THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal App: C.A. No. 134 of 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 TRINIDAD AND TOBAGO

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS
Appellant/Defendant

AND

KEVON NURSE
Respondent/Claimant

RULING ON APPLICATION FOR A STAY OF EXECUTION

Appearances:
Mr. Ian Benjamin SC for the Appellant
Instructed by Mr. Keston D. McQuilkin, Mr. Pierre Rudder, Mr. Nairob Smart
Mr. Shaun C. Morris for the Respondent
Interested Party: Public Defenders Department
Advocate Attorneys - Mr Raphael Morgan, Ms. Michelle Gonzalez
Instructing Attorneys – Mr. Michael Modeste, Ms. Tonya Thomas

The Application:

1. The Appellant has applied to this Honourable Court pursuant to **Part 64.10 and Part 64.18(b)** of the Civil Proceedings Rules, 1998 (as amended) for Orders that:

   (a) That the Appeal hearing be expedited and that the Court give such directions as are appropriate and in accordance with Part 64.12 and 64.13;
   (b) The Appellant is granted a further stay of execution of the decision of the Honourable Madam Justice Donaldson-Honeywell made on 5th July 2021, pending the hearing and determination of the appeal;

(c) Alternatively, that the Appellant is granted an interim stay of execution until this application can be heard; and
(d) That there be no Orders as to costs.

2. This Court has considered the Notice of Application accompanied by:

1) The Affidavit of Mr. Roger Gaspard S.C;
2) A draft of the orders sought.

BACKGROUND FACTS

3. This Court notes the following:

1) This Appeal concerns a challenge to the exercise of the applicant's constitutional power pursuant to s.90 of the Constitution.

2) The Respondent's application for Judicial Review concerned a decision by the Applicant to continue his prosecution for the charge of murder and which process of trials and retrials has gone on for 19 years.

3) On 5th July 2021 the Honourable Madam Justice Donaldson-Honeywell delivered the following decision which was reduced into an order as follows:

> *"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 this Honourable 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; and*
> *c. An Administrative order that the indictment filed against Kevon Nurse is quashed an of no effect;*
> *d. The Defendant is to pay the Claimant's costs of the Claim in an amount to be assessed if not agreed.*
> *e. Stay of execution for 28 days."*

4. On the 30th July, 2021, the Appellant filed a Notice of Appeal against the Learned Judge's decision challenging:

a) the decision to grant permission to apply for judicial review on a without notice basis on 23rd October 2020; and

b) the entirety of the decision whereby she substituted her decision on the merits for the Appellant's purported decision in relation to the prosecution of the Respondent for murder.

5. The Stay of Execution that the Learned Judge granted on the July 5, 2021 was for 28 days which expires on August 2, 2021.

6. The Notice of Appeal was served on the Respondent's Legal Representative.

GROUNDS

7. The grounds for this application are as follows:

   The Appellant submitted that the Learned Trial Judge erred in fact and/or law by:

   a) Substituting her decision on the merits for that of the Appellant and exercising his power under Section 90 of the Constitution of Trinidad and Tobago;

   b) Usurping the common law power of the criminal trial judge to stay a prosecution and substituting her decision for that of the trial judge and effectively staying the prosecution of the Respondent for murder;

   c) Wrongly applying the principles for establishing a stay of a prosecution as an abuse of process to the instant issue of whether there are sufficient grounds for the exceptional remedy of reviewing a prosecutorial decision;

   d) Wrongly concluding that the Respondent's prejudice occasioned by his inability to produce proper evidence for the trial due to the delay is a sufficient ground to grant the highly exceptional remedy of reviewing a prosecutorial decision to continue with a prosecution;

   e) Wrongly concluding in fact that the Appellant's omission to consider relevant factors;

   f) Wrongly substituting her opinion on the weighting of factors of public interest against the Respondent's prejudice in the Appellant's decision whether to continue the prosecution;

   g) Failing to consider all of the Respondent's alternative remedies in the criminal trial process (e.g.) a no case submission in addition to an application for a stay of the trial on grounds of abuse of process and appeal;

   h) Failing to direct herself properly or adequately to the law that an application seeking an administrative order in circumstances where a parallel remedy exists in the criminal proceedings was itself an abuse of process;

i) Wrongly concluding that the Appellant's decision to prosecute the Respondent was unreasonable and unfair; and

j) Wrongly concluding that the criminal proceedings were inadequate to deal with issues of delay and prejudice so as to ensure that the Respondent has a fair trial.

LAW AND REASONING
TEST FOR A STAY TO BE GRANTED

8. In **Civ. Appeal No. 48 of 2011 National Stadium (Grenada) Ltd v NH International (Caribbean) Limited and others**, the Honourable Madam Justice of Appeal Weekes (as she then was) set out the test for obtaining a stay of execution as at paragraphs 7 and 8:

> *"(i) The test in this jurisdiction for whether a stay of execution should be granted is*
> *(ii) whether the appeal has a good prospects of success and additionally whether there are any special circumstances which would justify exceptionally the grant of a stay."*

9. In the recent case of **Civ. App. 242 of 2020 The Commissioner of Police v Denyse Renne**, the Honourable Justice of Appeal Yorke Soo-Hon stated as follows:

> *"a) The test is whether the appeal has good prospects of success and whether there are any special circumstances which would justify the stay. Whether the court grants a stay depends upon all the circumstances of the case, but the essential factor is the risk of injustice."*

10. These requirements were summarized as in the case of **Civ Appeal No. S375 of 2018 Robert Gormandy and Shaun Sammy v The Trinidad and Tobago Housing Development Corporation**, where Madame Justice of Appeal Pemberton stated at paragraph 8:

> *"(i) Relevant factors to be considered in this application for a stay of execution are:*
> *1. Good prospects of success on appeal;*
> *2. Special circumstances justifying the stay of execution;*
> *3. Risks of injustice to either party;*
> *4. Should the stay be refused and the Appeal succeeds, what are the risks to the Appellant."*

Appellant Submissions

11. It is trite law that for the Appellant to succeed in its application for a stay it must be demonstrated, not only good prospects of success

on the appeal and/or additionally, whether there are any special circumstances that would justify the grant stay where for example the appeal would be rendered nugatory if the stay is not granted.

12. The Appellant submitted that this application meets and exceeds those principles clearly enunciated in the decisions of this Honourable Court.[1]

13. Further, the evidence affidavit in support of the application for the stay of execution of the Order does unequivocally set out good and substantial reasons.[2]

Good Prospects of Success on the Appeal

14. Their Lordships in the Judicial Committee of the Privy Council in the case of **Sharma v Brown-Antoine and Others** [2006] UKPC 57, provided guidance on whether the decision of the Director of Public Prosecution to prosecute an accused person was amenable to judicial review.

15. Lord Bingham delivering the leading decision of the Board stated at paragraph 14(5) stated the general principle as follows:

> *"(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, at pp 735, 736, and Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20 at paras [17] and [20].*
> ***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 parte Mead [1993] 1 All ER 772 at 782), '**sparingly exercised**' (R v Director of Public Prosecutions, ex parte C [1995] 1 Cr App Rep 136 at 140), '**very hesitant**' (Kostuch v Attorney-General of Alberta (1995) 128 DLR (4th) 440 at 449), '**very rare indeed**' (R (on the application of Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin), [2004] Imm AR 549 at para [49]), and '**very rarely**' (R (on the application of Bermingham) v Director of the Serious Fraud Office [2006] EWHC*

[1] National Stadium (Grenada) Limited v. NH International (Caribbean) Limited & Ors Civil Appeal No. 48 of 2011 @ para 7; Clayton Bruce and Maria Bruce v The National Insurance Board of Trinidad and Tobago Civ. App. No. 63 of 2005 @ page 4, para 3.
[2] Clayton Bruce and Maria Bruce v. The National Insurance of Board of Trinidad and Tobago, Civil Appeal No. 63 of 2005 per Madam Justice Weekes at para 2, page 2.

200 (Admin), [2006] 3 All ER 239 at para [63]. In R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326 at 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; see pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted." Emphasis added

16. Lord Bingham continued at the same paragraph:

> "***Decisions have been successfully challenged where the decision is not to prosecute*** *(see Mohit, at 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 (on the application of Pretty) v Director of Public Prosecutions [2001] UKHL 61, [2002] 1 AC 800 at para [67], and Matalulu, above, at p 736. In Wayte v United States 470 US 598 (1985) at 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 Director of Public Prosecutions' 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, at p 735, cited in Mohit, above, at 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, at 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*** *(Ex parte Kebilene, above, at p 371, and Pretty, above, at para [77]);*
>
> *(iv)* ***'the desirability of all challenges taking place in the criminal trial or on appeal'*** *(Ex parte Kebilene, above, at p 371, and see Pepushi, above, at 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 parte 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 at 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 at 24, 26, 46 and 53, Imperial Tobacco Ltd v Attorney-General [1981] AC 718 at 733, 742, R v Power [1994] 1 SCR 601 at 621 to 623, Kostuch v Attorney-General of Alberta, above, at pp 449, 450, and Pretty, above, at para [121]." Emphasis added*

17. He concluded at paragraph 24 as follows:

"**First, the judge rightly cited Matalulu and Mohit, above, as authority for the proposition that a decision to prosecute is in principle susceptible to judicial review on the ground, among others, of interference with a prosecutor's independent judgment. **But both cases must be understood in context**. In both cases challenges to decisions not to prosecute had been rejected, by the Court of Appeal of Fiji in Matalulu on the ground that flagrant impropriety was in effect the only available ground, and in Mohit by the Supreme Court of Mauritius on the ground that such a decision was not susceptible to review at all. **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." [emphasis added]
***See also paragraphs 31 to 36 of the joint opinions of* Baroness Hale of Richmond, Lord Carswell and Lord Mance. See also**: **Regina v. Director of Public Prosecutions, Ex parte Manning and Another [2000**] **3**

WLR 463 para 23; and Regina (Gujra) v Crown Prosecution Service [2012] 1 WLR 254 para 41-43.

Analysis

18. The Applicant submitted respectfully that the judicial review application before the Learned Judge did not a challenge the Appellant's decision to continue the prosecution of the Respondent on the grounds that he had acted ultra vires, that his informed judgment to continue the prosecution was tainted with dishonesty, mala fides or some exceptional circumstance, or that he failed to consider information that he was constitutionally required to so consider.

19. Instead, it is submitted that the application and the Learned Judge's decision were premised on the grounds that delay and the possibility of unreliable evidence affected the ability of the Appellant to continue the prosecution of the Respondent.

20. These are merits matters and are principles consistent with a stay application.

21. The Appellant submitted that the true nature of the application therefore was an assessment as to how the case brought against the Respondent would fare at criminal trial with a consideration of the strength of the prosecution's case at the end of the trial, the likely defences and the effect of the delay on those issues.

22. The Appellant submitted that the Learned Judge usurped the role of the criminal trial judge and decided that it would be unsafe to continue the prosecution. Not based on any of accepted exceptions, but consistent with the principles of a stay application.

23. Such a review as conducted by the Learned Judge was not a judicial review at all and is inconsistent with the established authorities that the Appellant's decision to prosecute for the reasons advanced by the Respondent are not amenable to judicial review.[3]

24. The Learned Judge's decision, respectfully conflates the issues usually associated with a stay with the principles of unreasonableness and unfairness on a judicial review application.

25. The conflation respectfully led the Learned Judge into error whereby she assumed the role of decision maker, whether the criminal court or the Appellant or both without any regard or sufficient regard to the impermissible nature of the task she had undertaken and

[3] Regina v. Director of Public Prosecutions, Ex parte Manning [supra] para 23 and Sharma and Antoine [supra].

disregarded the criminal court and Appellant's experience, expertise, policy including and the broad and unprescriptive ambit of his discretion.[4]

26. The Respondent's application before the Learned Judge was essentially an application for a stay disguised as a judicial review application and constitutional motion.

27. The Learned Judge respectfully was led into error as evinced at paragraphs 74 to 101 of her decision wherein she applied the prescriptions of a stay application to principles of unreasonableness and unfairness in the context of a judicial review application.

28. In so doing the Learned Judge respectfully, misapplied the principles that govern the exercise of her supervisory role and usurped the position of both the criminal court and the Appellant and substituted her decision for their respective decisions on the basis of unreasonableness and unfairness.

29. The Learned Judge's decision against that backdrop is inconsistent and is in opposition with the principles governing the Respondent's application. See: **Regina (Gujra) v Crown Prosecution Service [supra] para 41 and Sharma and Antoine [supra].**

Criminal Proceedings

30. The Learned Judge at paragraph 100 of her decision correctly we say respectfully, refers to the options available to the Respondent as part of the criminal proceedings to raise the issues he does on the judicial review application.

31. Having considered the options available to the Respondent, the Learned Judge fell into error, at paragraph 101, in concluding that the criminal proceedings were not the most efficacious and suitable alternative remedy to deal with the Respondent's challenges to his continued prosecution.[5]

32. Further, the Learned Judge did not properly consider or at all that the Director's decision save for the accepted exceptions was only amenable to judicial review where there were no other options available to the Respondent.

[4] Regina(Gujra) v Crown Prosecution Service [supra] para 41 and Sharma and Antoine [supra].

[5] Sharma v Antoine [supra] & R(Glencore Energy UK Ltd) v Revenue & Customs Commissioners [2017] 4 WLR 213 at paragraphs 53 – 59.

33. The Learned Judge at paragraphs 69 to 73 correctly cites the authorities where the prosecutor's decision was reviewable. However, the Learned Judge failed to properly consider or consider at all the applicability of those cases to the application before her.

34. Those cases involved a decision of the prosecutor not to prosecute where the criminal proceedings were either at an end or had never commenced. Judicial Review was the only option available to the applicants.

35. The Learned Judge's consideration of those cases in the context of the application before her should have led her to the conclusion that the basis of the Respondent's challenge to the decision of the Appellant was not amenable to judicial review and should be strongly discouraged.

36. Further, the Learned Judge erred in attaching little weight to the undisputed fact that the issues of delay and the reliability of the eye witness evidence were already adjudicated upon as part of the criminal proceedings on two stay applications and a no case submission and they were all rejected. That those options were utilized and still available to the Respondent.

Conclusion on the first issue

37. The Appellant submitted that he Learned Judge in excess of her supervisory power on the Respondent's judicial review application in error impliedly and expressly found that:

a) a conviction against the Respondent cannot be had because of the delay utilizing the balancing exercise of prejudice; and

b) It is an abuse of process to continue the prosecution because of delay and the unreliability of evidence.

38. The Learned Judge's decision is respectfully an error in law and an error of the application of the law rendering it unsafe**. Sharma v Antoine** @ para 24 [supra]

Whether there are any special circumstances that would justify the grant of the stay

39. The second limb of the test for a stay of execution is set out at para 7 of the decision of the Honourable Madam Justice of Appeal Weekes in **National Stadium (Grenada) Limited v. NH International (Caribbean) Limited & Ors (supra).** She stated:

> *"The test in this jurisdiction for whether a stay of execution should be granted is whether the appeal has good prospects of success*

and additionally whether there are any special circumstances which would justify exceptionally the grant of a stay."

40. At paragraph 59, she construed special circumstance as follows:

"a special circumstance must be something further than prospect of success that goes to the justice of the situation such as to be a factor that the court must consider in its balancing exercise."

41. Additionally, in considering the grant of a stay the Honourable Madam Justice of Appeal Weekes added that consideration should be had in assessing all the circumstances of the case, the risk of injustice. At paragraph 8 she states:

"In weighing the issue of injustice the court must consider, among other matters, if a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce judgment? If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the Appellant being unable to recover what has been paid to the respondent?"

42. These principles were followed and repeated by the Honourable Madam Justice of Appeal Pemberton in **Gormandy & Sammy v HDC Civ Appeal No S375 of 2018** at paragraph 8, where she states that the relevant factors to be considered in an application for a stay of execution are:

1. Good prospects of success
2. Special circumstances justifying a stay;
3. Risk of injustice to either party;
4. Should the stay be refused and the appeal succeeds, what are the risks to the Appellant.

Special Circumstance

43. Consistent with the guidance offered by this Honourable Court, the special circumstances that arise on the appeal, are set out at paragraphs 9, 12 and 13 of the affidavit of Mr. Roger Gaspard S.C.

44. The importance of the correct interpretation of the Appellant's powers pursuant to section 90 of the Constitution which affects the entire administration of criminal justice in the country, as well as, the correct approach to a Judicial Review challenge to the exercise of a section 90 power are factors that go beyond the prospect of success and touch and concern the justice of the situation.

45. Additionally, the issues raised on the appeal that concerns the proper role of the Criminal Court in granting substantive relief by way of a stay as opposed to that of a Judicial Review Court are all factors

that respectfully, weigh in favour of the continuation of the stay granted to the Appellant.

Risks to the Appellant

46. The evidence in support of the risks to the appellant if the stay is not granted is set out mainly at paragraph 10 of the affidavit of Mr. Roger Gaspard S.C.

47. The Appellant submitted that the appeal would be rendered nugatory and/or otiose if the stay is refused or not continued, since the Appellant will be unable to continue the prosecution of the Respondent for murder.

48. Further, upon the expiration of the interim stay on 9th August 2021, the Respondent, who has been charged for the serious of offence of murder, would be released from custody effectively curtailing the Appellant's ability to prosecute him.

49. The public interest in prosecution would suffer prejudice which would far outweigh the possible prejudice to be suffered by the Respondent if he is released before this important issue of law is adjudicated upon.

50. The risk if injustice to the Respondent if he is unable to benefit from the "fruits" of the decision of the Honourable Madam Justice Donaldson-Honeywell is mitigated by the order of 9th August 2021 deeming the appeal urgent for an expeditious hearing.

Disposition

51. Based on the aforementioned, the Appellant submitted that the interim stay of the execution of the order of the Honourable Madam Justice Donaldson-Honeywell should continue pending the hearing and determination of the appeal.

THE APPELLANT HAS BROUGHT THEIR APPLICATION ON THE FOLLOWING GROUNDS:
GOOD PROSPECT OF SUCCESS

52. In **Harracksingh v Attorney General and Another [2004] UKPC 3** Sir Andrew Legatt, delivering the judgement of the Board, stated that the trial judge's decision ought not to be disturbed unless it could be demonstrated that it was affected by material inconsistencies and inaccuracies or the judge had failed to appreciate the weight or bearing

of circumstances admitted or proved **or otherwise had gone plainly wrong**. [Emphasis mine]

53. In the case of **Sherief Ramsaran v Essau Hoodan** [1997] UKPC 47 (7th October, 1997) the Privy Council affirmed the decision of the Court of Appeal which had disturbed the trial judge's finding of fact. In the Court of Appeal, de la Bastide C.J. said:

> *"..... it is very well established that a Court of Appeal will only with great reluctance and in **special circumstances** interfere with the findings of a trial judge on issues of fact..."*

54. It is not for this Court at this stage to determine the appeals themselves but to sift the rivalling arguments on the merits of the issues to be articulated in the appeals identified above to determine whether there is any prospect of success in them. I must express a value judgment. "Prospect of success" is not an inflexible rule inscribed in Rule 64.18(1)(b) CPR. It is a principle developed in our case law to emphasise that as a threshold question, simply, that if the appeal is without merit no question of a stay should be entertained or at the other extreme, if there is a strong appeal the question of a stay ought to be axiomatic. This is illustrated in the cases of **National Stadium** and **A&A Mechanical Contractors**. The term "good prospect of success" was used interchangeably with "good arguable appeal" in **Rodrigues** and "an appeal with merit" in **National Stadium**. **Andre Baptiste** and **A&A Mechanical Contractors** demonstrates how the Court deals with cases where the Appellant's case falls on the extreme end of the spectrum of demonstrating no good prospect of success.

55. **Wenden Engineering Service Co. Ltd v Lee Shing Yue Construction Co. Ltd** [2002] HKCU 846 explains:

> *"5...the existence of a strong appeal or a strong likelihood that the appeal would succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay.....[6] the requisite strength of the appeal must be such that the court takes the view that "something has grievously gone wrong with the process of law in the court below".*[7]

[6] The Honourable Ma J Citing **Star Play Development Limited v. Bess Fashion Management Company Limited**, unreported, HCA No.4726 of 2001, 7 June 2002.

[7] Cited with approval in **NB v Haringey LBC** [2011] EWHC 3544 (Fam)

56. In most cases the court may be faced with simply an arguable appeal. In those cases, the applicant must still carry the burden to show something more to obtain a stay:

> *"(8) In most cases, the court will not be dealing with the extreme situations I have referred to. Often, it will be faced with simply the existence of an arguable appeal. Here, it becomes necessary for the appellant to provide additional reasons as to why a stay is justified. The demonstration of an appeal being rendered nugatory is one example, albeit a common one. Here, where it is demonstrated that an appeal would be rendered nugatory if a stay was not granted, the court may require no more than the existence of an arguable appeal. Correspondingly, where it cannot be shown that an appeal would be rendered nugatory if a stay were not granted, the court will require, in the absence of any other factors, the appellant to demonstrate strong grounds of appeal or a strong likelihood of success."*[8]

57. The existence of an arguable appeal would not of itself amount to a sufficient reason to grant a stay and simply puts the appellant's "foot in the door".

58. In **Robert Gormandy and Shaun Sammy v The Trinidad and Tobago Housing Development Corporation** Civ. Appeal No. S375 of 2018 (full court decision) the Court examined the inherent risks involved in refusing or granting the stay on the basis that there was an arguable appeal. It was a case whether indeed the appeal would have been rendered nugatory if the stay was not granted. In those special circumstances, the fact that the Court did not find there was "good prospects of success" in the appeal, did not prevent the court from examining the obvious risk of injustice if the stay was not granted. In the recent case of **Shalimar Keesha Ali v Duane Bevan Ragbir**[9], Dean-Armorer JA still considered the risks of injustice even where there were no good prospects of success which she analysed as something more than arguable or that it is fairly certain that the trial judge was wrong.[10]

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[8] **Wenden Engineering Service Co. Ltd v Lee Shing Yue Construction Co. Ltd** [2002] HKCU 846

[9] Family Appeal No. FHP 0006 of 2020

[10] Ibid at paragraph 22:

> *"22. In ascertaining the meaning of a good prospect of success, I considered, for the purposes of comparison, the interpretation placed in the term "reasonable prospect of success" of a claim as prescribed by Part 13.3 (1) **CPR**, when the Court is empowered to set aside a judgment in default of defence. A realistic prospect of success is one that is more than merely arguable. In my view, a good prospect of success must clearly be stronger than a reasonable prospect. It must be more than arguable and it must be fairly certain that the Judge was plainly wrong. The rationale for this high standard must be that in ordering a stay, a Court departs from the general principle that a successful litigant is entitled to the fruit of his litigation."*

59. In assessing the prospects of this appeal, it must be shown there is a good prospect of finding on the appeal that the trial judge erred in principle in her approach or has left out of account or has taken into account some feature that she should not or did not properly balance the factors that arose.[11] I will deal with each of the main issues raised on the appeal in turn which involves a short question of law to demonstrate that the grounds have merit and are arguable, and as such the chances of success are strong.

60. This Court finds that the Trial Judge committed a grave error in considering the law on the principle of the operation of the law with respect to a judicial review application for a stay of a criminal matter which ought to have been properly before a criminal court and not a civil court. Further, the breach of the respondent's constitutional right to a fair trial was dismissed by the learned trial judge. The Learned Judge usurped the role of the criminal trial judge and decided that it would be unsafe to continue the prosecution.

61. This Court agrees with the Appellant in that the Learned Judge's decision, conflated the issues usually associated with a stay with the principles of unreasonableness and unfairness on a judicial review application. The conflation led the Learned Judge into error whereby she assumed the role of decision maker, whether the criminal court or the Appellant or both without any regard or sufficient regard to the impermissible nature of the task she had undertaken and disregarded the criminal court and Appellant's experience, expertise, policy including and the broad and unprescriptive ambit of his discretion.

62. I find credence with the Appellant's submission in that the Learned Judge fell into error as evinced at paragraphs 74 to 101 of her decision wherein she applied the prescriptions of a stay application to principles of unreasonableness and unfairness in the context of a judicial review application.

63. In so doing the Learned Judge misapplied the principles that govern the exercise of her supervisory role and usurped the position of both the criminal court and the Appellant and substituted her decision for their respective decisions on the basis of unreasonableness and unfairness.

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[11] **Rodrigues Architects Limited v New Building Society Limited** [2018] CCJ 09 (AJ), paragraph 6:

> *"[6] As Lord Woolf MR in Phonographic Performance Ltd v AEI Rediffusion Music Ltd remarked of appellate courts reviewing the exercise of a judge's discretion, "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered or that his decision was wholly wrong because the court is forced to the conclusion that he has not fairly balanced the various factors fairly in the scale."*

64. This Court agrees with the Appellant that the Learned Judge fell into error, at paragraph 101, in concluding that the criminal proceedings were not the most efficacious and suitable alternative remedy to deal with the Respondent's challenges to his continued prosecution.

65. Further, the Learned Judge did not properly consider or at all that the Director's decision save for the accepted exceptions was only amenable to judicial review where there were no other options available to the Respondent.

66. This Court notes that there are cases where the prosecutor's decision was reviewable which involve a decision of the prosecutor not to prosecute where the criminal proceedings were either at an end or had never commenced. This was cited at paragraphs 69 to 73 of the learned Judges' ruling. In the case for consideration, however, she failed to properly consider the applicability of those cases to the application before her. Further, this Court notes that in those cases Judicial Review was the only option available to the applicants.

67. This Court finds that on a proper consideration of those cases in the context of the application before her should have led to the conclusion that the basis of the Respondent's challenge to the decision of the Appellant was not amenable to judicial review and should be strongly discouraged.

68. This Court notes that the Learned trial judge dismissed the notion of an infringement of the respondent's constitutional right to a fair trial at **para 102** as follows:

> *"[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. It cannot be concluded therefore that the Claimant's constitutional rights have been infringed in the present case. The Claimant will not be granted the declaratory reliefs sought as to infringement of constitutional rights."*

69. This Court has taken into account the 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.

70. The case of **Forrester Bowe v the Queen (2001) 58 WIR 1** is authority for the proposition that there is no rule of law which prevents a prosecutor from seeking a second re-trial. The Privy Council considered from para. 37-39 of its decision:

> *"[37]… There is* ***plainly no rule of law in this country which forbids a prosecutor from seeking a second retrial****. In the present case the trial judge ruled that this was so in the Bahamas also, and her ruling on that point was not challenged in the Court of Appeal.*
>
> *[38]* ***There may of course be cases in which, on their particular facts, a second retrial may be oppressive and unjust****. The Board judged Charles, Carter and Carter v The State (1999) 54 WIR 455 to be such a case. But it was there recognised (at pp 462 and 463) that the trial judge has a margin of discretion, and in Krishna Persad and Ramsingh Jairam v The State [2001] UKPC 2, 58 WIR 433, the Board remitted the issue of retrial to the Court of Appeal of Trinidad and Tobago, treating it as relevant but not conclusive that it was a second retrial.*
>
> *[39]* ***Whether a second retrial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served****. Full account must be taken of the defendant's interests, particularly where there has been* ***long delay*** *or he has spent long periods under sentence of death or if his* ***defence may be prejudiced in any significant way by the lapse of time****. Account must also be taken of the* ***public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system****. These are matters which a national court is well placed to consider.*
>
> *… The consequences of conviction in a capital case are of course grave and irreversible, but that is because the crime found to have been committed is judged by the State in question to be particularly heinous. The appellant may exercise any right he has to seek the exercise of mercy, or any constitutional relief which may be available. But the Board cannot hold that this trial was unlawful on the grounds of oppression or abuse."*

71. However, as was concluded by the learned trial judge in her decision[12], this Court finds that the public interest considerations is

[12] **Kevon Nurse v DPP Claim No. CV 2020 – 03286** at Para [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

not outweighed by the likely prejudice to the Respondent due to any delay in a sixth trial or with the multiplicity of trials without conviction.

72. **This Court finds that** the decision of the Appellant to continue the prosecution against the Respondent was lawful and reasonably determined despite the evidence of delay. The public interest factors which this Court has considered are outlined as follows:

a) Murder is the most serious of offences for which a citizen may be tried;
b) A conviction will result in the most significant sentence;
c) A firearm was used during the commission of the offence;
d) There is evidence that the offence was premeditated;
e) The offence was committed in close proximity to a child; and
f) A prosecution would have a significant positive impact on maintaining public confidence in the administration of justice.

73. Although delay is a public interest factor that could weigh against prosecution, it is mitigated where the offence is serious and the delays have been caused in part by the Respondent. In this particular case for consideration, the Respondent has contributed significantly to the delay, by his repeated insistence that he wished to represent himself and his "penchant to fire his attorney" once his trials began.

74. The plethora of cases on the issue of delay[13] has been fully considered by this Court. As have been canvassed fully by the learned

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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."

[13] **Chris Durham and Ors v The Director of Public Prosecution CV 2019-02178,** the Court, citing **Matalulu v DPP [2003] 4 LRC 712,** set out the circumstances in which decisions of the Defendant can be reviewed, e.g. in instances of bad faith, in excess of jurisdiction. The Court also considered that there may be other circumstances, not explicitly covered in the categories set out, 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."

Sanatan Dharma Maha Sabha v DPP CV2013-02358 also addressed the reviewability of the Defendant's decision in relation to prosecution. The Court set out at paras. 31-38 the role and responsibility of the Defendant to act as a minister of justice. The following dicta in the judgment of Powell J in **Wayte v United States (1985) 470 US 598 at 607-608** was cited:

> *"This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute"*

The cases of **Young v Frederick [2013] 2 LRC 179** and **R (on the application of Dalvinder Singh Gujra) v CPS [2011] EWHC 472** give due and proper regard to the great width of the Defendant's discretion, the polycentric character of his official decision making, the exercise of his constitutional powers, the separation of powers and the rule of law. In **Gujra,** the Court considered:

> *"It seems to me that the general inhibition against disturbing the decisions of an independent prosecutor must be just as strong where the court is invited to review the rationality of a judgment concerning the prospect of a conviction as it is in relation to other aspects of the decision-making process. The court should be very slow indeed to conclude that the judgment formed by an expert prosecutor as to the reliability of individual pieces of evidence or the likelihood of securing a conviction on the evidence as a whole is so far out that it should be struck down as irrational. This is an area where challenges by way of judicial review are, in my view, to be strongly discouraged."*

In **Durham**, the Court considered the constitutional unfairness involved (i.e. an admission of a perjured account by the identifying witness in a murder trial and the failure of the DPP to explain his decision-making process) was sufficient to bring the case into the category of exceptional cases where the High Court should intervene in judicial review. Following **Quigley v The Director of Public Prosecutions [2019] IEHC 171**, it reviewed the decision of the DPP to continue the prosecution of the claimants and held that the DPP's decision was not fairly and justly made.

The case of **ex p. Manning and another [2000] All ER (D) 674** the Court, considering the decision of the prosecutor not to prosecute, stated as follows:

> *"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 defenses. It will often be impossible to stigmatize 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."*

Charles, Carter & Carter v The State PC Appeal No. 33 of 1988, 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.

trial judge in her judgement at para 64 – 78 and on the issue of prejudice the case of **Dularie Peters v The State** Cr. App No. 34 of 2008 at para 29-30.[14]

75. Further, the argument advanced by the Appellant (Learned DPP) that the learned trial judge wrongly concluded that the criminal proceedings were inadequate to deal with issues of delay and prejudice in ensuring that the Respondent will have a fair trial is a significant legal argument which holds merit in this Court's view. The decision of **Brandt v Commissioner of Police & ors. [2021] UKPC 12,** in which the Privy Council considered that the questions as to admissibility of evidence were for the trial Judge in the criminal proceedings and cited **Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328,** where 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 is relevant in this regard. As noted above, the learned trial judge dismissed the respondent's motion on a constitutional right to a fair trial.

76. This Court holds the view that the trial process includes sufficient safeguards to address the issue of delay. One such safeguard includes the **jurisdiction to stay proceedings on grounds of abuse of process in the context of delay**. Further, 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 are sufficient in addressing any prejudice which may arise to the Respondent due to the delay.

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[14] The Court of Appeal in **Dularie Peters v The State Cr. App No. 34 of 2008** considered the prejudice occasioned after a long delay:

> *"29. The courts have recognized that in some circumstances the period of delay may be of the order sufficient to raise a rebuttable presumption of prejudice. In **R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. DPP Watkins L.J.** said:*
>
> > *"Obviously, what has to be demonstrated to the court is that the delay complained of has produced genuine prejudice and unfairness. In some circumstances as the cases show, Mr. Lawson referred to them in his skeleton argument, prejudice will be presumed from substantial delay. Where that is so it will be for the Prosecution to rebut, if it can, the presumption. As we have already stated **it is perfectly proper, according to circumstances, to infer prejudice from the mere passage of time. That inference is more easily drawn when dealing with a single brief but confused event which must depend on the recollections of those involved**." (emphasis added)*
>
> *[30] The position then is that, as in those jurisdictions which have the constitutional right to trial within a reasonable time, the mere fact of inordinate or excessive delay may be sufficient to raise a presumption in the appellant's favour that he will be prejudiced. Under the common law, however **the fact remains that the mere spectra of prejudice is not sufficient to warrant a stay, that prejudice must be enough, in all the circumstances, to render the continued prosecution unfair**."*

RISK OF INJUSTICE

77. This Court has found guidance in the case of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd.** [2001] All ER (D) 258 (Dec) Clarke LJ in weighing the risk of injustice in the circumstances of this case, noted at paragraph 22;

> "*It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?* ***On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"***

78. The Appellant submitted that there are **good prospects of successfully appealing the decision** of the Learned Judge and that the **facts revealed exceptional and special circumstances**.

79. On the question of balancing the relative risks of injustice, the question simply has come to this: that a stay will not cause injustice or unfairness to the respondent.

80. This Court holds that it should exercise its discretion and grant a stay of execution of a judgment pending the hearing of an appeal against the decision since it is evident from the circumstances of the case the risk of injustice lies against the Appellant (Learned DPP).

81. This Court finds that the appeal is not frivolous, and that the Learned DPP has demonstrated strong prospects of success. This Court further finds that the Appellant has demonstrated with cogent evidence that there will be a risk of injustice if the stay is refused.

82. It will not be difficult to demonstrate at the full appeal how the trial judge fell into error in considering the issue of delay and in strictly limiting her interpretation exercise in considering the interests of justice and **a realistic prospect of conviction.**

83. It is fair to say that even at its highest, if the trial judge was correct, had the matter proceeded to trial it is likely that a fair trial would be possible. The Respondent faces in my view a difficult task to convince the full panel court that its defence was not too speculative to

be case managed with adequate safeguards to a trial. Especially with the judge only trial option which has been a success in recent times.[15]

84. This Court is of the view that the issues need to be determined before a full panel whereby the Appellant's grounds outlined above at paragraph 7, hold merit for further consideration.

EXCEPTIONAL FEATURES

85. A special circumstance must be something, further than prospect of success, that goes to the justice of the situation such as to be a factor that the court must consider in its balancing exercise. I find that there are special circumstances disclosed by this applicant.

86. This Court notes that the appeal directly concerns the administration of criminal justice in this country as is referred to at paragraphs 9, 12 and 13 of the affidavit of Mr. Roger Gaspard S.C.

87. The exceptional features in this case which warrants a stay is that the appeal involves the public interest and the interest of justice.

88. The effect of the stay not being granted has been considered by this Honourable Court, in that the Appeal would be rendered nugatory and/or otiose as:

a) The Appellant will be unable to continue the prosecution of the Respondent for murder;
b) The Respondent will once the stay of execution expires necessarily be released from custody;
c) The States right and entitlement to prosecute the Respondent further for the serious offence of murder will be curtailed; and
d) The public interest in prosecution would suffer prejudice which would far outweigh the possible prejudice to be suffered by the Respondent as is outlined at paragraph 10 of the affidavit of Mr. Roger Gaspard S.C.

89. This Court is of the view that a stay is necessary pending the hearing and determination of the Appeal.

90. This Court finds credence in the submission advanced by the Learned DPP in that the nature of the issues that arise on the Appeal, are such that it is in the **public interest** and in the **interest of justice** that an Appeal of this nature be given priority. Further, this Court notes that this appeal includes pertinent issues for determination as follows:

[15] The State v Sean Luke CRS 046/2009 judgement delivered by Justice Ramsumair-Hinds

a) It concerns the correct interpretation of a provision of the Constitution i.e. s.90;
b) It also concerns the correct approach to a Judicial Review challenge to the exercise of a s. 90 power;
c) It concerns the proper role of the Criminal Court in granting substantive relief by way of a stay as opposed to that of a Judicial Review Court;
d) Should the appeal not be heard with expedition in substance the appeal would become otiose and nugatory;
e) The appeal directly concerns the administration of criminal justice in this country.

COURT'S DECISION

91. It is the duty of the Court to carefully balance the competing risks in the appellate process for both parties and arrive at a just solution which does not lightly remove the benefits that ought to be enjoyed to the Respondent.

92. For the reasons stated above, the Appellant's Application for a stay of execution against the decision of the Honourable Madam Justice Donaldson- Honeywell made on July 5, 2021 is hereby granted. **The Interim Stay of execution remains in effect until the hearing and determination of the appeal.**

93. No orders as to costs.

94. The Appellant's application for an expedited appeal is hereby granted with the following **case management orders** that:

i) Appellant to file and serve submissions and authorities on or before 25th August 2021

ii) The Respondent to file and serve submissions and authorities in response on or before 3rd September 2021

iii) The Appellant to be granted leave to respond to new issues raised in submissions on or before 17th September 2021

vi) Leave is granted to the interested third party to file and serve submissions and authorities on or before 25th August 2021. Such submissions are limited to the areas raised at paragraph 20 of the skeleton arguments filed 7th August 2021

v) Notice of appeal filed on 30th July 2021 as a procedural appeal to be heard as a substantive appeal. The hearing of the appeal is fixed to be heard before the panel of Judges presiding in the East Court on the 25th October 2021.

Dated this 13th AUGUST, 2021.

Malcolm Holdip

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MALCOLM HOLDIP
JUSTICE OF APPEAL

Shoba G. Nandalal
Judicial Research Counsel II