SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2008/003

Amended Pursuant to Leave Granted by the Honourable Madam Justice Gertel Thom on 14th February, 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 Chapter 125 of the Laws of Saint Vincent & the Grenadines Revised Edition 1990

And in the matter of an Application by Michelle Andrews for leave to apply for an order for Judicial Review of the decision of the 4th February, 2008 by The Director of Public Prosecutions to take over the Prosecution of Private Criminal Complaints Nos. 61/08 brought by Michelle Andrews against the Honourable 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 In 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 Director of Public Prosecutions purporting to take over The Prosecutions of 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 PC 16 OF NEW PROSPECT

Appellant

and

[1] THE DIRECTOR OF PUBLIC PROSECUTIONS
[2] THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES, JUDITH JONES-MORGAN
[3] THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES, SONIA YOUNG

Respondents

Application for leave to appeal the decision of the Honourable Madam Justice Gertel Thom given on Tuesday 11th March, 2008 refusing leave for Judicial Review and for orders that the application herein be treated as the appeal and that the appeal herein be expedited and for certain consequential directions.

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Dane Hamilton, QC	Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Emery Robertson, Mrs. Kay Bacchus-Browne, Ms. Nicole Sylvester and Ms. Sharon Cummings for the Appellant
Sir Richard Cheltenham, QC and Mr. Stephen Williams for the first respondent
Mr. Anthony Astaphan, SC and Mr. Grahame Bollers for the second respondent
Mr. Parnell Campbell, QC and Ms. Roxanne Knights for the third respondent

2008: May 19
July 14

Civil Appeal – Judicial Review – whether leave should be granted - whether there is a real prospect of success - whether there are other compelling reasons why leave should be granted - Constitutional powers of the Director of Public Prosecutions – Notice of Discontinuance - Nolle Prosequi - whether the DPP had constitutional authority to discontinue the complaints -

The appellant appealed against the decision in the court below refusing leave to apply for judicial review. The appellant applied for judicial review against the decisions of the Director of Public Prosecutions, to take over two private criminal complaints filed by the appellant and secondly to discontinue those complaints. The appellant alleged that she was indecently assaulted and raped by the Prime Minister while she was on security duty at his residence. The Prime Minister denied this allegation. She further challenged the filing of a Nolle Prosequi which in effect withdraws her matter before the court.

Held:

Refusing the application and making no order as to costs in accordance with Part 56.13(6) CPR 2000:

1. That section 64(2)(a)(b)(c) of the Constitution of Saint Vincent and the Grenadines gives the Director of Public Prosecutions the constitutional authority to discontinue private criminal complaints instituted in the Magistrate's Court.

   Tappin v Lucas (1973) 20 WIR 229 and Matalulu and Another v DPP [2003] 4 LRC 712 cited

2. That there were no valid reasons why the appellate court would disturb the trial judge's decision to refuse the application for leave for judicial review. The applicant failed to provide the statement and other evidence within her possession and knowledge to substantiate her claim. Therefore the court saw no merit in her claim and that the substantial appeal has no real prospect of success.

   Swain v Haillman (2001) 1 All ER 91 cited.

JUDGMENT

[1] CHONG J.A. [Ag.]: This is an application by the applicant seeking leave to appeal the decision of the Honourable Madam Justice Gertel Thom delivered on the 11th March, 2008 refusing leave to apply for Judicial Review in respect of two decisions. One decision sought to be challenged was the decision of the Director of Public Prosecutions to take over the two private criminal complaints filed by the Applicant and to discontinue the said criminal complaints. The other decision sought to be challenged was that 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 was vacated.

[2] At the beginning of the hearing counsel for the applicant abandoned their earlier request to treat this application as the Appeal. In order to arrive at a decision whether to grant or refuse leave my mind will be guided by the following considerations.

> "(i) Whether if leave is granted the substantive appeal would have a real prospect of success, or
>
> (ii) Whether there is some other compelling reason why the appeal should be heard."[1]

[3] In examining the above considerations close attention will be paid to the following:

(a) the facts;

(b) the constitutional powers of the Director of Public Prosecutions, the exercise of which is the subject matter of the applicant's application for Judicial Review;

(c) the decision to Nolle Prosequi;

(d) the real prospect of success of the substantive appeal;

[1] Blackstone's Civil Practice 2008 page 983, 984

(e) any other compelling reason why leave should be granted.

[4] Facts:

(1) The applicant is a police officer who on 3rd January 2008 was attached to the Special Services Unit of the Royal Saint Vincent and the Grenadines Police Force. On that date 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 4th January 2008 she made a report to the Commissioner of Police.

(2) No criminal charges having been brought against the Prime Minister, on 26th January 2008 the applicant's Attorneys wrote to the Commissioner of Police requesting him to investigate the applicant's report.

(3) On 31st January 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.

(4) Background facts leading up to Director of Public Prosecutions decision to take over and discontinue:

(i) On the 30th January, 2008 upon the receipt of a copy of a letter dated 29th January, 2008 addressed to the Commissioner of Police, the Director of Public Prosecutions questioned the Commissioner of Police who confirmed that he had conducted an investigation and had collected approximately 12 statements from several

police officers in relation to the applicant's matter. These statements were forwarded to the Director of Public Prosecutions.

(ii) All of the statements including a written statement sent by Dr. Ralph Gonsalves to the police in which he categorically denied any wrongdoing were received and studied by The Director of Public Prosecutions who after said review followed up with a Memorandum dated 31st January, 2008 to the Commissioner of Police in which he noted among other things, that:

"There is no signed statement (in fact no statement) from Constable Andrews. While the letter from counsel makes allegations, this cannot be a substitute for an official statement from the alleged victim. Although there are persons who state that the constable does not want any publicity that cannot in my view be a consideration and she should be asked to provide a detailed statement. Also, do the police have any medical report, or a statement from the doctor? This is needed."

(iii) In a subsequent follow-up to this memorandum in respect of the written statement, the Director of Public Prosecutions was informed by the Commissioner of Police that:

(a) The applicant had informed him that she did not wish to file any proceedings;

(b) The applicant was asked to prepare a report which she had not done;

(c) Notwithstanding the applicant's stated position to the Commissioner of Police, he had instructed Superintendent

Charles to obtain statements from all officers and the Deputy Commissioner of Police to obtain a statement from the applicant;

(d) With respect to the applicant's statement the Deputy Commissioner of Police informed the Commissioner of Police that the Applicant indicated that she was advised by her counsel not to speak to the police in the absence of her lawyer. The Attorney, Mrs. Kay Bacchus Browne (one of the Attorneys representing the Applicant) indicated that they would submit a written statement for the applicant.

(5) On 31st January 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 1st February 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 4th February 2008 to the Commissioner of Police or to him directly. The letter of 1st February 2008 was received by the applicant's attorney on 4th February 2008.

(7) On 4th February 2008 the applicant's attorney responded to the Director of Public Prosecutions indicating that the applicant had filed private criminal complaints and they could not accede to his request. From the above facts it is clear that:

(i) The police had conducted investigations in the matter and this was communicated to the applicant's attorney by letter dated January 31, 2008. Further, the Commissioner of Police in the same letter invited the applicant's attorneys to produce any evidence they may have in relation to the applicant's report.

(ii) The Director of Public Prosecutions had in his possession all the evidence available including some 12 statements from police officers in this matter prior to his decision to take over and discontinue the complaints.

(8) On the said 4th February 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 8th February 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 14th February 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 18th February 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.

Constitutional Power Of The Director Of Public Prosecutions

[5] Section 64 of the Constitution of St. Vincent & the Grenadines provides:

"(1) There shall be a Director of Public Prosecutions whose office shall be a public office.

(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 subsections (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) For the purposes of this section, any appeal from a judgment in criminal proceedings before any court or any case stated or question of law reserved for the purpose of any such proceedings, to any other court (including Her Majesty in Council) shall be deemed to be part of those proceedings:

Provided that the power conferred on the Director of Public Prosecutions by subsection (2) (c) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person.

(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."

[6] From a reading of the above Section (in particular s.64(2)(a), (b) and (c)) it is clear and without question that the Director of Public Prosecutions has the constitutional authority to discontinue private criminal complaints instituted in the Magistrate's Court, in this case, Criminal Complaints Nos. 61/08 and 62/08 filed by the applicant on the 31st January, 2008 at the Magistrate's Court, Kingstown (hereinafter referred to as "the Complaints")

[7] This view finds support in the case of Tappin v Lucas[2]. In delivering the judgment of the Court on provisions in identical terms to those in section 64 (2)(b) and (c) – Bollers CJ had this to say:

> "Under b. he (i.e. the DPP) 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 had the power to discontinue those proceedings at any stage before judgment is delivered."

[2] (1973) 20 WIR 229

In other words to use the language of the court in Matalulu and Another v DPP[3] "the Director of Public Prosecutions is empowered to regulate access to the criminal justice process".

[8] The learned trial judge in her judgment after examining all the relevant cases i.e. Tappin v Lucas, Matalulu and Another v DPP, Sharma v. Brown – Antoine[4], Mohit v Director of Public Prosecutions of Mauritius[5] and others came to the right conclusion that the Director of Public Prosecutions had the constitutional authority under section 64 to discontinue the Complaints.

[9] Having established that the Director of Public Prosecutions had the constitutional authority to discontinue the Complaints, the next question is under what set of circumstances should the Court grant leave for judicial review of the exercise by the Director of Public Prosecutions of his constitutional power to discontinue the Complaints in this case.

[10] In answering this question one must bear in mind the body of case law on this point, all of which is consistent in its findings that this is a 'highly exceptional remedy' (Sharma v Brown-Antoine) and one which should be 'sparingly exercised'[6]. In R v Director of Public Prosecutions, Exp. Kelilene[7] Lord Steyn had this to say -

> "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."

[11] With this in mind we must now examine the circumstances under which the court would grant leave for judicial review of the Director of Public Prosecutions'

[3] [2003] 4 LRC 712
[4] [2006] UK PC 57
[5] [2006] UK PC 20
[6] In a matter of an Application by David Adams for Judicial Review
[7] [2000] 2AC 326 at page 371

decision to prosecute or discontinue a private prosecution. For guidance we turn to the case of Matalulu v DPP – where the Court stated:

> "It may be accepted however, that a purported exercise of power (i.e. DPP powers under Section 64) would be reviewable if it were made:
>
> 1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).
> 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.
> 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
> 5. Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specific class of offences.
>
> There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

The burden of proof rests squarely on the shoulders of the applicant to put forward a case with a real prospect of showing that the Director of Public Prosecutions acted in excess of the Director of Public Prosecution's constitutional power under Section 64 of the Constitution of Saint Vincent and the Grenadines, which in my opinion she has failed to do.

[12] Bearing in mind the Matalulu guidelines, the applicant's reasons for seeking the Court's permission to review the decision of the Director of Public Prosecutions

are as listed at pages 29 and 30 of the written submission of Counsel for the second respondent. These are as follows:

"(1) Bias and bad faith.

(2) The DPP did not act in accordance with section 64 of the Constitution or 67 of the Criminal Procedure Code.

(3) Legitimate expectation.

(4) The accused held the positions of Minister of National Security under which the Police Service falls administratively as well as the portfolio of Minister of Legal Affairs.

(5) The DPP had no statutory power to discontinue the private criminal complaints.

(6) A discontinuance can only be effected by a Court of Law.

(7) A nolle prosequi can only be effected after the preferment of an indictment.

(8) Notwithstanding the reasons given by the DPP, these reasons are clearly reviewable in that there was sufficient evidence disclosed upon which a proper inquiry ought to have been conducted.

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

[13] All the above reasons/grounds were dealt with adequately in my opinion by the learned trial judge at Pages 12 and 18 of the trial judge's judgment and I see, in the case that the appellant wishes to advance, no valid reasons for an appellate tribunal upsetting her findings. I would add the following observations in respect of the said findings.

Bad Faith

[14] The learned trial judge found at pages 17 and 18 that there was no evidence of bad faith on the part of the Director of Public Prosecutions. In the absence of strong and compelling evidence of political interference or that the Director Public

Prosecutions acted dishonestly, fraudulently or corruptly then the presumption is that the Director of Public Prosecutions acted independently and impartially.

Section 64 of The Constitution and 67 of The Criminal Procedure Code:

[15] It is clear that section 64(2)(b) and (c) of the Constitution of St. Vincent and the Grenadines empowers the Director of Public Prosecutions to take over and continue any criminal proceedings instituted by or undertaken by any other person or authority and, to discontinue at any stage before judgment is delivered any such criminal proceedings. This includes the 'take over and discontinuance of proceedings instituted by any person by private complaint. Section 67 of the Criminal Procedure Code does not in our opinion limit the power of the Director of Public Prosecutions under section 64 of the Constitution; it is merely ancillary to its exercise – see Matalulu. Under section 64 the Director of Public Prosecutions may discontinue at any stage before judgment and as recognized and accepted in Matalulu, the power to discontinue conferred by the Constitution encompasses the entry of a nolle prosequi.

Legitimate Expectation

[16] The learned trial judge rightly concluded this expectation was subject to the constitutional power of the Director of Public Prosecutions to discontinue such proceedings at any time before judgment. Therefore, when the applicant failed to provide the statement and other evidence within her possession and knowledge the applicant by her act thwarted all legitimate expectation that was reasonably within her contemplation.

[17] I can see no basis for an appellate court interring with the finding of the learned trial judge, for the reason stated at paragraph 40 page 18 of her judgment, that there was no merit in the applicant's claim of contravention of Sections 1, 8 and 13(2) of the Constitution.

[18] For all the reasons cited above I conclude that the substantial appeal has no real prospect of success. In Swain v. Hillman[8] Lord Woolf M.R. said:

> "The words no real prospect of being successful or succeeding 'do not need any amplification, they speak for themselves'. The words really distinguish fanciful prospects of success or as Mr. Bidder submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[19] Based on the law and the findings of the learned trial judge, this court can see no 'real prospect' for success of the appeal against the trial judge's decision to refuse the application for leave for judicial review of the decision of the Director of Public Prosecutions.

[20] Were this the only consideration for granting leave to appeal; leave would be refused. However consideration must also be given to what Blackstone's Civil Practice 2008 at page 984 refers to as 'some other compelling reason why the appeal should be heard'.

[21] The court must now ask itself the question whether there is "some other compelling reason" why leave to appeal should be granted, notwithstanding our findings that there is no real prospect of success which in and of itself should be a compelling reason why leave should not be granted.

[22] For my part, having read the written submissions on both sides there is no area of the law applicable to this application which has not been fully aired and I cannot help but conclude that the learned trial judge took into consideration and did address her mind to all the relevant issues before arriving at her decision in dismissing the applicant's application for leave to apply for judicial review.

[8] (2001) 1 All ER 91

[23] Be that as it may, it may be instructive under the heading 'other compelling reasons' to deal with two other reasons raised in the applicant's grounds for leave to appeal, these are:

(i) public interest element, and

(ii) the applicant's apparent feeling of injustice.

[24] On the public interest element - this is what Lord Woolf, MR in Practice Note (1999) 1 AER 186 at page 187, had to say:

> "*leave may also be given in exceptional circumstances even though the case has no real prospect of success. If there is any issue which, in the public interest, should be examined by the Court of Appeal*."

In this case the only public interest element that can arise is the fact that alleged accused is the Prime Minister. In Re King's Application[9], the learned Chief Justice, Sir Denys William at page 35 on the issue of the public interest had this to say:

> "*…It cannot be accepted that a police officer should be charged and prosecuted for murder if a prima facie case is not made out. It cannot be in the public interest that a police officer should be treated differently from a civilian in such matters".*

And in R v. DPP Ex parte Duckenfeld[10] Lord Justice Laws at page 68 (g) to (h) said that it was perfectly proper for a DPP to discontinue proceedings if there was no sufficient evidence to warrant or support the charges. He concluded by saying:

> *"Such a prosecution could offer no legitimate benefit to anyone and would, potentially at least, be an abuse of the process of the court".*

[25] The applicant's apparent feeling of injustice –

(a) Surely, many if not most unsuccessful litigants have an apparent feeling of injustice that the outcome of their case did not go in their favour, but those feelings must be reasonably and objectively justified.

[9] (1980) 40 WIR 15
[10] [2000] 1 WLR 55

(b) In the instant case the applicant's feelings of injustice could only begin to be objectively justified if she had complied with the request of the Commissioner of Police and the Director of Public Prosecutions to provide her statement and other evidence in support of her accusation.

(c) The applicant cannot now successfully raise the argument of injustice on the grounds that the Director of Public Prosecutions failed to consider relevant facts or evidence for the following reasons:

(i) because the Director of Public Prosecutions had seen to the full investigation of the allegation by the interviewing and taking of statements from apparently all other potential witnesses and the consideration of whether the evidence was capable of sustaining the allegation;

(ii) the applicant failed to provide the evidence when requested to do so; and

(iii) the width of the considerations to which the Director of Public Prosecutions may properly have regard in instituting or discontinuing proceedings.

[26] In Matalulu the court held that:

> "….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".

[27] For the reasons given I find no other compelling reason why leave should be granted and accordingly leave is hereby refused.

[28] I make no order as to costs in accordance with Part 56.13(6) of CPR 2000 which states that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers the applicant has acted unreasonably in making the application or in the conduct of the application. I do not find that the applicant acted unreasonably in making the application.

Tyrone Chong, QC
Justice of Appeal [Ag.]

I concur.

Dane Hamilton, QC
Justice of Appeal [Ag.]

[1] BARROW JA: I have read the judgment of Chong JA [Ag.] and agree that the application for leave to appeal should be refused and that there be no order as to costs.

Denys Barrow, SC
Justice of Appeal