THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal App: No P134/2021
Claim No. CV 2020-03286

IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant/Defendant

AND

KEVON NURSE

Respondent/Claimant

AND

THE PUBLIC DEFENDER'S DEPARTMENT

Interested Party

Panel:
Ivor Archie CJ
Nolan Bereaux JA
Peter A. Rajkumar JA

Date of Delivery: 26 January 2022

Appearances:
Mr. Ian L. Benjamin S.C, Mr. Keston McQuilkin, Mr. Pierre Rudder instructed by Mr. Nairob Smart for the Appellant
Mr. Shaun C. Morris, Ms. Fayola Sandy for the Respondent
Mr. Raphael Morgan, Ms. Michelle Gonzalez, Mr. Michael Modeste, Ms. Tonya Thomas for the Public Defender's Department

I have read the decision of Rajkumar JA. I agree with it and have nothing to add.

……

Ivor Archie

Chief Justice

I have read the judgment of Rajkumar JA. I also agree with it and have nothing to add.

……

Nolan Bereaux

Justice of Appeal

Delivered by Peter A. Rajkumar JA

Background

1. The respondent was charged with murder in January 2001. On an application filed on October 12, 2020 the Claimant sought, inter alia, a declaration that the failure of the DPP to forthwith discontinue the prosecution for the charge of murder against the Claimant is **unreasonable** and unfair and a consequential order quashing the indictment. (Emphasis added)

2. Constitutional reliefs were also sought. These were denied by the trial judge and were not pursued on appeal. This appeal arises from the decision of the trial judge on July 5, 2021 to permit judicial review of decisions of the DPP to continue the prosecution of the respondent (or the accused).

3. The trial was listed on five occasions. On one of those occasions, he was tried and convicted on June 2, 2003 but that conviction was overturned on appeal and a retrial was ordered. His second full trial on November 14, 2019 resulted in a hung jury. Earlier trials on June 8, 2008 and May 5, 2011 had been aborted.

4. Over the more than 20 years since January 2001 when he was charged there were several adjournments and recusals by various trial judges in the criminal proceedings. Some of the adjournments were caused by the accused changing attorneys, or terminating their representation, and insisting on representing himself - on a charge with the potential for a sentence of death if convicted.

5. Within that period, the accused had made two applications for a stay of proceedings based on an alleged abuse of process caused by delay before trial judges in the criminal proceedings. These were dismissed on May 3, 2010 and on May 27, 2015 respectively.

6. At the time the application was made to the trial judge for judicial review of **the DPP's** discretion and **decision** to continue the prosecution, the matter was being case managed by a Master with a view to its progress to a sixth trial. In or around July 13 2020, three months before filing the application for judicial review on October 10, 2020, lawyers for the accused had indicated to the Master that he intended to pursue such a remedy again.

7. The application for judicial review was based on the alleged **unreasonableness** of the DPP's decision to continue the prosecution despite 20 years delay, which allegedly resulted in the unavailability of witnesses, the fading of memories, and the deterioration of the evidence generally.

8. The trial judge granted leave and made the following orders:
    a. A declaration that the failure of the DPP to discontinue the prosecution for the charge of murder against the Claimant is unreasonable and unfair.
    b. An order of Certiorari to remove into that Court the decision of the DPP pursuant to Section 90 of the Constitution of the Republic of Trinidad and Tobago whether to discontinue the prosecution for the charge of murder against the Claimant.
    c. An Administrative order that the indictment filed against Kevon Nurse is quashed and of no effect.

    However a stay was obtained and the accused remains in custody.

Issue

9. Whether the decision of the DPP to continue the prosecution of the respondent after 20 years was so exceptional as to fall within the very rare category of decisions to prosecute that were amenable to the public law remedy of judicial review, rather than leaving the issue of his continued prosecution to the criminal trial process and the alternative remedies available therein.

Conclusion

10. As to the prosecution of the respondent after more than 20 years there were always available to him an equally effective and timely alternative remedy in the court exercising criminal jurisdiction, in the form of an application to stay the proceedings against him on the ground of inordinate delay resulting in an abuse of process and the inability to obtain a fair trial.

11. This is especially so when his matter was already being case managed before a Master attached to the criminal court and he therefore had available to him that remedy on a timely basis. The application for judicial review failed to take into account that a case management Master is partnered with a judge, who can hear such an application without having to await the recommencement of jury trials, and without full preparation for such a trial being completed.

12. Further if such an application were to have failed there were other matters within the criminal trial process that also provided **additional safeguards**. The existence of those additional safeguards in fact make the criminal trial process a **potentially more effective**, but equally timely alternative remedy, than the very rarely granted judicial review of the DPP's wide discretion to prosecute. On such an application in the criminal proceedings, the only matter to be taken into account is whether it is possible for the accused to get a fair trial. Unlike on a judicial review application the **reasonableness** of the exercise of the DPP's **discretion** to prosecute on such an application would be irrelevant.

13. The invocation of a public law remedy, based on reviewing the **discretion of the DPP** to continue the prosecution, requires the exercise of assessing the evidence, its possible deterioration over time, and its **impact on a fair trial**. However that is the **same exercise** that a judge exercising criminal jurisdiction, in the alternative well-established procedure available on an application for a stay of proceedings, would there be required to conduct with a view to determining the same issue. However, that is only **one** element required to determine the unreasonableness of continued prosecution.

14. The discretion to prosecute is based on matters **additional** to those that must be considered on an application for a stay within the criminal trial process. The **additional elements** on an application for judicial review of the exercise of the DPP's discretion include the **public interest** and **public policy** considerations taken into account in deciding to maintain the prosecution for murder. However, these are not usually suitable for consideration, or readily reviewable, by a court. Therefore, (apart from the existence of equivalent, and potentially more effective, alternative remedies), a finding of **unreasonableness** in the exercise of that discretion, which involves review of such considerations of public policy, would be rare.

15. It has not therefore been demonstrated that, despite extraordinary delay, this is such an exceptional case that it requires bypassing the equivalent but specialised jurisdiction of the court before which the matter had already been listed. That trial court was equipped on an application before it to consider the issue of whether a fair trial was still possible in light of the extensive delay. That is because the exercise of judicial review of the DPP's discretion to continue the prosecution necessarily included both i. mirroring the very exercise that the trial court in the criminal jurisdiction could be called upon to conduct on the alternative remedy of an application for a stay **and**, ii. reviewing matters of policy unsuited to review *"because they are within neither the constitutional function nor the practical competence of courts to assess their merits"*[1].

16. Therefore, while in principle the possibility exists of exceptions in exceptional cases, in the instant case:-

    a. the availability to the accused of equally, if not more effective, and timely alternative remedies within the criminal trial process,
    b. the extraordinary inefficiency involved in judges exercising civil jurisdiction duplicating the criminal jurisdiction of the Assizes if required to examine and assess the entirety of the evidence in a

[1] Matalulu, Mohit, Sharma infra

criminal matter, consider its possible deterioration over time, and substitute their own discretion, both for that of the DPP, (on whether to continue a prosecution), and for that of a judge at the criminal Assizes (as to whether, despite such delay as has elapsed, a fair trial is possible),

c. the inappropriateness in most cases of a court's reviewing a partially policy and public interest based decision of the DPP, (which is necessarily an **additional** element inherent in the DPP's prosecutorial discretion),

d. the possibility of encroachments by judges exercising civil jurisdiction upon the exercise of jurisdiction of judges in the criminal courts,

all demonstrate conclusively that it was not appropriate for the respondent to seek remedies under the guise of judicial review, moreso three months after it had been indicated to the Master case managing his matter his intention to actually seek a stay in the criminal proceedings.

17. The above matters should have precluded judicial review being granted in his case as a matter of law. Nothing that is said here should be taken as an indication of what the outcome should be of any application for a stay if, or when, made before a court exercising criminal jurisdiction.

Orders

18. The appeal of the DPP is allowed. The Orders of the trial judge are set aside. The parties will be heard on costs.

Analysis

Law

19. The trial judge carefully and succinctly summarised the factual background at paragraph 5 of her judgment as set out hereunder:-

> *"Factual Background*
> *5. In the Claimant's Affidavit in support of his Application filed 12 October 2020, the history is summarised as follows: a. The first trial was held on 4 July 2002 and was aborted; b. The second trial was held on 2 June 2003. The Claimant*

was convicted and the conviction was subsequently quashed on appeal with a retrial ordered; c. The third trial was held on 8 January 2008 and was aborted; d. The fourth trial was held on 5 May 2011 and was aborted; e. The fifth trial was held on 14 November 2019 and resulted in a hung jury. The matter is currently before a Master for case management as the state is proceeding with the view to a sixth trial being held".

At paragraphs 6- 49 of that judgment the detailed history of the Claimant's five trials was carefully set out. It is unnecessary for reasons explained hereinafter to repeat that detailed history.

20. It is not in dispute that the discretion of the DPP is established under the Constitution as set out hereunder:-.

DIRECTOR OF PUBLIC PROSECUTIONS
90. (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— (a) to institute and undertake criminal proceedings against any person before any Court in respect of any offence against the law of Trinidad and Tobago; (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority. (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[2]*.*

Case Law - Summary

21. The ambit of a court's power **on an application for judicial review** to review the discretion of the DPP to prosecute, or to continue to prosecute, has been considered

[2] *(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."*

in several authorities as discussed below. The principles emanating therefrom include the following:

i. In principle judicial review of a prosecutorial discretion is available,

ii. However it is a highly exceptional remedy. The circumstances of its use have variously been described as “sparingly exercised”, “very rare indeed”, “very rarely” and “an exceptional remedy of last resort”. In fact, confirmatory of this approach, the Board in ***Sharma*** stated “we are not aware of any English case in which leave to challenge a decision to prosecute has been granted”.

iii. A decision to prosecute has been described “as particularly ill-suited to judicial review”. The reasons for this have been summarised in the case of **Sharma v Brown Antoine [2006] UKPC 57** especially at paragraph 14 (v) in the extract highlighted below. It is set out hereunder in extenso because the summary of the relevant principles cannot readily be improved upon and it emphasises and approves the principles established in previous authorities.

22. In **Sharma v Browne Antoine**, a decision of the Judicial Committee of the Privy Council on an appeal emanating from this jurisdiction, it was explained inter alia at paragraphs 14 (v), 24 and 30 per Lord Bingham (all emphasis added):-

> *Governing principles*
> *…. (5) It is well-established that **a decision to prosecute is ordinarily susceptible to judicial review**, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: Matalulu, above, pp 735-736; Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, paras 17, 21. It is also well-established that **judicial review of a prosecutorial decision**, **although available in principle**, **is a highly exceptional remedy**. The language of the cases shows a uniform approach: "rare in the extreme" (R v Inland Revenue Commissioners, Ex p Mead [1993] 1 All ER 772, 782); **"sparingly exercised"** (R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 140); "very hesitant" (Kostuch v Attorney General of Alberta (1995) 128 DLR (4th) 440, 449); **"very rare indeed"** (R (Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); **"very rarely"** (R (Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 371, Lord Steyn said:*

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

*With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. **We are not aware of any English case in which leave to challenge a decision to prosecute has been granted.** Decisions have been successfully challenged where the decision is not to prosecute (see Mohit, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: R (Pretty) v Director of Public Prosecutions [2001] UKHL 61, [2002] 1 AC 800, para 67; Matalulu, above, p 736. In Wayte v United States (1985) 470 US 598, 607, **Powell J described the decision to prosecute as "particularly ill-suited to judicial review."***

***The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review.** They include:*

*(i) "**the great width of the DPP's discretion** and the **polycentric character** of official **decision-making** in such **matters including policy and public interest considerations** which are **not susceptible of judicial review** because it is within **neither the constitutional function nor the practical competence of the courts to assess their merits**" (Matalulu, above, p 735, cited in Mohit, above, para 17);*
*(ii) "**the wide range of factors** relating to **available evidence**, **the public interest** and perhaps other matters which [the prosecutor] may properly take into account" (counsel's argument in Mohit, above, para 18, accepting that the threshold of a successful challenge is "a high one");*
*(iii) **the delay inevitably caused to the criminal trial if it proceeds** (Kebilene, above, p 371; Pretty, above, para 77);*
*(iv) "**the desirability of all challenges taking place in the criminal trial** or on appeal" (Kebilene, above, p 371; and see Pepushi, above, para 49). In addition to **the safeguards afforded to the defendant in a criminal trial**, **the court has a well-established power to restrain proceedings which are an abuse of its process**, **even where such abuse does not compromise the fairness of the trial itself** (R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42). But, as Lord Lane CJ pointed out with reference to abuse applications in Attorney-General's Reference (No 1 of 1990) [1992] QB 630, 642,*
*"We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that **the trial process itself is equipped to deal with the bulk of complaints which have** in recent Divisional Court cases **founded applications for a stay."***
*(v) **the blurring of the executive function of the prosecutor and the judicial function of the court**, and of **the distinct roles of the criminal and the civil courts**: Director of Public Prosecutions v Humphrys [1977] AC 1, 24, 26, 46, 53; Imperial Tobacco Ltd v Attorney-General [1981] AC 718, 733, 742; R v*

Power [1994] 1 SCR 601, 621-623; Kostuch v Attorney General of Alberta, above, pp 449-450; Pretty, above, para 121.

Paragraph 24

…

The effect of the decisions by the Supreme Court of Fiji and the Board was to establish that such decisions are in principle susceptible to review** and that the available grounds are somewhat wider than the Fiji Court of Appeal had suggested. But the judgments of the Supreme Court and the Board **accepted**, implicitly if not expressly, **the extreme difficulty of obtaining such relief**, and neither threw any doubt on the **authority, in England and elsewhere, emphasising the reluctance of the courts to grant it.** This had the result that the judge approached the question of arguability without any recognition of the very ambitious case the Chief Justice was seeking to establish. Nor did she **consider which**, if any, of the Chief Justice's **complaints** could not **be adequately resolved within the criminal process itself**, **either at the trial or, possibly, by application for a stay of the proceedings as an abuse of process. It is ordinarily a condition of obtaining relief that a complaint cannot be satisfactorily resolved in this way (as it cannot where the decision is not to prosecute) and a grant of leave which ignores this condition must be suspect.

Paragraph 30

*….We start however by expressing our full agreement with the proposition that **judicial review of a decision to prosecute is an exceptional remedy of last resort**, for all the reasons which Lord Bingham and Lord Walker identify in paragraph 14.*

23. In **Matalulu v DPP [2003] 4 LRC 712** the court recognised that a review on the grounds that the DPP exercised his prosecutorial discretion **without regard to relevant considerations** or otherwise **unreasonably** were unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Those considerations also include the public interest and public policy which are matters that are not suited to review by a court.

24. In **Matalulu** cited in ***Sharma***, the full quotation at pages 735-736 was as follows:

*"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of **the DPP's discretion and the polycentric character of official decision-making** in such matters including*

policy and public interest considerations *which are not susceptible of judicial review because it is* ***within neither the constitutional function nor the practical competence of the courts to assess their merits****.*

This approach subsumes concerns about separation of powers. The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They ***must be exercised within constitutional limits****. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made: 1. In excess of the DPP's constitutional or statutory grants of power—such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)). 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion—if the DPP were to act upon a political instruction the decision could be amenable to review. 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe. 4.* ***In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*** *5. Where the DPP has fettered his or her discretion by a rigid policy—e.g. one that precludes prosecution of a specific class of offences.*

There may be other circumstances *not precisely covered by the above in which* ***judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.*** Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice." (All emphasis added)

25. The decision in ***Matalulu*** was made in the context of the Constitution of Fiji. The equivalent provisions in 1990 and 1997 Constitutions of Fiji are nearly equivalent if not identical to those in this jurisdiction.

26. In **Mohit v. The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20** per Lord Bingham para 18 those principles in ***Matalulu*** were cited with approval.

> *"The essence of the appellants' argument is encapsulated in the cited passage of the judgment of the Supreme Court of Fiji in Matalulu. Under the Constitution of Mauritius the DPP is a public officer. He has powers conferred on him by the Constitution and enjoys no powers derived from*

the royal prerogative. Like any other public officer ***he must exercise his powers in accordance with the Constitution and other relevant laws, doing so independently of any other person or authority. Again like any other public officer, he must exercise his powers lawfully, properly and rationally, and an exercise of power that does not meet those criteria is open to challenge and review in the courts.*** *The grounds of potential challenge certainly include those listed in Matalulu, but need not necessarily be limited to those listed. But the establishment in the Constitution of the office of DPP and the* ***assignment to him and him alone of the powers listed in section 72(3) of the Constitution; the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account;*** *and, in some cases, the difficulty or undesirability of explaining his decisions: these factors necessarily mean that* ***the threshold of a successful challenge is a high one****. It is, however, one thing to conclude that* ***the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution****, and* ***quite another to hold that such decisions are immune from any review at all****, as a line of English authority relating to the DPP and other prosecuting authorities has shown…."*

27. The powers of the DPP in Mauritius under section 72(3) of its 1968 Constitution were described as indistinguishable from those under the Constitution of Fiji. The exclusive nature of the DPP's powers in section 72(3) was provided for by section 72(5) of the Constitution of Mauritius. They are in nearly identical terms to those in section 90 of the Constitution of the Republic of Trinidad and Tobago.

28. These principles were reiterated and summarised in the case of **Leonie Marshall v DPP [2007] UKPC 4** per Lord Carswell in which the above dicta in ***Sharma***, ***Matalulu*** and ***Mohit*** were cited with approval at paragraphs 17 and 18 below:-

    17. The position and functions of the DPP are such that judicial review of his decisions, though available in principle, is a "**highly exceptional remedy**" (*Sharma v Brown-Antoine* [2006] UKPC 57, para 14). Where **policy considerations** come into the decision it is **particularly difficult for a court to review it**, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712, 735-6, which was cited with approval by the Board in *Mohit v The director of Public Prosecutions of Mauritius* [2006] UKPC 20:

"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have **proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits**. This approach subsumes concerns about separation of powers."

18. Where the **decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict**: *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330, 349, para 41, per Lord Bingham of Cornhill CJ. There are many examples of such statements by courts in the common law world relating to decisions to prosecute, as to which see *Sharma v Browne-Antoine, supra,* para 41. **In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower.** The reasons are set out in para 23 of the judgment of Lord Bingham CJ in *Ex parte Manning, supra:*

"23 Authority makes clear that a decision by the director **not to prosecute** is susceptible to judicial review: see, for example*, R v Director of Public Prosecutions, ex p C* [1995] 1 Cr App R 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since **while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial…** In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. **This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it.** So the courts will not easily find that a decision **not to prosecute** is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since **judicial review is the**

only means by which the citizen can seek **redress against a decision not to prosecute** and if the test were too exacting an effective remedy would be denied." (All emphasis added)

29. In the context of a **decision not to prosecute** a judgment call by the DPP is required which involves an assessment of the strength of the case at the end of the trial. As a matter of law courts will defer to that judgment call by the DPP even if they do not agree with it. Although these latter statements were made in the context of a decision **not to prosecute,** where the threshold for judicial review would be lower because it is the only means of redress, they are equally applicable to a decision to prosecute where the threshold for judicial review would be at least as high if not higher.

30. In **R v Horseferry Road Magistrates' Court ex parte Bennet [1994] 1 A.C. 42**. Judicial review was commenced based upon the alleged illegality of the process by which the applicant had been brought from South Africa to the U.K to face trial, bypassing special procedures which existed for extradition in the absence of an extradition treaty. Lord Griffith observed (at page 61) as follows (all emphasis added):-

> *"As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, 168-169, Sir Roger Ormrod said:*
>
> *"The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (**b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.**"*"

At first sight, this dictum appears to favour the respondent as it mirrors the argument of his attorneys that prejudice caused by delay can amount to an abuse of process such that a court can intervene by way of judicial review to prevent it.

However the weight of subsequent authorities cited previously (*Matalulu*, *Mohit*, *Sharma*, *Marshall*) which address the additional factor of the DPP's prosecutorial decision-making discretion in continuing a prosecution, is against it. That discretion can take into account factors additional to delay simpliciter. The respondent is not without redress because the issue of abuse of process can still be addressed, as it always could, in the criminal proceedings.

Judicial Review Act

31. The approach of permitting judicial review of a prosecutorial discretion only in exceptional circumstances is mirrored in the **Judicial Review Act, Chapter 7:08 section 9 as follows:**

> *9. The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.*

32. The rationale for treating judicial review generally as a remedy of last resort was explained in **R v (Glencore Energy UK Limited) v Revenue and Customs Commissioners [2017] 4 WLR 213** paragraphs 55 -56 per Lord Sales:-

> ***55*** *In my view, the principle is based on the fact that judicial review in the High Court is* ***ordinarily a remedy of last resort****, to ensure that the rule of law is respected* ***where no other procedure is suitable*** *to achieve that objective. However, since it is a matter of discretion for the court,* ***where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course….***
>
> ***56*** *Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts.* ***It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter.*** *It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case.* ***It promotes proportionate allocation of judicial resources for dispute resolution*** *and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as*

protector of the rule of law, where its intervention really is required. (All emphasis added)

33. Although these statements were specifically in relation to alternative statutory remedies the reasoning in the areas highlighted is equally self-explanatory of the desirability of not permitting judicial review where there are suitable alternative procedures at common law in the criminal proceedings. The court noted[3] that in the U.K. the suitable alternative remedy principle applied even though it was not based upon any statutory provision which ousted the jurisdiction of the High Court on judicial review. However, in this jurisdiction that principle is statutorily endorsed by section 9 of the Judicial Review Act above. These explanations of restricted availability of judicial review generally, especially when there are alternative statutory remedies, are consistent with the proposition expressed at paragraph 30 of ***Sharma*** above that judicial review of a discretion to prosecute is an exceptional remedy of last resort.

34. The danger of a court's blurring of the distinction between the grounds for judicial review and succumbing to the temptation of substituting its own view of the evidence was pointed out in **Reid v Secretary of State for Scotland [1999] 2 A.C 512** per Lord Clyde page 541-542

> *Judicial review involves a challenge to the legal validity of the decision.* ***It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case.*** *It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while* ***the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in***

[3] Paragraph 53

a case of review**, as distinct from an ordinary appeal, **the court may not set about forming its own preferred view of the evidence. (All emphasis added)

35. The cases identified above all emphasise that judicial review of a prosecutorial discretion is an exceptional remedy and reiterate why that is so. The trial judge recognised most of these principles but fell into error in failing to properly apply them to the circumstances of this case in the manner further explained below.

Considerations by the DPP

36. The relevant paragraphs setting out the matters that he took into consideration in deciding to continue with the instant application were explained by him in his affidavit as set out hereunder (all emphasis added):-

Affidavit of DPP

8. … The file is reviewed and the Director of Public Prosecutions applies the Full Code Test. The Full Code Test has two stages. The first stage, is called the evidential stage and is a consideration of the evidence. The Director must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against a defendant on any charge that is preferred against him. The Director must consider what the defense case may be, and how that is likely to affect the prosecution case. When deciding whether there is enough evidence to prosecute, the Director must consider whether the evidence can be used and is reliable.

*9. **If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be**. If the case does pass the evidential stage, the Director must proceed to the second stage and decide if a prosecution is needed in the **public interest**.*

10. The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the case should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favor. Deciding on the public interest is not simply a matter of adding up the number of factors on each side. The Director must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

140. Having been satisfied that there is sufficient evidence to justify this prosecution, I then considered whether a prosecution is required in the public interest. That question, I have answered in the affirmative having regard to a number of factors. The main ones in favour of prosecution are:

(i) Murder is the most serious of offences for which a citizen may be tried.

(ii) A conviction will result in the most significant sentence.

(iii) A firearm was used during the commission of the offence.

(iv) There is evidence that the offence was premeditated.

(v) The offence was committed in close proximity to a child.

(vi) A prosecution would have significant positive impact on maintaining public confidence in the administration of justice.

141. I have also considered the factor of the long delay since the offence took place. This is a public interest factor against prosecution unless the offence is serious and the delay has been caused in part by the defendant.

142. As stated before, murder is the most serious of offences. Secondly, I am of the view that the record clearly shows that the defendant has contributed significantly to the delay in one or two ways.

37. The DPP therefore applied his own policy, and satisfied himself that the case passed the evidential test based on his experience as a prosecutor. He then proceeded to consider the public interest factors, weighing those in favour of continuing the prosecution, and taking into account delay, which weighed against doing do. The weight that he placed on each factor, and the decision that he arrived at in this polycentric decision making process, have been recognised in the authorities cited above as matters best suited for him. In any event, those authorities have warned against a court's second-guessing that exercise by the DPP and substituting its own determination as to what weight is to be attributable to any particular factor. A court cannot substitute its own preferred outcome by reference to allegedly relevant considerations. Neither can it do so by assigning extra weighting to any preferred factor, for example in this case, delay.

Judgment of the trial judge

38. The trial judge clearly recognised that i. the DPP took into account public interest factors in deciding to continue with the prosecution despite delay, ii. while he did take delay into account he balanced it against other considerations (identified in his affidavit and in the judgment, iii. he was guided by his own policy as set out in the

Full Code test and iv. took into consideration the safeguards available to the accused within the trial process. This is apparent from paragraphs 57, 58, and 59 of the judgment of the trial judge set out hereunder (all emphasis added):

> *57. As to the second stage of the test, the Defendant outlined the **public interest factors** considered,* (and repeated paragraph 140 of the DPPs affidavit as set out above).
>
> *58. The Defendant considers that although delay is a public interest factor that weighs against prosecution, it is mitigated where the offence is serious and the delays have been caused in part by the Claimant. The Defendant contends that the Claimant contributed significantly to the delay. He did so by his repeated insistence that he wished to represent himself and his "penchant to fire his attorney" once his trials began.*
>
> *59. The Defendant further contends that, in considering the **public interest** stage of the Full Code test, he took into account that the trial process includes sufficient safeguards to address these concerns. The safeguards include jurisdiction to stay proceedings on grounds of abuse of process in the context of delay. Alternately, should the trial proceed, another safeguard is that the implications of delay can be addressed in the trial judge's summation to the Jury. These safeguards were considered to be sufficient to address any prejudice to the Claimant due to the delay.*

39. The trial judge carefully set out the issues that she considered[4], (all emphasis added):-

> *"D. Issues*
> *61. The central issue in the present case is whether the decision of the Defendant to continue the prosecution against the Claimant was lawful and reasonably determined taking into consideration the evidence of delay. If not, the Court must determine whether an order should be made that the prosecution be discontinued. In this regard, there are a number of sub-issues to be considered as follows: a. Is there **evidence** before the Court in Para 134 to 139 of the Defendant's Affidavit that the first stage of the Code Test was established i.e. the evidential test? b. **Was there basis for the Defendant's conclusion in the second stage of the Code Test – the Public Interest Stage, that there was sufficient public interest in favour of continuing the Prosecution?** In particular, ought **more weight** to have been afforded in this deliberation to: • alleged prejudice to the Claimant's case due to inability to call one witness, • the cumulative effect of the delay with the fact of a multiplicity of trials, • the fact that two were concluded without conviction and • That the Trial Judge in the latter of the two underscored inconsistencies in the testimony of the Defendant's sole eyewitness? c. If the Defendant failed to duly*

[4] At paragraph 61 of the judgment

*consider the evidential and **public interest aspects** of the test to continue the prosecution, ought the matter to be addressed in the context of the Criminal Trial proceedings by way of stay?"*

40. Sub issue (a) as identified by the trial judge required her to consider and assess the entirety of the **evidence** with a view to considering the rationality of the DPP's judgment concerning the prospect of conviction. The very matters that the judge below in the judicial review proceedings had been asked to take into account in considering the wider issue of unreasonableness of the DPP's decision to continue to prosecute, were the matters that the trial judge in specialised criminal proceedings would be asked to take into account in the more focussed proceedings on an application for a stay, based solely on whether a fair trial of the accused was possible.

41. Sub issue (b) involved the trial judge impermissibly reviewing the **public interest** in favour of continuing the prosecution, and considering the **weight** that ought to have been accorded to this aspect in the DPP's deliberations.

42. The authorities above firmly establish that the additional **public interest considerations** that must be taken into account are a part of the prosecutorial decision making process where courts have traditionally deferred to the DPP's discretion, (See ***Matalulu***, ***Mohit***, ***Sharma***, ***Leonie Marshall***).

43. Apart from embarking on an examination of the public interest factors that the DPP took into account the trial judge further erred in failing to appreciate that "…contentions that the power has been exercised…without regard to relevant considerations or otherwise unreasonably are otherwise to be vindicated because of the width of the considerations to with the DPP may properly have regard in instituting or discontinuing proceedings", (***Matalulu***). This apparent from the following paragraphs of the judgment:

"*If the Defendant had sight of these notes before making the continuation of prosecution decision, he may have concluded that the case could not pass the first i.e. evidential stage of the full code test.*

95. The public interest considerations of the Defendant as set out in his Affidavit are pertinent and indeed persuasive. However, although the Defendant carefully examined many relevant factors, he did not ***sufficiently establish*** *in his affidavit that he considered* ***some pertinent matters of public interest*** *that weigh against continued prosecution. In particular, a. The multiplicity of trials; b. That two were full trials which ended without conviction; and c. The critical differences in the strength of the case against the Claimant from the first trial to the fifth highlighted by the trial Judge in the fifth trial.*

96. The ***public interest considerations*** *in favour of continued prosecution in the present case are* ***outweighed*** *by the likely prejudice to the Defendant occasioned by the inordinate delays, taken together with the multiplicity of trials without conviction and the evidence of weakening strength of the case for the prosecution. It is clear, as suggested by the Claimant, that each successive trial has become increasingly oppressive, particularly as there is no change in the evidence being offered by the Defendant in addition to the failure to secure a conviction. The Defendant's* ***omission to sufficiently consider*** *these* ***relevant factors*** *renders the decision to prosecute in a sixth trial unreasonable.*

44. The trial judge fell into error in failing to appreciate that public interest and public policy considerations were within neither the constitutional function nor the practical competence of courts to assess their merits (***Matalulu, Mohit, Sharma, Leonie Marshall***) and in second-guessing the public interest considerations taken into account by the DPP. Despite careful analysis and acknowledgement of the authorities throughout the judgment the trial judge failed to appreciate the express limitations on her ability to review matters of policy.

45. Still further, the trial judge erred in failing to appreciate that issues of **weight** of the various factors in the Full Code test were not suitable for judicial review, and that in a case of review the court may not set about forming its own preferred view of the evidence. See for example ***Reid*** per Lord Clyde supra.

46. It was not for a court on judicial review to determine that omission to consider that a particular matter was so significant as to require reviewing the DPP's discretion as to the weight attributable thereto. Further, even if that were permitted, which it is not, there was no justification for failing to remit the decision to the DPP to reconsider it taking that matter into account.

47. As to sub issue (c), the trial judge failed to appreciate that the weight of binding authority was against her assumption of jurisdiction on this issue when there was an equally timely and effective **alternative remedy** within the criminal trial process. Attorneys for the accused failed to appreciate that their alternative remedy on an application for a stay in the criminal proceedings did not require the recommencement of jury trials or the completion of all preparations for trial, and that the trial process was equipped to deal with their complaint. As to this see further below.

48. Having misdirected itself on those principles, established by precedent binding on that court, the trial judge then proceeded to conduct a thorough exercise, which involved detailed assessment of the evidence including its availability, possible deterioration and weight.

49. These included:

    (i) the length of time that had transpired since the alleged offence;

    (ii) the increasing difficulty alleged with respect to securing evidence that could corroborate the alibi defence of the accused from the Arima district hospital;

    (iii) the reduction in availability of the witnesses for the accused;

    (iv) the fading of memory of witnesses over time; and

    (v) the potential prejudice to the accused.

    These were all matters which were more appropriately to be considered by a judge in criminal proceedings.

50. The trial judge correctly identified the case of **Charles and Carter v The State** PC Appeal No. 33 of 1988 which referred to the availability of appropriate and adequate safeguards within the trial process itself. See paragraph 74 of the judgment set out hereunder:

    "In Charles, Carter & Carter v The State PC Appeal No. 33 of 1988 cited by the Claimant, the trial court determined an application for a stay of proceedings on the basis of exceptional delay in favour of the accused. This is a clear instance

of an applicant in similar circumstances being afforded the appropriate and adequate safeguards within the trial process itself."

51. The trial judge fell into error however in thereafter duplicating the exercise that would be involved in an application for a stay within the criminal trial process. See inter alia paragraphs 97 and 98.

> *Stay of proceedings/abuse of process application at trial*
>
> *97. In light of the reluctance of the courts to interfere in the decision of the Defendant to prosecute or not, it must be considered whether or not any prejudice to the Claimant could be adequately addressed in the pending sixth trial process.*
>
> *98. In the recent decision of Brandt v Commissioner of Police & ors. [2021] UKPC 12, the Privy Council considered the trial process as an adequate alternative recourse where the admissibility of WhatsApp data was challenged. The Court considered that the questions as to the admissibility of evidence were for the trial Judge in the criminal proceedings. Citing Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328, the Court held that the constitutional motion was an abuse of process in the face of an adequate parallel legal remedy in the criminal proceedings.*

52. The trial judge clearly appreciated the possibility of an application for a stay of proceedings within the criminal process, (see paragraph 100 set out below):-

> "*The criminal trial proceedings are likely to provide certain safeguards against unfairness. Should the matter proceed to a sixth trial, there may be the opportunity to (sic) the trial Judge for stay of proceedings based on abuse of process. Additionally, if the trial proceeds to conclusion, there is the safeguard that the trial Judge can give the jury directions in relation to the impact of the delays and multiple trials on the strength of the evidence".*

53. The trial judge considered instead that the Privy Council decision in **Herbert Bell v DPP PC App. No.44 of 1984** involved circumstances more similar to the present case. In that case, a constitutional motion was brought on the basis of the constitutionally enshrined right to a fair trial within a reasonable time in the Jamaican Constitution. No such constitutional right to a fair trial within a reasonable time exists in this jurisdiction, a matter which the trial judge appreciated[5], but ignored. The trial judge

[5] See paragraph 102 *"As indicated by the Privy Council in Charles, Carter & Carter above, there is no constitutionally protected right to a fair trial within a reasonable time".*

noted at paragraph 99 that the Privy Council stated: "**If the constitutional rights of the applicant** had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time." However, in considering that dictum to be at all applicable the court failed to appreciate that it involved a very different issue, namely whether there had been a breach of the constitutional right in Jamaica to a fair trial within a reasonable time. That right was remediable therefore on a constitutional motion, and not susceptible to the argument, unlike in this jurisdiction, that a suitable alternative remedy existed within the criminal jurisdiction and the applicant should have been confined to remedies there available.

54. The trial judge fell into error in concluding at paragraph 101 as follows: "*However, it cannot be ignored that one of the **major factors** involved in the prejudice to the Claimant in the present case is **delay**. To allow a sixth retrial to proceed and leave the Claimant to rely on the safeguards available at trial would not duly address the prejudice he has faced. He would remain in detention without conviction and be further prejudiced by additional **delays** while awaiting the sixth trial. The extent of the additional delay may be difficult to ascertain based on the current global pandemic constraints wherein **there are restrictions preventing the conduct of Jury trials**".* (All emphasis added)

55. The Court's conclusion focussed mainly on prejudice to the accused and the consideration that this factor outweighed all others. In focussing on the issue of delay in the context primarily of prejudice to the accused, the trial judge in effect embarked on the very exercise in which a judge in the criminal proceedings would have been engaged on an application for a stay based upon abuse of process. However, the trial judge was being asked to review, on the ground of **unreasonableness,** the decision of the DPP in the exercise of his **discretion** to continue the prosecution.

56. The trial judge was therefore required to consider and take into account that the prosecutorial decision making process was polycentric, involving also considerations of public policy and the public interest. Her analysis either ignored the **public interest** in a continued prosecution, or assigned it far lesser weight than **prejudice** to the accused caused **by the delay**. These are both matters that the DPP expressly took into account, but his weighting of them produced a different result. The trial judge was not entitled to conduct that exercise and assign greater weight to the factor of delay than he did. The trial judge was required: i. to take note of the fact that those matters were within neither the constitutional function nor the practical competence of a court and further ii. that arguments based on an alleged failure to have taken into account one or more of the factors that would go into that discretion would be unlikely to be vindicated[6].

57. Further, the analysis above of the effect of delay culminating in paragraph 101 of the trial judge's judgment was based upon the misconception emanating from the respondent's attorneys that an application for a stay in the criminal proceedings could not be pursued until jury trials had resumed, a matter addressed below.

Suspension of Jury Trials

58. The trial judge was led to believe that the suspension of jury trials precluded an application for a stay before the trial judge in the criminal proceeding and would therefore continue to create inordinate delay for the accused. This is reflected in the judgment of the trial judge and in the submissions of the respondent as follows.

59. It was submitted that a suspension of jury trials rendered the possibility of a motion for a stay of proceedings at the start of trial unavailable unless he chose a judge alone and virtual trial. This premise pervades the appellant's submissions but is

[6] ***Matalulu*** *"But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings".*

incorrect[7] This submission was based on a false premise as nothing prevented the issue being placed by the Master before the partnered judge in the criminal jurisdiction prior to and without the need for empanelling a jury.

60. See also paragraph 25 of the submissions where it is repeated that the application for a stay "*could not have been done, until the matter was retrial ready which includes full case management by a Master and docketing before a trial judge who can **then** hear the appellant **at the start of trial, whenever the trial can start** based on the **jury trial restrictions** and other matters on the Court's list.*" (All emphasis added)

    i. "The accessibility of the remedies in criminal process are (sic) invariably truncated by the **suspension of jury trials**".

    ii. See also paragraph 64(b) as follows: '*the remedies in the criminal process are by far less convenient as they require the Respondent to continue to case manage his matter, in accordance with the Criminal Proceedings Rules and **prepare for trial**…'*

    iii. *'Prepare the Application for the stay of proceedings and **wait the for completion of case management before said application could be heard before a trial judge**".* (All emphasis added)

    iv. See paragraph 64(a)(vii) "cause himself and his witnesses to undergo the rigour of a complete trial for a third time".

    v. See also paragraphs 74, 75 and 81 of the submissions repeating the fallacy of suspension of jury trials causing further delay and the necessity for undergoing the trial process itself in any event.

    vi. In addition see paragraph 83 of the submissions - "*in this jurisdiction **case management must be complete** before the matter is transferred to a trial judge…"*

[7] See paragraphs 18 (iii) submissions of the respondent filed 13 September 2021, paragraph 25, paragraph 64 (a).

61. Her conclusion at paragraph 101 and 103 therefore ignores a. the duplication of the jurisdiction of the criminal court and b. the impermissible review and weighting of public policy and public interest considerations better suited to the DPP under his constitutionally conferred discretion, and unsuited to consideration or review by a court.

62. The decision of the trial judge involved careful review of the evidence that would be before a trial court hearing the criminal matter. This unnecessary duplication of judicial resources demonstrates why a judicial review court should not have been asked to review the decision to prosecute.

Conclusion

63. As to the prosecution of the respondent after more than 20 years there were always available to him an equally effective and timely alternative remedy in the court exercising criminal jurisdiction, in the form of an application to stay the proceedings against him on the ground of inordinate delay resulting in an abuse of process and the inability to obtain a fair trial.

64. This is especially so when his matter was already being case managed before a Master attached to the criminal court and he therefore had available to him that remedy on a timely basis. The application for judicial review failed to take into account that a case management Master is partnered with a judge, who can hear such an application without having to await the recommencement of jury trials, and without full preparation for such a trial being completed.

65. Further if such an application were to have failed there were other matters within the criminal trial process that also provided **additional safeguards**. The existence of those additional safeguards in fact make the criminal trial process a **potentially more effective**, but equally timely alternative remedy, than the very rarely granted judicial review of the DPP's wide discretion to prosecute. On such an application in the criminal proceedings, the only matter to be taken into account is whether it is possible for the accused to get a fair trial. Unlike on a judicial review application the

reasonableness of the exercise of the DPP's **discretion** to prosecute on such an application would be irrelevant.

66. The invocation of a public law remedy, based on reviewing the **discretion of the DPP** to continue the prosecution, requires the exercise of assessing the evidence, its possible deterioration over time, and its **impact on a fair trial**. However that is the **same exercise** that a judge exercising criminal jurisdiction, in the alternative well-established procedure available on an application for a stay of proceedings, would there be required to conduct with a view to determining the same issue. However, that is only **one** element required to determine the unreasonableness of continued prosecution.

67. The discretion to prosecute is based on matters **additional** to those that must be considered on an application for a stay within the criminal trial process. The **additional elements** on an application for judicial review of the exercise of the DPP's discretion include the **public interest** and **public policy** considerations taken into account in deciding to maintain the prosecution for murder. However, these are not usually suitable for consideration, or readily reviewable, by a court. Therefore, (apart from the existence of equivalent, and potentially more effective, alternative remedies), a finding of **unreasonableness** in the exercise of that discretion, which involves review of such considerations of public policy, would be rare.

68. It has not therefore been demonstrated that, despite extraordinary delay, this is such an exceptional case that it requires bypassing the equivalent but specialised jurisdiction of the court before which the matter had already been listed. That trial court was equipped on an application before it to consider the issue of whether a fair trial was still possible in light of the extensive delay. That is because the exercise of judicial review of the DPP's discretion to continue the prosecution necessarily included both i. mirroring the very exercise that the trial court in the criminal jurisdiction could be called upon to conduct on the alternative remedy of an application for a stay **and**, ii. reviewing matters of policy unsuited to review *"because*

they are within neither the constitutional function nor the practical competence of courts to assess their merits"[8].

69. Therefore, while in principle the possibility exists of exceptions in exceptional cases, in the instant case:-

    a. the availability to the accused of equally, if not more effective, and timely alternative remedies within the criminal trial process,

    b. the extraordinary inefficiency involved in judges exercising civil jurisdiction duplicating the criminal jurisdiction of the Assizes if required to examine and assess the entirety of the evidence in a criminal matter, consider its possible deterioration over time, and substitute their own discretion, both for that of the DPP, (on whether to continue a prosecution), and for that of a judge at the criminal Assizes (as to whether, despite such delay as has elapsed, a fair trial is possible),

    c. the inappropriateness in most cases of a court's reviewing a partially policy and public interest based decision of the DPP, (which is necessarily an **additional** element inherent in the DPP's prosecutorial discretion),

    d. the possibility of encroachments by judges exercising civil jurisdiction upon the exercise of jurisdiction of judges in the criminal courts,

    all demonstrate conclusively that it was not appropriate for the respondent to seek remedies under the guise of judicial review, moreso three months after it had been indicated to the Master case managing his matter his intention to actually seek a stay in the criminal proceedings.

70. The above matters should have precluded judicial review being granted in his case as a matter of law. Nothing that is said here should be taken as an indication of what the outcome should be of any application for a stay if, or when, made before a court exercising criminal jurisdiction.

[8] Matalulu, Mohit, Sharma infra

Orders

71. The appeal of the DPP is allowed. The Orders of the trial judge are set aside. The parties will be heard on costs.

……

Peter A. Rajkumar

Justice of Appeal