court documents also show an endorsement that the cases were dismissed.

76. A legitimate question therefore arises as to what is the pragmatic effect and/or legal position when no evidence is offered and leave to withdraw a summary case is sought before a magistrate? And further, what is the position if this is done and then subsequently leave is granted to withdraw the case and it is then dismissed by a magistrate? Does the decision not to offer evidence and to seek leave to withdraw a case in this context amount to a discontinuance? And if so, what is the effect, if any, of an order granting leave to withdraw and/or to dismiss a case, if in fact this order is made subsequently? Finally, on the facts and in the circumstances of this case, was there a discontinuance and/or a dismissal?

77. The resolution of all of these questions would appear to involve mixed questions of fact and law and be influenced by the context and circumstances of a case. For example, in determining whether a case is discontinued or not, would the advice and instructions to, and the

intentions, utterances and actions of the prosecutor be relevant, and if so to what extent? Further, even though both cases were dismissed by the magistrate, what is the true effect of what happened in these matters in relation to the impugned decisions of the police prosecutor and his advisors?[44]

78. In my opinion, the trial judge deprived herself of the opportunity to find the true underlying facts in this case when she proceeded to hear and determine this matter without the benefit of the orders and approach indicated by Aboud J. (Ag.). In so doing the judge fell into error.

(c) Is the matter purely academic, and so pointless?

79. Finally, on the issue as to whether or not this case should be dismissed because the issues can only be of academic significance, it is my view, that until the underpinning facts are established such a conclusion is premature. This case may raise issues of real public importance. Firstly, when is it lawful/unlawful for a police prosecutor to offer no evidence and/or seek leave to withdraw criminal charges in a summary matter? Secondly, what is the ambit of Section 90 of the Constitution in relation to the DPP's power to discontinue criminal proceedings? Both of these issues are matters of significant public and constitutional importance in a developing democracy such as Trinidad and Tobago. In this case there is also an underlying allegation of political interference in the prosecution of criminal proceedings. This allegation, if established, raises many issues that are also of great public and constitutional importance in a developing democracy such as Trinidad and Tobago.

[44] In this regard, see also the recent decisions of the Court of Appeal in **Housend v Tyson** (1995) 3 TTLR 782 and **Burgess v Silverton** Magisterial Appeal No. 98 of 2008, which may help shed some light on what was the true intention of the prosecutor and what really transpired on the 9th February, 2004.

CONCLUSION

80. In light of the above, the appeal is allowed. The orders of the trial judge are set aside. The Appellant's application for judicial review is to be returned to the list of cases and placed before a new judge for hearing and determination. The Respondent is to pay the Appellant's costs of this appeal.

P. Jamadar
Justice of Appeal

I have read the judgment of P. Jamadar, J.A. and I agree with the decision. Like Smith, J.A. I see no relevance so far as the cases referred to at footnote number 44 are concerned.

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C. V. H. Stollmeyer
Justice of Appeal

I have read the judgment of P. Jamadar, J. A. and I also agree save and except that at footnote number 44 there is a reference to two cases which deal with the duties of a Magistrate when dismissing a complaint. Since no issue was taken about the Magistrate's decision to dismiss the complaint in this matter, I find that these two cases have no relevance to this matter.

G. Smith
Justice of Appeal