COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2006/001

BETWEEN:

[1] HENRY LIU
[2] FENG HUANG

Appellants

and

[1] THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[2] DIRECTOR OF PUBLIC PROSECUTIONS
[3] COMPTROLLER OF CUSTOMS

Respondents

Before:

The Hon. Sir Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Hugh Rawlins	Justice of Appeal
The Hon. Mr. Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Ramesh Maharaj, SC and with him Mr. Gerald Burton for the appellants
Mr. Anthony Astaphan, SC and with him Mrs. Heather Felix-Evans for the respondents

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2007: November 28;
2008: September 22.

Civil Appeal – Cross appeal-Abuse of Process-substantive offences-whether the learned judge had jurisdiction to institute substantive charges against the appellants- Conspiracy charges-exceptional circumstances – whether there is a requirement to plead bad faith – remedies in public law by way of judicial review and constitutional motion – whether denying costs to the appellants was erroneous.

The appellants, economic citizens of the Commonwealth who were entitled to engage in business in accordance with the law of the land were arrested and over 300 fraud related charges were brought against them between April and December 2000. Eighteen months later, conspiracy charges were also brought against the appellants and their locally incorporated company and a customs officer were named as defendants in the conspiracy charges. These charges were allegedly related to the removal of goods from a bonded warehouse without the payment of the relevant taxes. An agreement which was made

between the appellants and the Comptroller of Customs to compound the offences and make a payment was not realized. The appellants sought various public law remedies while the various charges were being brought before the Magistrates' Court.

Held: allowing the appeal only to the extent that the appellants are awarded their costs below; allowing the cross-appeal in part and making no order as to costs in the appeal:

(1) The filing of over 300 charges against the appellants and the prosecution thereof do not constitute an abuse of process. Accordingly, the decision of the trial judge that the conspiracy charges against the appellants proceed and that there was no contravention of the appellants' right to property under the Constitution of the Commonwealth of Dominica, are upheld.

"An abuse can exist where the prosecution has manipulated or misused the process of the court or taken advantage of a technicality or where on a balance of probability the accused has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution."
Hui Chi Ming v R [1991] 3 All ER 897 cited.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, **Regina v Telford**. **Justices Ex Parte Badham** [1991] 2 WLR 866 cited.

"The circumstances must be considered in the light of local conditions, legal, economic, social and cultural. The court can take account of economic realities, in particular lack of resources and skilled staff on the part of the prosecuting authorities, but there are limits to this: the constitutional right of an individual cannot be placed at the mercy of the Government's inefficiency. (See Bell v Director of Public Prosecutions [186] LR CONST 329, 401i to 402e and Mungroo v The Queen [1991] 1 WLR 1351, 1354f to 1355c)."
Dicta from Nazereus Andrew v Attorney General SLUHCV 2005/0090 delivered on 17th June 2005 applied.

Bhola Nandlal v The State [1995] 45 WIR 412 and **Verrier v Director of Public Prosecutions** (1967) 2 AC 195 applied.

(2) The cross-appeal is allowed to the extent that the name of Gene Lawrence is restored to the conspiracy charges.

(3) The appellants were entitled to their costs in the proceedings in the court below, but none of the parties is entitled to costs in the appeal because there was no unsuccessful party in the appeal proceedings.

JUDGMENT

[1] **THOMAS J.A. [AG.]:** The matter before the Court involves an appeal and a cross appeal with respect to the judgment of Madame Justice Clare Henry-Wason delivered on 25th November, 2005.

Background

[2] The appellants are economic citizens of the Commonwealth of Dominica and as such are entitled to engage in business activities in accordance with the law of the land. In this regard they sought and were granted permission to operate a bonded warehouse pursuant to the **Customs (Control and Management) Act**[1] **("the Customs Act").** This warehouse was closely connected to their importing, manufacturing, retailing and related businesses.

[3] The **Customs Act** and the regulations made thereunder prescribed certain procedures that must be adhered to before the warehoused goods can be lawfully removed from the said warehouse. However, in the course of time the Comptroller of Customs obtained information that goods were being removed otherwise than in accordance with the Act. This led to investigations by the Customs Department and subsequent execution of search warrants at the appellants' residence and places of business.

[4] The result of all of these activities is that the appellants were arrested and ultimately over 300 charges were brought against them between April and December 2000. These charges, essentially related to fraud on the revenue and variations thereof. Then some eighteen months later, conspiracy charges were also brought against the appellants and their locally incorporated company, Shine Union Trading Co. Ltd. A customs officer, Gene Lawrence, was named as a defendant in the conspiracy charges.

[5] Some form of agreement was reached between the appellants and the Comptroller of Customs to compound the offences which entailed the payment of a certain penalty. This did not come to fruition.

[1] (Chap. 69:01)

[6] While these charges were before the Magistrates' Court, the appellants together with their company brought various actions seeking remedies in public law by way of an application for judicial review[2] and constitutional motion[3].

[7] In the constitutional motion, various declarations were sought with respect to: contraventions of the separation of powers doctrine, the right to property, right to a fair hearing and the right not to be subject to illegal searches. On the other hand, the application for judicial review sought a review of various decisions of the Director of Public Prosecutions, the Comptroller of Customs and His Worship Magistrate Ossie Lewis with respect to the continuation of the prosecution of the charges even after numerous adjournments.

[8] In the case of the Magistrate, the review concerned his refusal to adjourn the information before him *sine die* until the termination of the matter in the High Court.

[9] The matters before the Court were consolidated and heard between 21st and 24th February, 2005. The Order of the learned trial judge on the consolidated matters is in the following terms:

. "1. That all the substantive charges be stopped and not proceeded with by the prosecution;
2. That the name of Gene Lawrence be struck from the conspiracy charges be allowed to proceed without further delay against the First and Second Claimants [now the First and Second Appellants]; that in any event the preliminary inquiry must be completed by 31st March 2006.
3. The respondents pay the third Claimant [Shine Union Company Ltd.] cost to be assessed by the Master."

Appeal and Cross Appeal

[10] The appellants filed a notice of appeal and the respondents filed a notice of cross appeal. However, due to the overlap of the grounds I consider that it will be necessary, at least in one instance, to discuss a ground of appeal and a ground of cross appeal together.

[2] DOMHCV2004/338
[3] DOMHCV2004/441

[11] In the notice the respondents appealed against the part of the decision of the trial judge which –

> "1. Held that the prosecution and/or the continued prosecution of them on three conspiracy charges did not amount to an abuse of process and/or breach of the fundamental rights of the appellants and a breach of the principles of public law.
> 2. Did not award the appellants their costs in the High Court proceedings."

The appeal

[12] Some eleven grounds are contained in the Notice of Appeal[4]. However, there is much overlapping and repetition. The grounds as filed are as follows:

> "1. The decision of the learned judge is erroneous in law in holding that the three conspiracy charges ought to proceed against the appellants notwithstanding her finding that it was not an exceptional case for the prosecution to file conspiracy charges along with the charges for the substantive offences. The learned judge erred in law in not holding that the prosecution and/or continued prosecution of the appellants on the conspiracy charges amounted to an abuse of process, and contravened their fundamental rights as claimed in their claim.
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> 2. The decision of the learned judge is erroneous in law in holding that the three charges of conspiracy which named Mr. Gene Lawrence as an alleged conspirator with the appellants ought not to be proceeded with against Gene Lawrence but ought to be proceeded with against the appellants.
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> 3. The learned judge erred in law in holding that the State could proceed with the three charges of conspiracy against the appellants although she found that it was an abuse of process for the prosecution to proceed with the charges for the substantive offences against the appellants although the conspiracy charges are based on the same evidence upon which the charges for the substantive offences were preferred and prosecuted.
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> 4. The learned judge erred in law in not holding that the prosecution and/or the continued prosecution of the appellants on the conspiracy charges amounted to an abuse of process since the prosecution manipulated and abused the process of the Court in prosecuting the appellants on the charges for the substantive offences and/or charges of conspiracy. The learned judge was not entitled in law to permit the three conspiracy

[4] The grounds of appeal are numbered 7-17 in the Notice of Appeal. However for the purposes of this judgment, the grounds will be dealt with as grounds 1-11.

charges for the substantive offences to proceed in the light of the finding that the prosecution of the appellants for the substantive offences were effective and sufficient and that it was not an exceptional case to justify the prosecution on the conspiracy charges for the substantive offence.

5. The learned judge erred in law in holding that the Comptroller of Customs did not compound the charges for the substantive offences which finding by her led her not to hold that the three conspiracy charges were an abuse of process since they were based on the same evidence upon which the charges for the substantive offences were based.

6. The learned judge erred in law in failing to hold that the prosecution of the appellants on the charges for the substantive offences infringed the principle of the doctrine of the separation of powers and they therefore could not be prosecuted for conspiracy since the evidence upon which the conspiracy charges were based is the same evidence on which the prosecution for the charges of the substantive offences were based.

7. The learned judge erred in law in failing to take into account material evidence which related to the conduct of the State in its investigations, in the laying of the charges and in the prosecution of the appellants for her to determine whether the prosecution and/or continued prosecution the appellants on the conspiracy charges amounted to an abuse of process.

8. The learned judge erred in law in failing and/or refusing and/or omitting to find that the appellants' public law and/or constitution rights as claimed by them were contravened by the impugned actions and/or conduct of the State.

9. The learned judge erred in law in failing and/or refusing and/or omitting to find that the appellants' public law and/or constitutional rights as claimed by them were contravened by the impugned actions and/or conduct of the State.

10. The learned judge failed to take into account relevant and material evidence of the contraventions by the State of the fundamental rights of the appellants for her to determine whether the continued prosecution of the appellants on the conspiracy charges amounted to an abuse of process.

11. The learned judge failed to take into account relevant and material evidence of the contraventions by the State of the fundamental rights of the appellants for her to determine whether the continued prosecution of the appellants on the conspiracy charges amounted to an abuse of process.

12. The decision of the learned trial judge is unreasonable and cannot be supported having regard to the evidence.

13. The decision of the learned judge in denying the appellants their costs in the High Court was erroneous in law."

[13] Given the similarity in the contents of grounds 1, 3, 4, 5, 7 and 9, these will be analysed under the ground now numbered 1 together with the variations thereon. That ground is couched in the following terms:

Ground 1: The decision of the learned judge is erroneous in law in holding that the conspiracy charges ought to proceed against the appellants notwithstanding her finding that it was not an exceptional case for the prosecution to file conspiracy charges along with charges for substantive offences. The learned judge erred in law in not holding that conspiracy charges amounted to an abuse of process and contravened their fundamental rights as claimed in their claim.

Submissions

[14] The basic argument advanced by learned counsel for the appellants, Mr. Ramesh Maharaj, SC is that the substantive charges together with conspiracy charges are only filed in exceptional circumstances which did not arise in this context. It is further contended that the filing of the conspiracy charges constituted an abuse of process.

[15] Mr. Anthony Astaphan, SC, for the respondents, contends, essentially, that neither the charges under the **Customs Act** nor the conspiracy charges constituted or amounted to an abuse of process of the Court. Learned senior counsel submits further that there was evidence in support of the charges and the prosecutor had indicated to the Magistrate that she was going to proceed first with the conspiracy charges and not with the charges under the **Customs Act**.

Doctrine of abuse of process

[16] The doctrine of abuse of process is raised by both sides in relation to the substantive as well as the conspiracy charges against the appellants and as such a detailed analysis is required coupled with an application of the law. But what constitutes abuse of process?

[17] In **Halsbury's Laws of England**[5] it is stated that:

> "An abuse of process of the Court arises where its process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or simply, where the process is misused.

[18] As to where the jurisdiction resides to prevent abuse of process, Lord Justice May in **R v Telford Justices Ex Parte Badham**[6] had this to say:

> "In modern times the law of abuse of process can be said to be derived from the speeches in *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254. Lord Morris said ([1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301):
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> > 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any thwarting of its process.'
>
> This general principle was treated as applicable to justices holding a summary trial by Lord Parker CJ, with whom Diplock LJ and Ashworth J agreed in *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467:
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> > 'So far as the ground on which they did dismiss the information is concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.**"**

[19] In **Director of Public Prosecutions v Humphery**[7] even though the House of Lords was concerned with the question of estoppel, both Lord Salmon and Lord Edmund Davies did say, obiter, that there must always be a residual discretion to prevent anything which savours of abuse of process.

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[5] Volume 37 (4th ed), para. 434
[6] [1991] 2 All ER 854 at 856
[7] [1976] 2 All ER 497, 527 and 533

[20] At a later stage, Lord Diplock in **Hunter v Chief Constable of West Midlands**[8] stated the following:

> "My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process may arise are very varied, those which give rise to an instant appeal must surely be unique. It would in my view, be most unwise if this House were to use this occasion to say that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power"

[21] In sum, therefore, based on the foregoing, it may be said that any court has an inherent power to prevent the misuse of its procedure. Such misuse may be of such a nature that it would be unfair to a party seeking justice, or the use of the procedure may be such as to bring the administration of justice into disrepute. Further, the circumstances in which abuse of process may arise are many and varied.

Did the learned judge have jurisdiction to make the order respecting the substantive charges against the appellants?

[22] Ordinarily, this question may not arise given the state of the law. But it does in this instance because learned counsel for the respondents, Mr. Anthony W. Astaphan, SC, has submitted that the learned judge exceeded her authority or lacked the jurisdiction to make the order in relation to the substantive charges against the appellants. These are his submissions:

> "43.The Respondents contend that the Appellants have not pleaded any grounds or particulars or adduced evidence capable of establishing not even by 100 miles, a case of dishonestly, mala fides, fraud or corruption on the part of the DPP or the Comptroller of Customs and Excise. The Appellants have relied solely on an allegation of delay, which is in serious dispute, the number of charges under the CUSTOMS ACT and the filing of the conspiracy charges. All of these allegations could properly be raised in criminal proceedings. These allegations are wholly insufficient to establish dishonestly, mala fides, fraud or corruption on the part of

[8] [1981] 3 All ER 727, 729

the Comptroller of Customs and DPP because the evidence shows, as accepted by the learned Trial Judge, that there is compelling material and evidence against the Appellants [see paragraphs [33] and [41] of the judgment of the learned trial Judge, pages 259 and 263 of the record of Appeal].

44. The Respondents further contend that in the absence of cogent and particularized grounds, and strong and compelling evidence of dishonesty, mala fides, fraud or corruption, the learned judge ought to have dismissed the Appellants' application for judicial review and consequently she erred when she dismissed…all of the charges under the CUSTOMS ACT. It is submitted that the judge ought to have held that the committal or trial court were more then competent to deal with the allegations made by the Appellants and she ought therefore to have dismissed the application of judicial review. By failing to do so the learned judge misdirected herself and/or usurped the functions of the criminal court. See also Martin v Director of Public Prosecutions Claim No. ANUHCV2003/0822 (Antigua and Barbuda) and Mohit v Director of Public Prosecutions PCA No. 31/2005 and Sharma v Carla Brown, Deputy DDP and Others (2006) 69 WIR 379."

[23] In replying to these submissions learned senior counsel, Mr. Ramesh Maharaj, SC submitted that the decided cases show that the court has an inherent jurisdiction with respect to matters which infringe on its process. He submitted further that there is no requirement to plead bad faith. Reliance was placed on cases such as **Turipa v R**[9]; **Bennett v Horseferry Road Magistrates' Court and another**[10] **Mahanial Bagwandeen v Attorney General of T&T**[11].

[24] The jurisdiction of a superior court to stay proceedings on the basis of abuse of process has been discussed above but now it is necessary to examine the exact nature and extent of the power.

[25] Lord Justice Laws in **R v Director of Public Prosecutions Ex Parte Kebilene**[12] declared that the High Court possesses the power to review decisions of the Director of Public Prosecutions as it does with respect to decisions of every subordinate public authority by

[9] [2004] 1 NZLR 706
[10] [1993] 3 All ER 138 (HL)
[11] [2004] UKPC 21
[12] [2000] 2 AC 326

force of the common law unassisted by statute[13]. This is, in essence, a broad statement of an aspect of the *ultra vires* doctrine[14]. However, the exact nature of the power to stay proceedings on the basis of abuse of process is explained in **Turipa v R[15]**. In this case it was held that the Court's jurisdiction to stay proceedings for abuse of process was supervisory and was not a review of the prosecutor's decision but focused on the basic issues of fairness, prejudice and the overall integrity of the criminal process[16].

[26] Having regard to the matters considered by the learned judge, as outlined above, I hold the view that in a broad sense, the learned trial judge was concerned with fairness, or as she actually put it 'oppression'. The learned trial judge went on to say, at paragraph 40 of her judgment, that:

> "The court must consider whether the claimants could obtain a fair trial and after the lapse of such a long time or would they be prejudiced in the preparation of their defence. The claimants have a constitutional right to a fair hearing within a reasonable time."

[27] The even narrower question is whether or not bad faith must be pleaded in these circumstances. I have already indicated, implicitly, my agreement with Mr. Maharaj that such a pleading is generally unnecessary. What follows are the reasons for this position.

[28] Mr. Astaphan has armed himself with decisions[17] which hold that bad faith or dishonesty must be pleaded. But these are cases which relate either to a plea of bad faith as a matter of choice because of the case being advanced[18]; or in the exceptional circumstance where a court may grant judicial review with respect to a decision of the Director of Public Prosecutions. Therefore, unlike the decisions along the lines of the **Turipa case** supra**,**

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[13] Ibid, at pages 404-405. See also Molvao v Dept of Labour [1980] 1 NZLR 46; R v Bradford JJ Ex parte Wong [1981] 1 QB 445, 446

[14] See for example, Wade & Forsyth, Administrative Law (7th ed.) p. 41: The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law" De Smith, Woolf and Jowell, JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS (5th ed) say: 'In essence, the ultra vires doctrine permits the courts to strike down decisions made by bodies exercising public functions which they have no power to make.'

[15] [2004] 2 NZLR 706

[16] Ibid para. 67

[17] R v Director of Public Prosecutions Ex parte Kebelene, supra

[18] See: Smith & Anor v L.J. Williams Ltd [1980] 32 WIR 395; AG v KC Confectionary Ltd. [1985] 34 WIR 387; Bhagwandeen v AG/T&T [2004] UKPC 21

they are concerned, not with the conduct of the proceedings or with fairness, but with the merits of the actual decision. In other words the authorities relied on do not represent the general rule regarding the grant of judicial review.

[29] This is neatly illustrated by the dictum of Lord Steyn in **Ex Parte Kebilene**, supra, when he said this:

> "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 amendable to judicial review."[19]

This is in alignment with a dictum uttered by his Lordship in **R v Panel On Takeovers Ex Parte Fayed[20]** when he said:

> "But it seems to me that in the absence of fraud, corruption or mala fides, judicial review will not be allowed to probe a decision to charge individuals in criminal proceedings. It would be unworkable to extend judicial review into this field."

[30] For jurisdictions such as the Commonwealth of Dominica[21], Trinidad and Tobago[22] and Barbados[23] whose constitutions establish the office of Director of Public Prosecutions the issue under consideration was ultimately put beyond doubt in **Sharma v Carla Brown-Antoine, Wellington Vergil and Trevor Paul[24].**

[31] In that case, on a review of the principles governing the review of a decision to prosecute, Lord Bingham of Cornhill and Lord Walker of Gestingthorpe reasoned in this way[25]:

> "It is not enough that a case is potentially arguable, an applicant cannot plead potentially 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 at 733. . (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

[19] Ibid page 371
[20] [1992] BCLC 938
[21] Constitution of the Commonwealth of Dominica, section 72
[22] Constitution of the Republic of Trinidad and Tobago, section 90
[23] Constitution of Barbados, section 79. It is to be noted that in the case of Re King's Application [1988] 40 WIR 15, Chief Justice Williams in ruling that the court had jurisdiction to review decisions of the DPP did not cite or rely on the established authorities. Instead, he said: " I find it impossible to say that the decision was unreasonable, improper or irregular within *Wednesbury* principles."
[24] [2006] 69 WIR 379
[25] Ibid, at page 388

discretion to political instruction (or, we would add, persuasion or pressure) is a recognized 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 Meade* [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 Pepuski) 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 Serious Fraud Office* [2006] EWHC 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**."**

[32] Their Lordships went on to say that: "We are not persuaded that the Chief Justice has any complaint which cannot be fairly resolved within the criminal process"[26].

[33] Given the legal and factual circumstances attendant on the 325 substantive charges as determined by the learned judge; and given also the dicta in the Sharma case, it is my conclusion that Her Ladyship did have the jurisdiction to review the process and procedure connected with the 325 substantive charges against the appellants.

Judge's order on the substantive charges

[34] It is common ground that the factual matrix surrounding this ground of appeal is the filing of over 300 substantive charges and about 18 months later 3 further conspiracy charges were also filed against the appellants.

[26] Ibid at page 395

[35] In the High Court proceedings the appellants successfully argued that the filing and prosecution of the substantive charges were oppressive and as such constituted an abuse of process. In her ruling the learned trial judge said this at paragraph 37 of her judgment[27]

> "Having read through all the substantive charges, and having made an attempt to distinguish the differences between them, the Court can say positively that the filing of the 325 charges under these circumstances are oppressive and vexatious"

[36] And at paragraph 38 the learned judge continued thus:

> "Here the conduct of the prosecution was oppressive and amounted to an abuse of the process of the court. Clearly the matters could have and ought to have been consolidated into a far smaller number of charges. While it is technically possible to defend 325 substantial charges, fairness demanded that the matters be brought forward in a manageable and just manner. Further, the prosecution's position that they would try 10 or so at first and then make a decision shows that they did not intend to consolidate the matters where it was clearly possible to do so."

[37] Having quoted a dictum in **Hui Chi Ming v R**[28] as to the judicial nature of abuse of process, Her Ladyship continued in this way at paragraph 38[29]:

> "An abuse can exist where the prosecution has manipulated or misused the process of the court or taken advantage of a technicality or where on a balance of probability the accused has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution"

[38] In this regard, the cases of **Bennett v Horseferry Road Magistrates' Court**[30] and **Regina v Telford Justices, ex Parte Badham**[31] are cited.

[39] On the question of delay learned counsel for the respondents, at paragraph 39 of his submissions has asked the court to consider certain matters in relation to the question of delay. These include: the complexity of the case, the duration of the investigation, the number of witnesses, resources available to the State and the prevailing circumstances in the Magistrates' Court. In this regard, I consider certain dicta of Justice Murray Shanks in

[27] Record of Appeal ("Record") at page 261
[28] [1991] 3 All ER 897
[29] Record of Appeal, page 262
[30] [1993] 3 All ER 138
[31] [1991] 2 WLR 866

Nazereus Andrew v Attorney General[32] to be relevant. His Lordship was at the time adjudicating on an allegation of a breach of the claimant's right to a fair hearing within a reasonable time. In that context this is what His Lordship said:

> "The circumstances must be considered in the light of local conditions, legal, economic, social and cultural. The court can take account of economic realities, in particular lack of resources and skilled staff on the part of the prosecuting authorities, but there are limits to this: the constitutional right of an individual cannot be placed at the mercy of the Government's inefficiency. (See **Bell v Director of Public Prosecutions [1986] LR CONST 329, 401i to 402e** and **Mungroo v The Queen [1991] 1 WLR 1351, 1354f to 1355c)."**

[40] Despite the difference in the constitutional context, I consider the above-quoted dictum to be of general application especially with respect to the Bill of Rights. In this case it speaks to and encompasses the following: the 325 substantive charges, the incisive comments and criticisms on these charges by the learned judge, the adjournments, the hiring of a number of prosecutors, one of whom failed to show up and the nature of the issue involved, that is to say, the alleged unlawful removal of goods from a bonded warehouse without the requisite legal procedures, especially the payment of the appropriate taxes.

[41] It is to be noted that the dictum in **Hui Chi Ming v R** on abuse of process quoted by Justice Henry-Wason reads thus:

> "Something so unfair and wrong that a court should not allow a prosecutor to proceed with what was in all other respects a regular proceeding"[33]

Also in **Moevao v Department of Labour**[34]**,** Mr. Justice Richardson in the New Zealand Court of Appeal while reviewing the circumstances justifying the staying of a prosecution said that this may be done if the Court "…concludes from conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression." At the same time it is to be noted that one of the propositions resting on the case **Bennett v Horseferry Road Magistrates' Court** is that

[32] SLUHCV2005/0090, delivered on 17th June, 2005
[33] Page 262 of the Record of Appeal
[34] [1980] 1 NZLR 464, 482

the maintenance of the rule of law prevailed over the public interest in the prosecution of crime.

[42] Therefore, having regard to the facts as found by the learned trial judge and the authorities cited, I cannot agree that the filing of over 300 charges and the prosecution thereof do not constitute an abuse of process. I would therefore affirm the learned trial judge's order in this connection.

The conspiracy charges

[43] In terms of the conspiracy charges, the learned trial judge, having examined the rule which says that so long as there is an effective and sufficient charge, the addition of a charge of conspiracy is undesirable[35], went on to hold as follows:

> **"**The Court having found that this was not an exceptional case justifying the filing of conspiracy charges along with the substantive charges, and the Court having stopped the prosecution of the substantive charges, there is no reason why the 3 counts of conspiracy cannot proceed against the first and second Claimants. The issue of delay does not apply since the conspiracy charges were filed some 1 ½ years after the substantive charges and a reasonably short time before the filing of the 1st constitutional matter. Further, it cannot be said, in respect of conspiracy matters, that they are oppressive or that the Claimants' right to a fair trial within a reasonable time has been contravened. The three counts of conspiracy will therefore be allowed to proceed[36]."

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[44] In an effort to impugn the conspiracy charges, learned counsel for the appellants submits that the 3 conspiracy charges were infected by abuse of process which increases the risk of injustice to his clients. He also says that it could not be said that the multitude of substantive offences charged were not effective and sufficient so as to require the filing of conspiracy charges, especially having regard to the learned judge's ruling that it was not an exceptional case. It is the further submission of learned counsel that the ruling of the learned judge on the conspiracy charges fails to take into account the general prohibition against adding conspiracy charges to effective substantive charges. Further still, that the

[35]The authorities cited by the learned trial judge are: R v Dawson [1960] 1 WLR 163; R v Davey [1960] 3 All ER 533

[36] Page 266 of the Record of Appeal

evidence of conspiracy was available at the time of the filing of the first substantive charge with evidence being the same in both types of charges.

[45] On behalf of the respondents it is submitted that neither the substantive nor the conspiracy charges constituted an abuse of process and that in any event, the matter of abuse fell within the jurisdiction of the criminal court.

[46] Finally, it is contended that there is no absolute prohibition against the prosecution of conspiracy simply because another offence has been committed or charged. In this regard also, it is submitted that the case of **Verrier v Director of Public Prosecutions**[37] does not support the appellants' case.

[47] The law which governs the laying of substantive and conspiracy charges on the same issue is well settled. It has an element of antiquity since one of the earliest authorities on the point dates back to 1871 when Chief Justice Cockburn articulated the position in this way:

> "…when the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiracy to commit it for the course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and which deprive defendants of the advantage of calling their co-defendants as witness."[38]

[48] The position was re-stated in **R v Dawson**[39] but the holding was narrower. This is what was held per curiam:

> "Where there are substantive charges which can be proved, it is, in general, undesirable to add a charge of conspiracy; it can work injustice on the defendants because evidence otherwise inadmissible on the substantive charges against certain defendants become admissible; it adds to the length and complexity of the case so that the trial may become unworkable and impose an intolerable strain upon the court and the jury[40].

[37] [1967] 2 AC 195
[38] [1871] Criminal Law Cases 87,93
[39] [1960] 1 WLR 23
[40] This rule was applied in R v Davey [1960] 3 All 533

[49] The next major development regarding the rule came in **Verrier v Director of Public Prosecutions**, when Lord Pearson in giving the sole opinion of the House of Lords re-stated the said rule with some modifications[41].

> "Although it must follow logically from what is said above that it could in a very exceptional case be right to charge conspiracy even when the substantive offence had been committed and was charged, it should undoubtedly remain the general rule that, when there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable because it will tend to prolong and complicate the trial: see *R v Dawson* and *R v Davey*"

[50] The outstanding feature of the above dictum is that it arose out of a circumstance in which the court had to grapple with the severity of a sentence for the substantive offence and a conspiracy where the latter was the more serious. In those circumstances the Court created two exceptions – one relating to the greater penalty for conspiracy as opposed to the substantive offence and, more importantly, the charging of a conspiracy when a substantive offence has been committed.

[51] More recently, the substantive and conspiracy count rule was applied in **Bhola Nandlal v The State**[42] by the Court of Appeal of the Republic of Trinidad and Tobago. The facts of the case are somewhat involved and complicated, but for present purposes what is relevant is the fact that the appellant and another were charged, on a second indictment, with conspiracy to pervert the course of justice. This happened even after the said appellant was convicted and sentenced on a first indictment arising out of the same event. His appeal was allowed.

[52] In delivering the judgment of the Court, Sharma JA, as he then was, reviewed the relevant Commonwealth authorities on the matter of conspiracy charges.

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[41] [1960] 2 AC 195, 223-224
[42] [1995] 49 WIR 412

[53] At page 429 he said that:

> "If a substantive offence is not committed it is the practice to charge with conspiracy. The reason for this is obvious. Where, however, there is an offence and substantive charge, the addition of a charge of conspiracy is in the absence of exceptional circumstances undesirable; see *Verrier v Director of Public Prosecutions.* It is not desirable to include a charge of conspiracy which adds nothing to the effective charge of the substantive offence; see *R v James.* One example of an exceptional circumstance in which a charge of conspiracy might be added is where the substantive offence(s) does not adequately represent the overall criminality; see *R v James* (*1974).* It is the modern practice where an indictment contains a substantive count(s) and a related conspiracy count, the judge should require the Prosecution to justify the joinder, or failing jurisdiction to elect whether to proceed on the substantive or on the conspiracy count. Joinder is satisfied for this purpose if the judge considers that the interest of justice demanded it. To sum up then, if the Director of Public Prosecutions wished to charge conspiracy at all, then this should have been joined with the count of corruption in the first indictment against the appellant. The State would have had to satisfy the judge, that there was jurisdiction for so doing. If it did not, then the conspiracy charge would have to be stayed."

[54] His Lordship continued at page 430 in this way:

> "The underlying concept of our criminal law system is the need to bring criminal offenders to conviction; the need to protect the innocent from wrongful conviction; and to these can be added a third, the need to protect the moral integrity of the criminal justice system. It is, however, to the first and third principles we have paid heed in coming to our conclusion."

[55] After referring to two Canadian authorities[43] on the principles of justice that underlie the fundamental values of society, Justice of Appeal Sharma concluded by saying:

> "We find that the Director of Public Prosecutions' approach in prosecuting the appellant on the second indictment in the circumstances of this case was a clear affront to common decency and fair play. In our opinion, all the principles underpinning our criminal justice system had been served by the conviction and sentence of the appellant on the first indictment, and any further prosecution would have been oppressive. The conviction on the second indictment are quashed; the sentence is hereby set aside[44]."

[43] Kryowski v R [1988] 62 349, 350 per Wilson J; R v Conway [1989] 70 CR (3) 209, 222-223 per l'Hereux-Dube J.
[44] Page 432 at paras f-g

[56] In view of these numerous principles pertaining to the filing of substantive and conspiracy, it is now appropriate to return to the basic facts in the case.

[57] Before the court is a circumstance where the appellants were charged with 325 substantive offences and 3 charges of conspiracy. These allegedly relate to the removal of goods from a bonded warehouse without the payment of the relevant taxes. The learned trial judge found as a fact that these events did not constitute an exceptional case for the purposes of the rule relating to the charging of substantive and conspiracy counts. Her Ladyship therefore held that the three counts of conspiracy should be allowed to proceed.

[58] The rule is that an appellate court can only interfere with a finding of a lower court if it is satisfied that that court was patently wrong. In this case while the conclusion on the conspiracy charges is correct the reasoning is contradictory. This in my view would justify intervention.

[59] The learned judge having determined that the case was not exceptional should have ruled that the conspiracy charges cannot proceed. Instead, Her Ladyship ruled that the charges must proceed without giving reasons.

[60] In fact there are two good and substantial reasons why the conspiracy charges should proceed. Firstly, in the above-quoted dictum of Sharma J A in the **Bhola Nandlal case** it is stated that joinder of substantive and conspiracy charges is justified if the judge considers that the public interest demanded it. What is involved in this instance is an allegation of a considerable loss of revenue to the government. In fact Her Ladyship noted at paragraph 8 of her judgment that the evidence revealed that the appellants agreed to compound the offences and pay a penalty in accordance with the law in excess of $1,700,000.00. According to her, this was not paid.

[61] While I consider that the public interest demanded the prosecution of the appellants on the conspiracy charges, the mitigating factor is the fact that the substantive charges are stayed thereby removing any prejudice.

[62] The second reason relates to the lack of reasoning underpinning the learned judge's finding that the case was not exceptional. The legal reality is that the criterion of exceptional circumstance, as laid down in the **Verrier case**, giving rise to substantive and conspiracy charges being filed must be measured in the context of the Commonwealth of Dominica. Accordingly the matters that fall for consideration in this context are: the fact that the appellants came to the State as economic citizens as part of the strategy of economic development of the State; and the allegations against the appellants relate inter alia to the fraudulent evasion of custom duties. The matters, though they are allegations relate to inter alia the fraudulent evasion of custom duties. These matters, though they are allegations at this stage have the potential of contradicting the appellants very status as economic citizens.

[63] For the reasons advanced above I would affirm the learned judge's ruling that the conspiracy charges may proceed.

Ground 8: The learned judge erred in law in failing/or refusing or omitting to find that the appellants' public law rights and/or constitutional rights as claimed by them were contravened by the impugned action and/or conduct of the State.

[64] In the constitutional motion filed on 24th September, 2004 the appellants sought various declarations with respect to alleged contravention of sections 3,6,8,10 and 11 of the Constitution Commonwealth of Dominica.

[65] The learned trial judge did not find in favour of the appellants with respect to any of the contraventions alleged.

[66] Specifically, with respect to the alleged violations of the right against illegal searches and the right to enjoyment of property, the learned judged ruled, relying on **Attorney General**

of Jamaica v Williams[45]**,** that she was satisfied that warrants issued by the Magistrate were valid there being no evidence amounting to a rebuttal. She ruled further that the appellants failed to establish the alleged violations.

[67] In terms of the right to a fair hearing, there was no specific finding with respect to this right by the learned judge. Instead, the more than 300 substantive charges were stayed on various technical grounds relating to abuse of process.

[68] In terms of the seizure of the appellants' goods by the Comptroller of Customs, the learned judge ruled that any such goods which are liable to forfeiture under the **Customs Act** must await the outcome of the trial of the substantive charges, to determine if forfeiture proceedings were to be instituted. She went on to conclude that there was no violation of section 6 of the Constitution.

[69] Despite the width of this ground of appeal, the only constitutional right addressed in the submissions by learned counsel for the appellants relates to deprivation of property. The contention is that the ruling of the learned judge does not reflect the provisions of the Act and in particular the effect of the forfeiture rules in the Sixth Schedule to this Act. The submissions continue thus:

> "67 Rule 6 of the Sixth Schedule provides that if a notice of claim against forfeiture is received, the Comptroller shall take court proceedings for the forfeiture of the goods concerned. The rules do not state that the institution of such proceedings must await the result of any criminal proceedings.
>
> 68. Indeed the rules envisage that such proceedings may run concurrently: Rule 8(a)(i) provides that civil proceedings may be instituted in The Magistrates' Court having jurisdiction. Where any offence in connection with that thing was committed or where any proceedings for such an offence have been instituted."

[70] This issue can be dealt with in short order. The fact of the matter is the constitutional and statutory scheme runs thus. The Constitution of Dominica in section 6(6)(a)(ii) contemplates the existence or the enactment of a statute dealing with forfeiture of property, either by way of a penalty for breach of any law or for forfeiture in consequence

[45] Page 254 of the Record of Appeal at para. 24

of a breach of law. One such law respecting forfeiture in consequence of breach of law is the **Customs Act** as prescribed by sections 98, 101 and 117 thereof. Additionally, section 6(6)(a)(vii) of the Constitution permits goods to be seized and detained for as long as may be necessary for the purposes of any examination, investigation, trial or inquiry. These constitutional provisions are commonly referred to as exceptions to the right.

[71] What Rule 6 of the Sixth Schedule to the **Customs Act**, does is to prescribe a procedure to deal with the circumstance where there is a claim against forfeiture, in effect by anyone, including a third party, who claims an interest in the property to be forfeited. In such a circumstance, the Comptroller is mandated to utilize proceedings for the forfeiture of goods or property.

[72] There is nothing in the evidence to suggest that there was a claim in this regard which the learned trial judge did not take into account. In any event, as noted above, the supreme law permits goods seized in these circumstances to be detained for as long as may be necessary for the trial. I therefore agree with learned counsel for the respondents that there was no contravention of the appellants' right to property under the Constitution.

Ground 11: The decision of the learned judge in denying the appellants their costs was erroneous in law.

[73] Learned counsel for the appellants submits that the learned judge exercised her discretion as to costs by awarding the Third Claimant its costs of the proceedings before her when in fact the first and second appellants also argued the same case. Learned counsel goes on to submit that the exercise of the discretion cannot be interfered with, but the inescapable logic is that the appellants too should be awarded their costs given the circumstances.

[74] The difficulty with this ground lies in the fact, identified by learned counsel for the respondents, that the learned judge did not indicate the reason for the award of costs in the manner in which she did. Also, no indication was given as to whether she was acting pursuant to CPR 56.13(6) in respect of which the Board recently gave guidance thereon in

Toussaint v Attorney General of St. Vincent and the Grenadines[46]. Indeed, the order made is that the costs are to be assessed by the Master. This would seem to be outside of CPR 56.13(5) which mandates the judge to assess the costs.

[75] Regardless of what may have influenced the learned judge to make the award of costs to exclude the first and second-named claimants, the fact is that CPR 64.6(1) ordains that, both in the High Court and in the Court of Appeal, if a decision is made to order costs, the general rule is that any such order must require the unsuccessful party to pay the cost of the successful party.

[76] Henry Liu, Feng Huang and Shine Union Trading Corporation, being the claimants in the proceedings, were successful in the proceedings and as such, by virtue of CPR 64.6(1) were entitled to their costs, rather than the third-named claimant alone. In the circumstances I would vary the existing order as to costs to indicate that all of the claimants are entitled to costs of the proceedings. The costs are to be assessed by the Master.

The other grounds of appeal

[77] Determinations have been made with respect to grounds 1,3,4,5,7 and 9 on the one hand and ground 8 on the other hand, and as such I consider that any elaboration on the remaining grounds would be otiose.

The cross appeal

[78] In the respondents' Notice of Cross Appeal the following Orders as contained in the judgment are appealed:

(a) 'That all of the substantive charges be stopped and not proceeded with by the prosecution'.

(b) 'The name Gene Lawrence be struck from the conspiracy charges'.

[46] [2007] UKPC 48

(c) 'The Respondents pay the Third Claimant cost to be assessed by the Master.'

[79] It will be recalled that in the discussion of abuse of process in relation to the conspiracy charges against the appellants, the question of the substantive charges was also discussed and the judge's Orders were sustained. Therefore, the need to deal with the matter of Gene Lawrence's name being struck from the conspiracy charges must be addressed.

[80] Both the appellants and the respondents challenge the learned judge's order that the name of Gene Lawrence to be struck from the conspiracy charges but for different reasons. In the case of the appellants it is the reality that they are to face conspiracy without the person with whom they were originally charged. On the other hand, in the case of the respondents the contention is that the exclusion of Gene Lawrence on the basis of political pressure cannot be supported, especially where a "criminal enterprise" is involved.

[81] After an examination of the submissions on both sides, this is the learned judge's conclusion at paragraph 44 of the judgment:

> "The Court disagrees. The Comptroller clothed with ostensible authority agreed not to prosecute. Mr. Lawrence has performed the required condition and resigned, it is not in the public interest that the Comptroller should be allowed to resile from the agreement. Patel v Spencer (1976) 1WLR 1268, Attorney General of Trinidad and Tobago v Phillip & Others (1995) 1 AC 396. No charges therefore in regard to the Shine Union matters can be brought against Mr. Lawrence."

[82] An agreement not to prosecute necessarily activates the Constitution of the Commonwealth of Dominica where under the Director of Public Prosecutions is given the full plenitude of power to discontinue or take over any criminal proceedings. And unlike the Constitution of the Republic of Trinidad and Tobago there is no express power to pardon, ab initio, vested in anyone. This constitutional feature renders the **Phillips case**, on which the learned judge relied, distinguishable. In any event their Lordships in the Privy Council ruled that the pardon at issue in that case was invalid. This brings us back to the power of the Director of Public Prosecution in the Commonwealth of Dominica and the question whether the decision not to prosecute Mr. Gene Lawrence was approved by that

functionary. There is no evidence that he did and as such it does not lie within the province of the Comptroller of Customs to determine that Mr. Lawrence should not be prosecuted. While it may not be in the public interest to permit the Comptroller to resile from his promise, it is never in the public interest to violate the supreme law of the land. Accordingly Mr. Gene Lawrence's name must be restored to the conspiracy charges.

Result

[83] I would allow the appellants' appeal to the extent that the appellants are awarded their costs below; and, for the avoidance of doubt, the orders respecting the substantive charges and the conspiracy charges against the appellants are affirmed.

[84] The cross appeal is allowed to the extent that the name of Mr. Gene Lawrence is restored to the conspiracy charges.

[85] Both sides achieved some success in the appeal and cross-appeal. As such there is no unsuccessful party and for this reason I am of the view that there should be no order as to costs.

Errol L. Thomas
Justice of Appeal (Ag)

I concur.

Sir Brian Alleyne, SC
Chief Justice (Ag.)

I concur.

Hugh A. Rawlins
Justice of Appeal