THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 41 OF 2008

IN THE MATTER OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES CHAPTER 2 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

AND IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 125 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

AND

IN THE MATTER OF AN APPLICATION BY MICHELE ANDREWS FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION OF THE 4TH FEBRUARY BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TAKE OVER THE PROSECUTION OF PRIVATE CRIMINAL COMPLAINTS NOS. 61/08 AND 62/08 BROUGHT BY MICHELE ANDREWS AGAINST DR. RALPH E. GONSALVES AND THE DECISION OF THE 4TH FEBRUARY 2008 OF THE DIRECTOR OF PUBLIC PROSECUTIONS PURPORTING TO WHOLLY DISCONTINUE AND ENTER NOLLE PROSEQUI RESPECT OF BOTH PRIVATE CRIMINAL COMPLAINTS.

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION AND /OR DETERMINATION OF THE CHIEF MAGISTRATE OF THE 14TH FEBRUARY, 2008 WHEREBY SHE PURPORTED TO GIVE EFFECT TO THE DECISIONS AND ACTIONS OF THE DPP OF THE 4TH FEBRUARY, 2008, PURPORTING TO TAKE OVER AND DISCONTINUE AND ENTER NOLLE PROSEQUI IN RELATION TO PRIVATE CRIMINAL COMPLAINTS NOS 61/08 AND 62/08 BROUGHT BY THE APPLICANT, BY INDICATING BY LETTER OF THE 14TH FEBRUARY, 2008 THAT THERE IS NO LONGER A VIABLE MATTER BEFORE THE COURT AND VACATING THE DATE ON THE SUMMONS OF THE 22ND FEBRUARY, 2008.

BETWEEN:

MICHELLE ANDREWS
P.C. 16 OF NEW PROSPECT

Applicant

v

THE DIRECTOR OF PUBLIC PROSECUTIONS, COLIN WILLIAMS

First Respondent

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES, JUDITH JONES-MORGAN

Second Respondent

THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES, SONIA YOUNG

Third Respondent

Appearances: Mr. Emery Robertson, Mrs. Kay Bacchus-Browne and Ms. Sharon Cummings for the Applicant. Ms. Nicole Sylvester absent.
Sir Richard Cheltenham Q.C., and Mr. Stephen Williams for the First Respondent.
Mr. Anthony Astaphan S.C. and Mr. Grahame Bollers for the Second Respondent.
Mr. Parnell Campbell Q.C. and Ms. Roxanne Knights for the Third Respondent.

2008: February 14, and 28
March 11

JUDGMENT

[1] **THOM, J**: This is an application by Police Constable Michelle Andrews for leave to apply for an order for judicial review of the decision of the Director of Public Prosecutions to take over the two private criminal complaints filed by her and to discontinue the said criminal complaints and the decision of the Chief Magistrate that a nolle prosequi having been filed by the Director of Public Prosecutions there was no longer a viable matter before the court and that the date on the summons in relation to the said complaints were vacated.

BACKGROUND:

[2] The Applicant is a Police Officer who on January 3, 2008 was attached to the Special Services Unit of the Royal Saint Vincent and the Grenadines Police Force. On January 3, 2008 she was detailed to perform security duties at the Prime Minister's residence. The Applicant alleges that while she was performing such duties she was indecently assaulted and raped by Dr. Ralph Gonsalves the Prime Minister of Saint Vincent and the Grenadines. She made a report to her superior Superintendent Charles on the same day and on the following day January 4, 2008 she made a report to the Commissioner of Police.

[3] No criminal charges having been brought against the Prime Minister, on January 26, 2008 the Applicant's Attorneys wrote to the Commissioner of Police requesting him to investigate the Applicant's report.

[4] On January 3, 2008 the Commissioner of Police responded to the Applicant's Attorneys indicating that the matter was investigated and the investigations did not reveal any evidence of wrong-doing by Dr. Gonsalves. The Commissioner invited the Applicant's Attorneys to produce any evidence they may have in relation to the Applicant's report.

[5] On January 31, 2008 the Applicant filed two private criminal complaints being:

(a) indecent assault contrary to Section 127 (1) (b) of the Criminal Code Chapter 124 of the Revised Laws of Saint Vincent and the Grenadines.
(b) rape contrary to Section 123 (1) of the Criminal Code Chapter 124 of the Revised Laws of Saint Vincent and the Grenadines.

[6] On February 1, 2008 the Director of Public Prosecutions wrote to the Attorney for the Applicant Mrs. Kay Bacchus-Browne informing her that the Applicant had not provided a statement to the Police even though the Police were informed that a statement would be provided. The Director of Public Prosecutions requested the Applicant's Attorney to provide a copy of the statement and any other evidence which the Applicant had in support of the accusations by midday on February 4, 2008 to the Commissioner of Police or to him directly. It is not disputed that this letter was received by the Applicant's Attorney on February 4, 2008.

[7] On February 4, 2008 the Applicant's Attorney responded to the Director of Public Prosecution indicating that the Applicant had filed private criminal complaints and they could not accede to his request.

[8] On the said February 4, 2008 the Director of Public Prosecutions wrote to the Chief Magistrate informing her that he was taking over the two private criminal complaints filed by the Applicant and on the said day the Director of Public Prosecutions filed notice of discontinuance in relation to the said complaints.

[9] On February 8, 2008 the Applicant applied for leave for an order for Judicial Review of the decisions of the Director of Public Prosecutions to take over the said criminal complaints and to discontinue same.

[10] On February 14, 2008 the Chief Magistrate wrote to the Attorney for the Applicant indicating that a Nolle Prosequi was entered by the Director of Public Prosecutions and as a consequence there was no longer a viable matter before the Court and that the date of the summons had been vacated.

[11] On February 18, 2008 the Application was amended to include inter alia leave for an order of Judicial Review of the decision of the Magistrate as contained in her letter dated February 14, 2008.

GROUNDS OF THE APPLICATION:

[12] The grounds pleaded by the Applicant are:

(a) The decision to take over is unconstitutional made without due process of law and contrary to Section 64 of the Constitution and Section 67 of the Criminal Procedure Code.

(b) The decision to take over is ultra vires the powers of the Director of Public Prosecutions or alternatively it was an arbitrary irregular and procedurally improper exercise of the powers of office of the Director of Public Prosecutions and is contrary to law.

(c) The decision to enter a nolle prosequi is in breach of Sections 64 of the Constitution and Section 67 of the Criminal Procedure Code and made without due process, unreasonable, irrational, erroneous in law, illegal and an improper, biased and or perverse exercise of such powers or discretion.

(d) The Applicant had a legitimate expectation that the private criminal complaints purportedly taken over by the Director of Public Prosecutions would have been continued.

(e) The decision to take over and to enter a nolle prosequi contravened Sections 1, 8 and 13(2) of the Constitution.

(f) The Nolle Prosequi is a nullity since it can only be effected after the preferment of an indictment, discontinuance could only be effected in a court of law and further the matter having commenced in the Magistrate Court, under Section 67, the Director of Public Prosecution could only issue an intention to discontinue, the Magistrate had to discharge the accused person.

(g) There was procedural impropriety, there was a breach of the rules of natural justice in that the decision of the Director of Public Prosecution was tainted with bias and the Applicant was not given a fair hearing.

(h) Under Section 64 of the Constitution the Director of Public Prosecution can take over and continue criminal proceedings but he cannot take over criminal proceedings to discontinue them.

(i) The reasons given by the Director of Public Prosecution for his decision to take over and discontinue the proceedings show that the Director of Public Prosecution misconstrued Section 123 of the Criminal Code, he applied the wrong evidential test and there was sufficient evidence disclosed upon which a proper inquiry ought to have been conducted.

(j) The Chief Magistrate acted in excess of her jurisdiction or usurped the jurisdiction of the President of the Family Court when she issued the letter of February 14, 2008.

(k) The Chief Magistrate had no power to give effect to the nolle prosequi other than in a court of law; her actions were therefore null and void.

(l) The Chief Magistrate erred in law in not affording the Applicant an opportunity to address her on the effect of the purported nolle prosequi.

SUBMISSIONS:

[13] Learned Counsel for the Applicant referred the court to Part 56 of CPR 2000 and submitted that the Applicant had satisfied all of the requirements for the grant of leave. A sufficient interest had been shown by the Applicant to justify granting leave.

[14] There was no delay in making the application, the decisions of the Director of Public Prosecutions complained of were made on the 4th February 2008 and the application for leave was made on February 8, 2008. The decision of the Chief Magistrate is dated February 14, 2008 and the application was amended accordingly to include the Chief Magistrate on 18th February 2008. There was no alternative form of redress available to the Applicant. Section 69 of the Criminal Procedure Code gives the Applicant the right to institute private criminal complaints while Section 70 and 71 set out the procedure. These procedures were followed by the Applicant in instituting the two criminal complaints against Dr. Gonsalves.

[15] Learned Queen's Counsel for the Respondents submitted that the grounds on which an applicant can seek permission for judicial review of the decision of the Director of Public Prosecutions are limited. The grounds are those outlined in the case of ***Matalulu v Director of Public Prosecutions*** and ***Sharma v Browne-Antoine***. The test to be applied by the court on an application for leave is the test as stated by the Privy Council in ***Sharma's*** case. The Applicant has failed to show that she has a reasonable prospect of success on any of the grounds mentioned in the cases of ***Matalulu*** and ***Sharma***. The Applicant's application does not disclose any permissible or arguable grounds for judicial review.

[16] The Applicant never provided a statement or any evidence to the Police or the Director of Public Prosecutions even though requested to do so by the Director of Public Prosecution.

While the Applicant in her affidavit deposed that she visited and was examined by doctors, no medical report was submitted to the Police or to the Director of Public Prosecutions.

[17] Under Section 64 of the Constitution the Director of Public Prosecutions is empowered to discontinue any criminal proceedings at any stage before judgment, see ***Tappin v Lucas***, ***Sylvester v McDowall*** and ***Matalulu v Director of Public Prosecutions***. There is no issue of jury direction of the Magistrate since there is no judicial function to be performed by the Magistrate, the discharge of the accused is by operation of law which follows when the Director of Public Prosecutions issues a Nolle Prosequi.

LAW:

[18] The powers of the Director of Public Prosecutions in relation to criminal prosecutions are outlined in Section 64 of the Constitution of Saint Vincent and the Grenadines. The relevant provisions are subsections (2), (3), (4) and (6). Section 64 reads as follows:

> "(2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –
>
> (a) to institute and undertake criminal proceedings against any person before any court of law (other than a court martial) in respect of any offence alleged to have been committed by that person;
> (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
> (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.
>
> (3) The powers of the Director of Public Prosecutions under subsection (2) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.
>
> (4) The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (2) of this section shall be vested in him to the exclusion of any other person or authority:
>
> Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the

withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(5) ------

(6) In the exercise of the powers vested in him by subsection (2) of this section and section 42 of this Constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[19] It is settled law and counsel on both sides agree that a decision of the Director of Public Prosecutions made pursuant to section 64 of the Constitution is subject to judicial review.

[20] In ***Matalulu's*** case the court in considering Section 114(4) of the Constitution of Fiji which is in similar terms to section 64 of the Constitution of Saint Vincent and the Grenadines stated the grounds on which the Director of Public Prosecutions' decision could be reviewed as follows:

"(1) In excess of the Director of Public Prosecutions' 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 Director of Public Prosecutions 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 Director of Public Prosecutions were to act upon a political instruction the decision could be amenable to review.

(3) In bad faith, for example dishonesty. An exampled 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 Director of Public Prosecutions 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 Director of Public Prosecutions 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.

A mistaken view of the law upon which a proposed prosecution is based will not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced. Where a complaint is particularized in such a way as to raise the question of law for determination it may be struck out or where an indictment does the same, the indictment may be quashed. Such an error of law does not fall within the category of an error of law which goes to the Director of Public Prosecution's powers to prosecute.

Where the Director of Public Prosecutions decides to discontinue a prosecution on the basis of a mistaken view of the law then, by definition, there is no court proceeding within which that view can be tested and it may be, a stronger case for review can be made. In ***R v Director of Public Prosecutions ex p Kebeline*** (2000) 3 LRC 377 at 420 Lord Steyn stated, as a general principle, that in the case of a decision not to prosecute, judicial review is available. His Lordship cited ***R v Director of Public Prosecutions exp. C*** [1995] 1 Cr. App. R. 136 observing that in such a case there is no other remedy. That however, was a case in which the Crown prosecutor acting on behalf of the Director of Public Prosecutions in making the decision not to prosecute, had failed to comply with the settled policy of the Director of Public Prosecutions set out in a Code for Crown Prosecutors issued by the Director of Public Prosecutions pursuant to Section 10 of the Prosecution of Offences Act 1985. It was nevertheless accepted by the Divisional Court in that case that the power to review a decision of the Director of Public Prosecutions not to prosecute was to be sparingly exercised.

Again an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the Director of Public Prosecution's power or vitiates the proper exercise of the Director of Public Prosecution's discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The Director of Public Prosecutions is empowered to make such judgments even though they may be wrong on law or mistaken on the facts."

[21] In **Leonie Marshall v Director of Public Prosecutions** P.C. A. No, 2 of 2006 Lord Carswell in delivering the decision of the Privy Counsel stated at Paragraph 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] UK PC 57, paragraph 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] UK PC 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. The approach subsumes concerns about separation of powers."

[22] Counsel on both sides agree that the test to be applied by the Court on an application for leave is the test as stated by the Privy Council in ***Sharma's*** case. The Court stated the test in the following terms:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: ***R v Legal Aid Board, Exp Hughes*** (1992) 5 Admin LR 623, 628; Fordham ***Judicial Review*** Handbook, 4th ed. (2004) p. 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the crime standard of proof in ***R (N) v Mental Health Review Tribunal*** (Northern Region) [2005] EWCA Civ 1605, {2006] QV 468 paragraph 62 in a passage applicable mutatis mutendis to arguabliltiy.

> "…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability) but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."
>
> It is not enough that a case is potentially arguable. An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen: ***Matalulu v Director of Public Prosecutions*** (2003) 4 LRC 712, 733."

[23] While the courts have repeatedly stated that judicial review of prosecutorial decisions is a highly exceptional remedy, decisions not to prosecute have been successfully challenged in a number of cases such as ***Mohit v Director of Public Prosecutions of Mauritius*** [2006] UK PC 20, ***R v Director of Public Prosecutions exp. C*** [1995] 1 Cr. App. R 36, and ***R v Director of Public Prosecutions, Ex parte Manning and another*** [2001] QB p. 330. In ***Mannings's*** case Lord Bingham stated at paragraph 23:

> "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. 135. 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. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their

> task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. 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 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."

[24] I will apply the above mentioned principles to this case.

[25] I will deal first with the grounds relating to the decisions of the Director of Public Prosecutions.

The Director of Public Prosecutions' power under Section 64 of the Constitution

[26] Learned Counsel for the Applicant submitted that the Director of Public Prosecutions had no authority under Section 64 to take over and discontinue a private criminal prosecution. The Director of Public Prosecutions could only take over and continue, but not take over to discontinue.

[27] The powers of the Director of Public Prosecutions under Section 64 of the Constitution were reviewed by the Eastern Caribbean Court of Appeal in ***Sylvester v McDowall*** and similar provisions were reviewed in ***Tappin v Lucas*** and ***Matalulu v Director of Public Prosecutions***. All of the cases have determined that the powers of the Director of Public Prosecutions under Section 64 are separate and distinct. The Director of Public Prosecutions can discontinue any criminal proceedings at any stage before judgment. There is no need for the Director of Public Prosecutions when he takes over a private prosecution to continue the proceedings before he discontinues it.

[28] In ***Sylvester v McDowall*** the issue was whether before the Director of Public Prosecutions could discontinue under Section 64(2) (c) of the Constitution the private criminal proceedings instituted by the Respondent he was first obliged to take them over and continue them under Section 64(2) (b). The court in holding that the powers in Section 64 are separate and distinct and are to be exercised independently of each other stated at p. 173 – 174 as follows:

> "The criminal proceedings in respect of which the Director of Public Prosecutions may exercise his powers under paragraphs (a), (b) and (c) of S. 64 (2) are the same in each case. They are "criminal proceedings against any person in respect of any offence alleged to have been committed by that person." But although the subject matter of the exercise of the Director of Public Prosecutions' powers under each paragraph of Section 64 (2) is the same, the powers themselves are different. In the first case he may institute proceedings, in the second case he may take over and continue such proceedings and finally he may discontinue the said proceedings. These powers are separate and distinct and are to be exercised independently of each other. In our view therefore on a true construction of Section 64 (2) of the Constitution it would be wrong and unnecessary for the Director of Public Prosecutions first to take over and continue criminal proceedings instituted by someone other than himself in order to discontinue the said proceedings."

[29] The Court was in agreement with the decision in ***Tappin v Lucas***. In ***Tappin's*** case the Guyana Court of Appeal considered the Director of Public Prosecution's powers under Article 47 of the Constitution of Guyana which is similar to Section 64 of the Constitution of Saint Vincent and the Grenadines. The issue was whether it was not necessary first for the Director of Public Prosecutions to take over the private criminal proceedings before discontinuing them Bollers CJ stated at p. 234:

> "In relation to the second point we are of the view that subsections (2) (a) and (b) of Article 47, which set out the powers of the Director of Public Prosecutions, are mutually exclusive, and that subsection (2) (c) telescopes the powers of the Director of Public Prosecutions as enacted in (a) and (b). In other words, under (c) the Director has power to discontinue any criminal proceedings instituted and undertaken by him under (a) or taken over and undertaken by him under (b). Under (b) he has the power to take over and continue criminal proceedings instituted by any other person or authority, which means a private prosecution, and therefore under (c) the clear and unambiguous meaning of the language used must be that he has the power to discontinue those proceedings at any stage before judgment is delivered. We cannot agree with the submission that the

Director must first take over the proceedings before he seeks to discontinue them as there is nothing in the language used in the Article to suggest that, and there is no procedure laid down in relation to his power to discontinue proceedings."

[30] Under Section 64 the Director of Public Prosecutions may discontinue at any stage before judgment. I agree that it was not necessary for the Director of Public Prosecutions to take over the complaints before he discontinued them. However, having taken them over, under Section 64 he was empowered to discontinue them at any time before judgment.

[31] I find that there is no realistic prospect of this ground succeeding if leave is granted.

Discontinuance can only be effected by a Court of Law.

[32] Learned Counsel for the Applicant submitted that the notice of discontinuance was a nullity. The matter having being commenced in the Magistrate's Court, and the Magistrate having issued a summons to the accused, under Section 67 of the Criminal Procedure Code the Director of Public Prosecutions could only issue an intention to discontinue and it is the Magistrate who had to discharge the accused person.

[33] Learned Queen's Counsel for the Respondents submitted in response that the power to discontinue is vested in the Director of Public Prosecutions under Section 64 of the Constitution. Section 67 sets out the institutional framework. Learned Queen's Counsel referred the Court to **Matalulu's case** at p. 724.

[34] Section 67 of the Criminal Procedure Code reads as follows:

> "(1) In any proceedings against any person and at any stage thereof before verdict or judgment as the case may be the Director of Public Prosecutions may enter a nolle prosequi either by stating in court or by informing the court in writing that the Crown intends that the proceedings whether undertaken by himself or by any other person or authority, shall not continue and thereupon the accused person shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizance shall be discharged, but such discharge of an accused shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

(2) If the accused is not before the Court when such nolle prosequi is entered, the Registrar or the Clerk of such court as the case may be, shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the officer in charge of the prison in which such accused may be detained and also if the accused person has been committed for trial to the Magistrate's court by which he was so committed and the Clerk thereof shall forthwith cause a similar notice in writing to be given to any person bound over to prosecute or give evidence and to their sureties (if any) and also to the accused and his sureties in case he shall have been admitted to bail.

(3) ------

(4) ------"

[35] In **Matalulu's case** the Court in reviewing section 71 (1) of the criminal procedure code of Fiji which is in the same terms as Section 67(1) stated at p. 724:

> " …….Having regard to the primary power of the DPP conferred by the constitution, to discontinue criminal proceedings, the provisions of the Criminal Procedure Code may be seen as ancillary to its exercise. It is not disputed that the power to discontinue encompasses the entry of a nolle prosequi.

[36] Section 67 simply restates the power of the Director of Public Prosecutions to discontinue any criminal proceedings at any stage before judgment and sets out the manner in which the decision of the Director of Public Prosecutions under Section 64 of the Constitute to discontinue proceedings is to be communicated to the Court and the procedure to be followed by the Court on receipt of the decision of the Director of Public Prosecutions. If the accused person is not present in court when the nolle prosequi is received, there is no requirement for the accused person to be brought before the court to be discharged by the Magistrate. A notice is to be sent to the accused person notifying him that a nolle prosequi has been entered. There is no requirement for the Magistrate to send a similar notice to a person who had instituted private criminal proceedings in relation to which a nolle prosequi had been entered. Nonetheless in this case the Magistrate by letter of February 14, 2008 notified Learned Counsel for the Applicant that a nolle prosequi had been entered. In view of the above I also find that there is no realistic prospect of this ground succeeding.

Nolle Prosequi only after preferment of Indictment.

[37] Learned Counsel for the Applicant submitted that the Director of Public Prosecutions could only enter a nolle prosequi after he had preferred an indictment thus the purported nolle prosequi is a nullity.

[38] The courts in ***Sylvester v McDowall***, ***Tappin v Lucas*** and ***Matalulu v Director of Public Prosecutions*** all determine that the Director of Public Prosecutions may discontinue criminal proceedings at any stage before judgment. This is also stated in Section 67 of the Criminal Procedure Code. There is no realistic prospect of this ground succeeding.

Legitimate Expectation

[39] In her application the Applicant pleaded at paragraph 15 of the grounds as follows:

> "The Applicant who has had to pursue her rights independently of the Police Force has not had the opportunity to pursue the Private Criminal Complaints in respect of these matters. The Applicant had a legitimate expectation that the Private Criminal Complaints would be dealt with before a court of competent jurisdiction where issues of criminal wrongdoing and innocence or guilt would be adjudicated upon."

[40] It is agreed by Counsel on both sides that the Applicant has a right to institute private criminal proceedings. It cannot be disputed that the Applicant's right to institute criminal proceedings is subject to the powers of the Director of Public Prosecutions under Section 64 of the Constitution to take over such private criminal proceedings and continue them or discontinue such criminal proceedings. In ***Matalulu*** the Court in considering Section 78 of the Criminal Procedure Code of Fiji which is in similar terms to Section 70 of the Criminal Procedure Code of Saint Vincent and the Grenadines said:

> "Also of importance is Section 78 of the Criminal Procedure Code, which provides for the laying of a complaint of the commission of an offence by any person and so encompasses the initiation of private prosecution. This is however subject to the constitutional power of the Director of Public Prosecutions to take over and discontinue such a prosecution. In that sense the Director of Public Prosecutions is empowered to regulate access to the criminal justice process."

[41] I agree with the submission of Learned Queen's Counsel for the Respondents that any expectation which the Applicant may have had was subject to the constitutional power of the Director of Public Prosecutions to discontinue such proceedings. This ground also has no realistic prospect of success.

Bias and Bad Faith.

[42] The Applicant in her application alleged that there is implied bias or the very likelihood of bias in the actions of the Director of Public Prosecutions given his historical political affiliation to the accused and the Unity Labour Party and that the Director of Public Prosecutions exercised his powers unreasonably and improperly in all the circumstances and the said actions were reviewable.

[43] Learned Counsel for the Applicant submitted that the court must infer bad faith from the actions of the Director of Public Prosecutions when he gave the Applicant an ultimatum to provide the statement by midday of February 4, 2008 when the letter was received the morning of February 4, 2008. After the statement was not provided by midday the Director of Public Prosecutions purported to take over and discontinue the proceedings.

[44] Learned Counsel for the Applicant also submitted that demand by the Director of Public Prosecutions for the provision of a statement within two hours showed the Director of Public Prosecutions had fettered his discretion by a rigid policy.

[45] I agree with the submission of Learned Counsel for the Respondents that in this case there is no basis for the allegation of bad faith or bias. The matters referred to existed prior to the appointment of the Director of Public Prosecutions by the Governor General acting on the advice of the Judicial and Legal Services Commission. In ***Spencer v The Attorney General of Antigua and Barbuda*** [1999] 3 LRC p. 1, the Court of Appeal stated that allegations of bad faith pleaded in vague and unparticularized terms were an abuse of the

process of the Court. In this case also the allegation of bad faith was indeed vague and unparticularized.

[46] There is no basis for the submission by Learned Counsel for the Applicant that the Director of Public Prosecutions has a policy that statements must be provided within two hours.

[47] I find that a request for evidence of the commission of an offence within a specified time after private criminal complaints had been filed cannot be considered to be done in bad faith.

Sections 1, 8 and 13(2) of the Constitution.

[48] The Applicant in her application alleged that the actions of the Director of Public Prosecutions in taking over and discontinuing the criminal complaints were in contravention of Sections (1), (8) and (13) (2) of the Constitution of Saint Vincent and the Grenadines.

[49] I agree with the submission of Learned Queen's Counsel for the Respondents that Section 1 is not an enforceable provision. Section 16 of the Constitution provides for the enforcement of Sections 2 to 15 inclusive only - See the case of ***Olliver v Buttigieg.*** Section 8 is irrelevant as it relates to a person who is charged with a criminal offence. Section 13 (2) must be read in conjunction with Section 13 (3) which defines "discriminatory". Having examined the Applicant's pleadings on this ground I find no allegation of discrimination in the sense in which discrimination is described in the Constitution of Saint Vincent and the Grenadines.

[50] I find there is no merit in the Applicant's claim of contravention of Sections (1), (8) and (13) (2) of the constitution.

Reasons for the Decisions

[51] Learned Counsel for the Applicant submitted that the Director of Public Prosecutions in his reasons for his decisions to take over and discontinue the criminal proceedings misdirected himself and took into account irrelevant considerations.

[52] Learned Counsel referred to the reasons by the Director of Public Prosecutions where he stated:

> "The Commissioner of Police provided me with a file containing a number of statements including an eye witness to the Prime Minister's activities that morning and others from several police officers with whom she spoke and told them variously that the Prime Minister kissed her, or tried to rape her. None said she reported she was raped."

[53] Learned Counsel submitted that the Director of Public Prosecutions seemed to have ignored subsection 4 of Section 123 of the Criminal Code which defines "rape offences" to include "attempted rape". Further the report related to two separate offences indecent assault and medical evidence is not required to prove either of the offences. The Director of Public Prosecutions applied the wrong evidential test. Learned Counsel referred the Court to the cases of ***R v Guilford Magistrate*** [2006] EWHC 2318 and ***Exp. Duckenfield*** (2000) 1 WLR p. 55. There was sufficient evidence disclosed upon which a proper inquiry ought to have been conducted.

[54] In response Learned Queen's Counsel submitted that there is no basis to challenge that the Director of Public Prosecutions' reasons are irrational or perverse and the Applicant has not sought to do so. Learned Queen's Counsel submitted further that the question as to whether or not there was sufficient evidence is a matter for the Director of Public Prosecutions not the Court. The alleged sufficient evidence has not been pleaded, particularized or identified. There is no plea or evidence to show that "sufficient evidence" was brought to the attention of the Director of Public Prosecutions and in bad faith, fraudulently or corruptly he deliberately ignored it. Further, the Applicant failed to provide a statement and or sufficient evidence capable of supporting or establishing the allegations to the Commissioner of Police or the Director of Public Prosecutions when requested so to

do. Section 123 of the Criminal Code is not relevant. The Director of Public Prosecutions was referring to the inconsistent and contradictory statements made by the Applicant.

[55] While there are no constitutional or statutory requirements for the Director of Public Prosecutions to give reasons for his decisions made pursuant to Section 64 of the Constitution when reasons are given these reasons could be challenged. In **Exp. Manning** the Court quashed the decision of the Director of Public Prosecutions not to prosecute where the reasons given showed that Counsel who dealt with the case did not correctly apply the Crown Prosecution Code.

[56] Having reviewed ***R. v Guilford Magistrate*** and ***Exp. Duckenfield***, I do not agree with Learned Counsel for the Applicant that the Director of Public Prosecutions applied the wrong evidential test in finding that there was not sufficient evidence to establish the offences of rape and indecent assault.

[57] The cases of ***R v Guilford Magistrate*** and ***R v Duckenfield*** acknowledged the right of a citizen to institute private criminal proceedings. The cases also recognized that the Crown Prosecutions Services was required to apply the provisions of the Code for Crown Prosecutors in determining whether to prosecute or not to prosecute. However a private person is not so bound and therefore the Court may issue a summons for private prosecution where the Crown Prosecution services have discontinued proceedings on the same facts.

[58] The cases do not decide that if the Crown Prosecution Services having reviewed the evidence determines that there is clearly no case to answer the Director of Public Prosecutions could not discontinue private criminal proceedings. In ***Duckenfield's*** case at page 68 letter F – H Laws LJ said:

> "The clearly no case to answer test".
>
> The argument here is that such a test is impermissibly rigid. It is said that the policy excludes any assessment of evidential deficiencies and so amounts to an unlawful fetter of the Director of Public Prosecutions' discretion and that it also leads to a distorted evaluation of the public interest factors. In my judgment the

> test involves no unlawful fetter of discretion. It is plain from the formulation "there is clearly no case to answer" that the Director of Public Prosecutions only intends to stop private prosecutions on this ground where no reasonable decision maker could conclude that there was sufficient evidence for the case to go forward. That seems to me to be a perfectly proper approach. Such a prosecution could offer no legitimate benefit to anyone and would potentially at lease, be an abuse of the process of the court. The test rightly identifies a class of case which should always be stopped."

[59] I agree with the submissions of Learned Queen's Counsel for the Respondents. This ground has no realistic prospect of success.

The Chief Magistrate acted in Excess of Her Jurisdiction.

[60] Learned Counsel for the Applicant submitted that the Magistrate acted in excess of her jurisdiction or usurped the jurisdiction of the President of the Family Court when she determined that as a consequence of the Director of Public Prosecutions having entered a nolle prosequi there was no viable matter before the court and purported to vacate the date of the summons issued on January 31, 2008.

[61] Learned Counsel for the Applicant referred the Court to the Family Court Act No. 53 of 1992 and submitted that pursuant to the said Act only the President of the Family Court had jurisdictions to deal with the two private criminal complaints since they related to sexual offences. Section 5(6) of the Act provides for the President of the Family Court to authorize any Magistrate to exercise the jurisdiction of the Family Court. The Chief Magistrate was not so authorized therefore she had no jurisdiction to carry out any directions given her by the Director of Public Prosecutions pursuant to Section 64 of the Constitution and section 67 of the Criminal Procedure Code. The Chief Magistrate should have transferred the matter to the Family Court for the President to deal with the nolle prosequi.

[62] Learned Queen's Counsel for the Respondents submitted that when the Director of Public Prosecutions enters a nolle prosequi there is no judicial function to be performed by the Magistrate only an administrative function. The Magistrate had no discretion to exercise.

The directions had to be acted on immediately. It was irrelevant which Magistrate acted on the directions of the Director of Public Prosecutions.

[63] As stated earlier Section 67 sets out inter alia the procedure to be followed by the Court on receipt of the decision of the Director of Public Prosecutions. Having reviewed Section 67 (1) and (2) there was no need for the Chief Magistrate to get authorization from the President of the Family Court before issuing a notice pursuant to Section 67.

[64] If the submission of Learned Counsel for the Applicant is correct then the complaints being in relation to sexual offences should have been made to the Family Court.

[65] In this case the nolle prosequi was entered at the very court to which the complaints were made and the summons issued. Further the nolle prosequi was entered before the accused person was required to attend court pursuant to the summons. The matter was never before the Family Court.

[66] Learned Counsel for the Applicant also submitted that the Magistrate did not afford the Applicant an opportunity to address here on the effect of the purported nolle prosequi/notice of discontinuance and without directing her mind that the proceedings were private proceedings instituted pursuant to Section 69 of the Criminal Code. Also that at no time did Dr. Gonsalves appear in Court to answer any charges or to be discharged by the Court. The Magistrate's action in vacating the date set for hearing of the complaints was illegal, null and void.

[67] Having regard to the provisions of Section 67 which were discussed earlier in this judgment, I find that the submissions of Learned Counsel for the Applicant have no merit. The Magistrate has no jurisdiction to hold any hearing after a nolle prosequi is entered. Under Section 67 (2) there was no requirement for Dr. Gonsalves to appear in Court to be discharged. Further the nolle prosequi was entered before the date stated in the summons for him to appear in court.

[68] In conclusion having reviewed the pleadings in this matter and the submissions made on behalf of the Applicant by Learned Counsel and the submissions made by Learned Queen's Counsel on behalf of the Respondents I find that there are no arguable grounds for judicial review having a realistic prospect of success.

[69] The application is dismissed.

COSTS:

[70] Learned Senior Counsel for the Attorney General urged the Court to award costs against the Applicant and or her Attorneys, having regard inter alia to the conduct of the Applicant and her Attorneys prior to and by the filing of the Application for leave which provide strong and compelling evidence of a flagrant abuse of the process of the Court.

[71] Learned Counsel for the Applicant submitted that on an application for Judicial Review costs in not awarded by the Courts.

[72] This case concerns an application for an administrative order. The general rule as stated in Part 56.13(6) of CPR 2000 is that no order for costs may be made against an applicant for an administrative order unless the Court considers that the Applicant has acted unreasonably in making the application or in the conduct of the application.

[73] Having regard to the background of this case which I outlined earlier in this judgment, I do not find that the Applicant acted unreasonably in making the application or in the conduct of the application.

[74] I will therefore make no order as to costs.

.....
Gertel Thom
HIGH COURT JUDGE