IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF JUSTICE

ANTIGUA AND BARBUDA
Claim No: ANUHCV 2008/0632

In the matter of Section 88 of the Antigua and Barbuda Constitution Order 1981
Chapter 23 of the 1992 Revised Laws of Antigua and Barbuda
And

In the matter of Section 23 of the Police Act Chapter 330 of the 1992, Revised Laws of Antigua and Barbuda
And

In the Matter of a decision by the Commissioner of Police to lay charges against Steadroy Benjamin on the 7th day of August 2008
Between

Steadroy C. O. Benjamin

Applicant

And

Commissioner of Police
Ivan Walters
Chief Magistrate, District `A`

Senator Colin Derrick
Minister of Justice and Public Safety

Attorney General of Antigua and Barbuda

Respondents

Appearances:

Mr. A. W. Astaphan
with Mr. J. Fuller and
Mr. Hugh Marshall Jr. — Applicant

Mr. Douglas Mendes S.C.
with Mr. K. Kentish — Respondents

.....
2009: January 19
2009: July 31
.....

JUDGMENT

1. Harris J: The Applicant applies to the court for leave to apply for judicial review of the decision of the Commissioner of Police made on 7th August 2008 to lay criminal charges against him.

2. The case for the applicant is based on two (2) grounds: (i) That the Commissioner of Police is bound by any directive or advice given by the Director of Public Prosecutions ('the D.P.P') and the Commissioner acted in contravention of the directions of the DP.P that charges were not to be laid against the Applicant. (ii) That the Commissioner of Police acted under the Political or executive direction, control or influence of the 3rd and 4th Respondents usurped the functions of the court and/or violated the separation of Powers doctrine when they disregarded the said decision and instructions of the D.P.P; and that if dissatisfied with the D.P.P's decision and instructions not to charge the Applicant, the 1st, 3rd and 4th Respondents were obliged to seek to set them aside by proceedings in the High Court[1].

FACTS

3. The facts of this matter are that; at all material times Mr. Gary Nelson was the acting Commissioner of Police. He worked for the Government of Antigua and Barbuda on contract with no security of tenure. The Applicant is an Attorney at Law and a Member of Parliament.

4. On Saturday 26th July, 2008 the Applicant was in his Law Chambers. At about 1:30pm he received a telephone call from Corporal Cordel O'Garro of the Royal Antigua Police Force who invited him to come to the C.I.D Office. The Applicant went to the C.I.D Office. Having arrived at the C.I.D Office the Applicant met Corporal O'Garro, another Police Officer and one Linda Brann sitting together in an office. He was invited into the room. After a brief discussion, questions were asked and answers were given by the Applicant.

5. After the discussion, the Applicant was asked to give a witness statement. The Applicant was never warned or cautioned. He left the meeting with the impression that should any criminal charges be brought against Linda Brann and others, he would be a witness for the Prosecution. It was on this basis and understanding that the Applicant submitted the witness statement to Corporal O'Garro.

[1] See para 18.1.3 of the Applicants Written "Submission in case" filed in this matter.

6. Following the discussions with the Applicant, Corporal O'Garro said he reported his findings to his superiors. Mr. Ronald Scott, the Head of the CID, McLean Joseph, and Superintendent Hodge. He received instructions, from Mr. Scott to charge the Applicant. Subsequently, the Learned Director of Public Prosecutions ("the DPP") on the 28th July 2008 requested a copy of the file.[1] The file was brought to the Office of the D.P.P. Having reviewed the file, and discussed the matter with Corporal O'Garro, the DPP directed that the Applicant should not be arrested and that no charges should be laid against him.

7. On Friday 1st August 2008 the DPP left Antigua for holidays. On the 4th August 2008 Officer O'Garro asked Crown Counsel in the DPP's Office, Joanne Walsh whether she would put the DPP's instructions in writing. She did so. [See paragraph 5 of her affidavit filed on the 3rd December 2008 and exhibit "S.B.2"]. Officer O'Garro at some time sought the assistance of the DPP's office in drafting charges against the Applicant. Counsel Mr. Adlai Smith and Joanne Walsh of the DPP's Office declined to do so and Corporal O'Garro was told, again, of the DPP's instructions not to charge the Applicant, and they were instructed not to assist in the bringing of any charge against the Applicant[2].

8. Shortly after the DPP left the State, and in spite of the DPP's instructions, the First Respondent caused a complaint to be filed and summons of the 7th August 2008 to be issued against the Applicant. Corporal O'Garro says that he drafted the charge filed on the 7th August 2008. He does not give any evidence as to who drafted the other charges filed against the Applicant. This charge and summons were served on the Applicant at his Chambers on the 9th August, 2008. He was summoned to appear in Court on Monday 11th August, 2008. The Applicant attended Court on the 11th August 2008.

9. Before the Court proceedings began, the Police Prosecutor Senior Superintended of Police, Mr. Wendell Robinson, invited Mr. Hugh Marshall Jr., Counsel for the Applicant, into the Chambers of the Second Respondent. Mr. Wendell Robinson informed both Mr. Marshall and the Second Respondent that the First Respondent was directed by the Director of Public Prosecutions that

[1] See para 9 of Affidavit of Cpl. O'Garro.
[2] See para 6 and 7 of the affidavit of Joanne Walsh.

no criminal charge was to be laid against the Applicant. As noted by the Claimant, this statement in open court is consistent with the evidence of Crown Counsel Joanne Walsh.

At the hearing before the Second Respondent, Senior Superintendent Wendell Robinson stated in open court that he was awaiting directions from the First Respondent in relation to the prosecution of the Applicant, and that the First Respondent was himself waiting on and acting on directions from the Third Respondent. The Prosecutor also told the Court that the First Respondent had informed him that he had written to the Third Respondent, his Minister, to ask for an independent counsel to deal with the case

10. Subsequently, the Fourth Defendant requested that Senior Superintendent Wendell Robinson send the Applicant's file to him. On the First Respondent's instructions, the file was sent to the Fourth Respondent. Following the receipt of the file, the Fourth Respondent convened a meeting with Prosecutors. In the course of that meeting the Fourth Respondent suggested which should be put to the Applicant.

11. On the morning of 23rd September 2008 at about 7:45 am the Applicant was served with two additional charges at his Chambers. These charges, which were signed by the Second Respondent, were filed in the Magistrates Court on the 22nd September, 2008 and are numbered 829/08 and 830/08 respectively. The new charges were served by other police personnel and by Corporal O'Garro, the Investigator in this matter. Significantly, O'Garro said he drafted the charge file on the 7th August 2008. However, he gave no evidence as to who drafted the new charges filed in the Magistrate Court on the 22nd September 2008.

THE ISSUES

12. The issues arising in this matter are those which arise generally in all applications for leave to file for judicial review and those substantive issues peculiar to this case.

13. The general issues concern; firstly, the preliminary issue dealt with below; determining the applicable test for the grant of leave and; whether an alternative form of redress exists and, if so, why judicial review is more appropriate and why the alternative has not been pursued[1].

[1] See CRR 2000 Rule 56.3 (3) (e) and see also Sharma v Browne – Antoine [2007] 1 WLR 780.

14. The substantive issues peculiar to this application are **(i)** Whether the D.P.P has the authority to direct the Commissioner of Police not to prosecute a matter prior to the D.P.P instituting and undertaking criminal proceedings against any person or prior to taking over and continuing any criminal proceeding that may have been instituted by any other person or authority[1]; **(ii)** Whether the decision by the Commissioner of Police, in the face of the D.P.P's directives not to prosecute, usurped the function of the Court and/or violated the separation of power doctrine; **(iii)** Whether the 1st Respondent's decision to prosecute the Applicant was subject to political influence i.e. *"he acted in accordance with directions from the 3rd Respondent and/or that the Third and Fourth Respondent improperly intervened and interfered in the process[2].*

PRELIMINARY ISSUES

15. As stated, the Applicant seeks leave to judicially review a decision of the First Respondent. The Claimant submitted and I agree that there is no decision of the other Respondents which is under challenge. While alleged conduct on the part of the Third and Fourth Respondents is referred to in evidence, this is in support of the Applicant's case that the First Respondent acted under their influence. This is insufficient to make them parties to the action when no decision made by either of them is impugned. Far worse in the case for joinder of the Second Respondent, the judicial officer before whom the case is to be tried. No wrongdoing of any sort is alleged against him.

16. I think it convenient to dispose of this point at the onset. I subscribe to the Submissions of Counsel for the Respondent on this point and hold that there is no decision made by the 2nd and 3rd Respondent that is impugned. The application in relation to the 2nd and 3rd Respondents as parties is dismissed.

17. The other issue best dealt with at the preliminary stage is that of the Test for the Grant of Leave.

18. At trial, Counsel for the parties accepted that the general rule is that leave will usually be granted where the applicant discloses an arguable case having realistic prospect of success. In support

[1] See section 88 of the Constitution of Antigua and Barbuda.
[2] See Affidavit in support of Application without notice details of Applicants allegations at para 34 – 37, 46, 48; see also para (i) (j) and (k) of the grounds upon which relief is sought in Application for leave filed Nov. 07, 2008.

of this proposition was cited and relied up, a long line of cases including the Privy Council decision in Sharma v Browne Antoine [2007] 1 WLR 780, at pp 787 where the board set out that test as follows:

> *"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".*

19. However, in the case at bar, the parties, at Trial, accepted that all the evidence relevant to the issues in dispute in this Application (save for the evidence in relation to the political interference allegations) are already before the court on the application for leave and the Court has heard detailed argument from both sides.

20. In such a case, where it is not likely that the court at the substantive hearing would be in a better position to determine the issue in dispute than the court determining leave, or where the case involves the determination of a discrete point of law[1]; the applicable test for the grant of leave in this regard is that enunciated in the English Court of Appeal case of Mass Energy Ltd. v Birmingham City Council [1994] Env. L.R. 298 per Glidewell L.J. at pp 307 and 308:

> *"First, we have had the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if leave were granted, it is more unlikely that the points would be canvasses in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us…….*
>
> *Thirdly, as I have already said, we have most, if not all, of the documents in front of us; we have gone through the relevant ones in detail – indeed in really quite minute detail in some instance – in a way that a court dealing with an application for leave to more rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents.*
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> *For those reasons taken together, in my view, the proper approach of this Court, in this particular case, ought to be – and the approach I intend to adopt will be – that we*

[1] Al – Zagha v Secretary of State for the Home Department [1994] Inn AR 20 C.A

should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed." (Emphasis added)

21. Put shortly, the test is that; not only must the case be arguable, but sufficiently strong so as to be likely to succeed[1]. Out of an abundance of caution, let me state here that if I am mistaken as to the parties acceptance, at trial, of the Mass Energy test as the applicable test to the circumstances of the case at bar; then, I do now hold that the Mass Energy case does contain the applicable Law and test, in relation to the issue of the powers and duties of the DPP and the issue of the 'DPP's instructions and the separation of powers doctrine'[2] in the case at bar.

22. With regard to the second ground, if it is determined that the Applicant cannot adequately raise his complaint of political interference in the criminal trial, the test for leave for review before the High Court is as stated in *Sharma*, namely, whether there is an arguable ground for judicial review having a realistic prospect of success. In any event, in my view, in the case at bar, whether applying the Test in the Mass Energy case or in Sharma does not, in the end, alter the findings of this court.

THE CONSTITUTION

23. Section 88 of the Constitution of Antigua and Barbuda provides:

"(1) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do;

a. to institute and undertaken 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;

[1] See also similar dicta in; Rv Cotswold District Council ex parte Birmingham Parish Council [1997] EWCH Admin 407 (24th April, 1997) at para 70 -71; Rv Liverpool City Council, Ex parte Barry [2001] LLR 310, Rv London Docklands Development Corporation and CWI Holdings PLC ex parte, Christine Frost (1197) 73 P. & C.R.199 (at pgs 203 – 204) and R (on the application of Portland Port Limited and another) v Weymouth and Portland Borough Council [2001] EW H.C. Admin 1171, [2002] 2 P. & C.R. 430 (para 9); Fidelity Finance v McMichollis C.A. Trinidad & Tobago, 127/2007, Oct 2007.

[2] See pp 11 of Applicant's "SUBMISSIONS IN CASE'.

b. to take over and continue any such criminal proceedings that heave 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.

(2) Subject to section 89 of this Constitution, The powers conferred on the Director of Public Prosecution by paragraphs (b.) and (c.) of subsections (2) of this section shall be vested in him to the exclusion of any other persons 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 the or authority and with this leave of the court.

(3) 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 bee deemed to be part of those proceedings:

(4) The functions of the Director of Public Prosecutions under subsection (1) 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.

(5) Subject to section 89 of this Constitution, in the exercise of the functions vested in him by subsection (1) of this section and by section 45 of this Constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority."

APPLICANT'S SUBMISSION

24. The applicant's case is that the decision to prosecute him is perverse and unlawful.

25. The Applicant submits that his application has real prospect of success and that on the facts of his application, judicial review is appropriate for the following reasons;

26. The important facts are not in dispute;

27. The First Respondent is not on the permanent or pensionable service. He was on contract and answerable to the Third Respondent;

28. The DPP decided that the Applicant should not be charged and gave instructions. The First, Third and Fourth Respondents are obliged to comply with the DPP's decision and instructions. Alternatively, they were obliged in view of the separation of powers doctrine to seek redress from the High Court;

29. The prosecution was not brought by the DPP but in the name of the First Respondent in total disregard for the DPP's decision and instructions not to arrest or charge the Applicant. It is not in dispute that the DPP instructed Corporal O'Garro not to arrest or charge the Applicant and that as soon as the DPP went on holiday, the Applicant was charged;

30. The evidence is such that the Court can legitimately infer from, among other things, the statements of Senior Superintendent Robinson that the First Respondent received and/or was receiving directions from the Third Respondent in relation to the prosecution of the Applicant. This after the instructions by the DPP;

31. The evidence is that the Fourth Respondent, who is also a Minister of Government, and who is not in any way responsible for criminal matters, requested the Applicant's file. Subsequently, the Fourth Respondent met with prosecutors and gave questions to be asked on the Applicant. These remarkable events occurred after the decisions of and instructions from the DPP;

32. The political context and pressure have not been denied, and therefore are not in dispute;

33. The facts of this case make it an exceptional one warranting an application for judicial review.

34. Counsel for the Applicant submits that he accepts that judicial review of a decision to prosecute or discontinue a prosecution is an exceptional remedy with a relatively high threshold required in order to obtain leave. He contends however, that a lower threshold is required when what is challenged, is the decision not to prosecute. In support of this proposition he cited several authorities including Matalulu v D.P.P [2003] 4 LRC 712 at pp 733 (e) – (i), 734 (a) – 735 (g) and 735 (g) and 735 (a)[1] and Leonie Marshall v D.P.P PCA No. 2 of 2006 at paragraph 17, pp 8 to para 18, pp 10.

35. Presumably, counsel for the Applicant contends, that the lower threshold applies in this case and that the Applicant has risen above the threshold.

36. The Applicant contends that of critical importance to this case is the *incontrovertible* fact the DPP exercised his constitutional authority and directed that the Applicant must not be charged or prosecuted. The DPP's decision was made after O'Garro was allegedly instructed by his Superior Mr. Scott, to charge the Applicant. The Applicant submits (see below) that the DPP has the authority to decide that the Applicant should not be prosecuted. Surely, if the DPP has the power to institute or discontinue proceedings, he must have the power to prevent a prosecution. Put another way, it cannot be that a DPP is empowered to discontinue a complaint the very day it is filed, but has no authority to instruct that a charge should not be filed. Such a restrictive construction is *rooted in overzealous tabulated legalism and would be wrong.*

37. The Applicant contends that provisions of subsections (1) (a) to (c) of section 88 of the Constitution of Antigua and Barbuda ought to be construed purposively and in a manner which will protect the rights and liberties of the people of Antigua and Barbuda. They ought not to be construed or applied restrictively or with tabulated legalism. Therefore, on a proper and purposive construction of section 88 and/or the separation of power;

    (i) It ought not to be disputed that the DPP has the authority not to prosecute and to give instructions to Police Officers accordingly.

[1] See also Mohit v D.P.P of Mauritius (PC) [2006] 1 WLR 3347 at paragraph 17, page 3352 to paragraph 18, pp 3355; Sharma v Deputy Director of Public Prosecution, Carla Browne – Antoine [2007] 1 WLR 780 P.C. at paras (5) to (6), pp 787 – 789.

(ii) Members of the Executive cannot lawfully disregard a decision of the DPP. The decision and instructions do not bear the stamp of illegality on their foreheads. The decision and instructions stands as regular and lawful unless and until set aside by the Court.

(iii) The express constitutional powers conferred on the DPP are exclusive but not exhaustive. There are ancillary and/or implicit powers conferred on a DPP, which are essential and necessary for the proper exercise of his powers. One of these implicit or ancillary powers is the power or authority to instruct an investigating officer or prosecutor not to charge or prosecute an accused person or suspect. Accordingly, if an officer consults the DPP and/or the DPP instructs a Police Officer that no criminal proceedings should be instituted against any persons, the officer cannot disregard these instructions, and thereafter proceed to file charges whether on the authority or direction of any person or authority or otherwise

(iv) It would not be just or fair for the Court to restrictively construe section 88 or for the Court to construe or apply section 88 in a manner which deprives the DPP of necessary and obvious implicit and/or ancillary powers. If the DPP can issue instructions to discontinue proceedings which have been instituted or filed prior to judgment, surely he ought to have power to instruct a prosecuting authority or Police Officer not to institute criminal proceedings or charge."..[1]

38. The Applicant contends that there is no constitutional requirement for the D.P.P to just take over a proceeding or case before discontinuing it[2]. Counsel for the Applicant relies on several authorities in support of this contention including; Tappen v Lucas (1977) 20 WLR at pp 235 (a) to (b) per Bollers C.J; Sylvester v McDowall and others OECS L.R. Vol. 1 00 168 (at 172 – 173) per Lewis C.J; and Michele Andrew v The D.P.P and others HCVAP 2008/003 C.A. para 15 at pp14.

[1] See the written submissions of Mr. Astaphan S.C.

[2] I do not believe there is any issue over this contention. The cases referred to speak to the position when a proceeding is commenced by another prosecutorial authority including a private common law prosecution. In those other cases the DPP does not have to first take it over, but can directly discontinue it.

39. Counsel for the Applicant contends, there can be no justification for the involvement of the Third and Fourth Respondents in the prosecution of the Applicant. They are Ministers and Members of the Cabinet and Executive Branch of the Government. The Provisions of section 88 were intended to insulate the Office of DPP and criminal prosecutions from the influences of the Executive Branch of the Government. [See Commonwealth and Colonial Law by Sir Kenneth Roberts – Wray, 1996, at page 350 and Attorney General of Fiji v The DPP [1983] 2 AC 672 at page 679 (b) to (g) and 681 (c)].

40. Further, he submits that while it is true the Fourth Defendant is also the Attorney General, he is also a Minister of the Cabinet. As Attorney General, section 89 of the Constitution provides the only lawful circumstances in which the Fourth Respondent may properly give general or specific directions to the DPP. None of the circumstances existed in this case contends counsel for the Applicant. Consequently, the Fourth Respondent had absolutely no right interfering and requesting the Applicant's file which was in the hands of the Prosecutor and/or seeking to "give advice" to Prosecutors or investigators in relation to a specific criminal prosecution. Such actions say Mr. Astaphan S.C., constitute an unjustifiable trespass by the Respondent in a sphere of the criminal law which was of absolutely no concern of his. He ought never to ignore or leapfrog the decision or instruction of a DPP, however much he may want to disagree with the DPP. The final arbiter is the DPP. Mr. Astaphan S.C. submits that once the Fourth Respondent intervened or interfered he tainted the process and prosecution. See Ex Parte Attorney – General In re the Constitutional Relationship (1995) (8) BCLR 1070 at page 1085 (h) to 1086 (b) to 1089 (g).

41. The Applicant further submits that pith and substance of the Respondents' actions is to usurp the function of the Court in determining whether the DPP had the authority to decide that the Applicant ought not to be prosecuted. As Mr. Astaphan's arguments above seek to show; a decision of a DPP not to prosecute is subject to challenge only on very limited grounds. But in this case he says, the First, Third and Fourth Respondents have assumed judicial authority and decided that the DPP had no authority to decide that the Applicant should not be prosecuted. This usurpation, the argument goes, is a naked violation of the rule of law and separation of power doctrine and exposes the decisions to charge the Applicant as unlawful acts.

42. The Applicant submits that the Court ought to grant the application for leave to apply for judicial review to set aside the decision of the First Respondent to charge the Applicant, and the charges and summonses filed and served on the Applicant for the reasons set out above.

RESPONDENTS SUBMISSION[1]

43. On the issue of the existence of an alternative remedy, the counsel for the Respondents submits that it is trite law that judicial review is a remedy of last resort and that leave to pursue a prerogative writ will not be granted where an adequate alternative remedy is available to the Applicant to air his complaint. The Privy Council in ***Sharma*** merely confirmed what a long accepted principle is. Hence the requirement in Rule 56. 3 (3) (e) that an application for leave must state *"whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued."*

44. Counsel's submission on the plethora of reasons cited for the courts reluctance, as he put it, to interfere in the criminal process by granting leave such as is applied for in the case at bar, is extensive and not without authority[2]. Counsel cited in further support of his contention, Baroness Hale and their Lordships Carswell and Mance in the Sharma Case:

> *"Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court…….*
>
> *The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review or proper prosecutorial considerations…."*

[1] This is a substantially wholesale reproduction of counsels submissions. At the onset, let me say that I am convinced by the arguments of the Respondent on each of the issues in this matter, the full text of which is set out in the written submissions filed in this matter and buttressed by counsel's oral closing submissions.

[2] Imperial Tobacco v A.G. [1981] A.C. 718 per Viscount Dilhorne at P. 743 B R v DPP ex parte Pretty [2001] 1 A.C. 800 per Lord Hodhouse pp 852, Rv D.P.P ex p Kebilene [2002] 2 A.C. 326, per Lord Steyn at pp 371 F – H; Wayte v USA 1985US 598 per Powell J at p. 607 – 9, Kostuch v A.G. of Alberta (1995) 128 D.L.R 4th 441 pp. 450 – 1; R(Pepushi) v. CPS 2004 EW HC 798 per Lord Justice Thomas at para 49.

45. Counsel for the Respondents on this point, concludes, noting that issues such as the political interference in criminal proceedings can be adequately dealt with in the Magistrate Court in relation to summary proceedings, citing the recent Trinidad and Tobago case of Panday v Virgil [2008] 3 WRL 296 P.C., per Lord Brown pp 306 – 307. This case concerned a summary prosecution. In the said ***Panday case***, reference was made by counsel to the circumstances in the ***Sharma case*** as distinguishable on the basis that the Applicant, the Chief Justice of Trinidad and Tobago, was to be tried; not summarily, but on indictment. Lord Brown said: *"There lordships however, cannot see this as a relevant distinction".*

46. On the issue of the Power of the D.P.P to instruct the Police to lay charges, counsel for the Respondent contends that there is no Law which *"either empowers the D.P.P to instruct the Police to not lay charges or obliges the police to comply with any such instructions[1]".*

47. Counsel submits that the right of a private person to initiate criminal proceedings is entrenched in the Common Law and can only be displaced by clear legislative prescription. The constitutional importance of this right, submits counsel for the Respondents, Mr. D. Mendes S.C., is identified by lord Diplock in Gouriet v Union of Post Office workers [1978] A.C. 435 at pp. 497 – 498":

> *"In English public law every citizen still has the right, as he once had duty (though of imperfect obligation), to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure .It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and to brings criminals to justice, and the creation in 1879 of the office of Director of Public Prosecutions, the need for prosecutions to be undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law".*

48. Counsel contends that this right of a private citizen vests in the Police and indeed for the most part forms the underlying basis for charging a person. In Lund v Thompson [1959] 1 QB 283

[1] Para 26, Respondents Written Submission.

(285) Diplock J (as he then was) put it thus: *"Although, in all but an infinitesimal numbers of case, no doubt information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a Police Officer; he exercising the right of any member of the public to lay on information and to prosecute an offence".*

49. Counsel for the Respondent argues further; that the Police are under a corresponding common law duty to enforce the law[1]. Further, the Police Act, Cap 330 of the Laws of Antigua and Barbuda, specifically imposes a duty on Police Officers, inter alia, to bring criminal offenders before the court and to prosecute persons found committing any offences or whom – they may reasonably suspect of having committed any offence.

50. Accordingly, submits Mr. Mendes S.C., not only are police officers empowered to lay criminal charges, they are indeed, under a duty to detect crime and to lay charges against anyone caught in the act or in respect of whom there exists reasonable grounds to suspect that he or she has committed an offence. It follows that police officers could only lawfully accept instructions not to lay charges where there is an equally clear provision in law mandating that they do so. The question is whether there is any legislative provision empowering the DPP to so instruct the police.

51. On the issue of the Power of the D.P.P Counsel for the Respondent submits that the effect and import of Section 88 of the Constitution support the contention of the Respondents on this issue.

52. The DPP is not empowered by the terms of section 88 to prohibit anyone from instituting or undertaking criminal proceedings.

53. The Respondents contend that the DPP is granted exclusive power to take over and continue any criminal proceedings that may have been instituted by any other person or authority, He is also granted exclusive power to discontinue any criminal proceedings instituted or undertaken by himself or any other person or authority, except that this power is without prejudice to that other person or authority's power to discontinue those proceedings themselves. Significantly, the DPP

[1] Rubin v D.P.P. [1990] 2 QB 80 (86 – 87)

is not vested with exclusive power to institute or undertake criminal proceedings. That power is shared with the public at large.

54. Section 88 is premised upon the existence of the power of other persons and authorities, including police officers, to institute or undertake criminal proceedings without reference to the DPP;

55. The DPP's power to take over and discontinue proceedings at any time before judgment is exercisable only in relation to such proceedings already instituted or undertaken. The Respondents submit that the power is not exercisable before criminal proceedings are commenced.

56. Accordingly, says counsel for the respondents, the power to take over and discontinue proceedings already commenced cannot be equated with a power to prevent proceedings from being commenced by other persons.

57. In the premises submits Mr. Mendes S.C., the First Respondent was not obliged to heed the DPP's instruction to not charge the Applicant. Indeed, he was duty bound both at common law and by section 23 of the Police Act to prosecute the Applicant once satisfied that there were reasonable grounds for suspecting that he had committed an offence. The DPP is empowered to take over and discontinue these proceedings but he is not empowered to prohibit the First Respondent from instituting or undertaking them in the first instance. To the extent that the DPP purported to do so, he acted ultra vires the Constitution.

58. On the *"Quality and Cogency"* of the Applicants evidence on the political interference allegations, counsel for the Respondents says that strictly speaking, there is no need to go further to consider the evidence tendered by the Claimant in support of his second ground. Leave ought to be denied for the reasons already given. However, for the sake of completeness, he submits in the alternative, that the Applicant has failed to present an arguable case having a realistic prospect of succeeds, that the decision to lay the charge against him was politically influenced. I can only adopt the Respondents response to the Applicant on this point.

Submissions in support of the 'political interference' allegations

59. The Respondent's response to these allegations are set out in para 36 – 38 of the Respondents written submission in opposition to the Application for leave to apply for Judicial Review, filed on the 19th December 2008 and buttressed in the oral address at the close of the trial.

60. The response to the 'political interference' allegations includes identifying the dates of the acts of the 3rd and 4th Respondents complained of, as occurring after the decision and the laying of the subject charges, rendering therefore; the alleged acts as incapable of having had any influence on the laying of the charge.

61. Further, contends the counsel for the Respondent, much of the evidence in support of the Applicants case in relation to the 'political interference', is patently heresay and inadmissible.

62. It is submitted by counsel for the Respondents, that given the seriousness of the allegation made against the First Respondent, this court ought to grant leave only on the basis of reliable and cogent evidence and as his analysis demonstrates, the Applicant has fallen very short in this regard.

THE COURT'S FINDINGS AND CONCLUSIONS

63. I am convinced by the arguments of the Respondents in this matter as set out in their statement of case, written submissions and oral submissions at the trial. These submissions have been substantially set out above. I would just highlight and add the following observations;

64. The plain reading of section 88 of the Antigua and Barbuda Constitution supports the contention of the Defendants on the 1st issue in this matter – The powers of the DPP under section 88 of the Constitution. The powers of the DPP are set out clearly in section 88 of the Constitution and, at the risk of oversimplifying it, his power to terminate a prosecution is not triggered until a prosecution has been instituted by the DPP or other authorized entity. Counsel for the Respondents accepted that the DPP has the power not to prosecute, but identified the real issue in the matter to be, whether the DPP had the power to direct that others not prosecute. I agree

that this is the central issue with respect to the DPP's Constitutional authority. As I said above, I agree with and adopt the submissions of counsel for the Respondents on this issue. Further, the power to direct another person not to prosecute is an entirely different power to that given to the DPP under section 88. The power to direct another not to prosecute, is not an incidental power to those set out in section 88 as contended by learned Senior Counsel for the claimant, but is an intrusive power. Parliament has passed various Acts that require the consent of the DPP before any prosecution can be commenced under them. Likewise if parliament had intended that the Police be subject to the control of the DPP in the manner submitted by the Claimant, it would have done so by way of legislation. Further, if the framers of the constitution so intended they would have also done so.

65. I am also impressed by one of the alternative submissions by counsel for the Respondents; that at present, the DPP exercises his power to *nolle pros* and discontinue matters, in public and under public scrutiny, whereas the act of directing the police *not to prosecute* removes that dimension of a public 'reconning' as it were although it achieves the same ends. It is not being suggested that every decision of the DPP attracts the requirement that he give his reasons for so acting, but certainly, operating under the public's scrutiny is a 'check and balance' on the actions of a DPP, informs his deliberations and indeed the action of all persons holding offices of a sensitive and public nature.

66. I note the preponderance of opinion and authority as recognizing the DPP as having, prior to criminal proceedings being instituted, an advisory role only, with respect to the Police and any other entity that has such a criminal prosecutorial role. The interface between the DPP and the police and moreso, the Attorney General, can be a clumsy one. In more recent times the boundaries of the interface between the Attorney General and the DPP, came in for judicial consideration in the Sharma case and later was the subject of commentary by Mr. Karl Hudson-Phillips Q.C.[1] One disregards the advice of a DPP at ones own peril. To disregard the advice of a DPP surely places on the prosecution, a heightened evidential burden to discharge, if, such as in this case, allegations of political or other improper interference is subsequently alleged against the police in relation to instituting criminal proceedings against a member of the opposition party.

[1] See article in the Trinidad and Tobago Newsday newspaper of July 2009; see also article by Kenneth Lalla S.C. in the 16th July 2009 e-edition of the Newsday.

67. The issue as to whether the Court is the only authority to have determined in this case, whether, notwithstanding the DPP's directives not to prosecute the claimant, the Commissioner of Police could lawfully have instituted the subject criminal charges, was specifically addressed by counsel for the Respondents, Mr. D. Mendes S.C. in his oral submissions to the court. For my part, on any given day, there must be several if not numerous decisions taken by the police or other similar authority[1] to act or not to act in any given circumstance, that invokes the enquiry as to who has the authority to make that decision. That every such decision must be placed before a court for resolution, would render the operation of the administration of the criminal justice and enforcement systems nigh impossible. Further, the clarity of section 88 allowed the police in seeking guidance for their actions, to rely on their initial interpretation that they could have preceded with instituting and undertaking the prosecution in the circumstances of this case. Let me say that undoubtedly, there will be decisions made by functionaries of the State that patently trespass upon the separation of powers doctrine. I venture to say that we will know these circumstances which are likely to give rise to these decisions when we see them. In my view the circumstances that presents itself in this case not one of those.

68. I note that the police would have instituted these proceedings knowing full well that the DPP had the authority (and this authority is not disputed) to subsequently either take over and discontinue the criminal proceedings or simply discontinue the proceedings.[2] The decision of the police to institute the criminal proceedings in the circumstances of this case is not in contravention with the separation of powers doctrine. The DPP's guidance to the police was in the way of advice, not a directive based on a constitutional power.[3] The police or other functionary of the crown did not usurp the role of the court. The Court does not have the sole control over the interpretation on the plain reading of the Constitution, but, for the most part has only the final say on its interpretation or in any event, the latter say. The Constitution is a working document intended for the average literate citizen to read and understand and ultimately to be guided by it without necessarily resorting to the court to interpret it's every word as suggested by the claimant.

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[1] Or any other public authority whatsoever.
[2] This fact introduces the last issue in this matter.
[3] In article captioned "**Cops to seek DPP's advice"** in the Trinidad and Tobago Newsday 8/July 2009, it speaks of the investigation of a criminal matter having advanced to a certain stage, where the police now propose to seek the advice of the DPP as to what further steps to take. This article shows an example of the working relationship between the police and the DPP prior to any criminal proceedings being commenced. The police at this time will, presumably, pass the file to the DPP for his perusal on there own volition and not on the directive of the DPP.

69. The Claimant cited Jones v Whalley [2007] 1 AC in support of the proposition that the decision of a 'responsible official' such as the DPP cannot be circumvented at the behest of the Commissioner of Police (the separation of powers issue). In that case however, the court was balancing the competing interests of the Police prosecution and the public-interest decision not to prosecute, against the common law right of a private prosecution. Here the police decided not to prosecute and the private citizen, without the benefit of knowledge (or without an interest) of the prevailing public interest considerations, commenced the private prosecution. That court expressed doubts as to the value of the surviving right of a private prosecution in modern English civilization[1]. This authority, simply is not a convincing authority for the claimant's case on this point.[2] .

70. The Respondent also argued above, that the Police Act gives the police the right to initiate and undertake prosecutions and that the Constitution was written with the backdrop of an existing Police Force and the common law practice of private prosecutions. The claimant, contends however, that laws can be brought into conformity with the Constitution[3]. I too, see no inconsistency between the Constitution of Antigua and Barbuda, more particularly section 88 of the Constitution and the existing law, including the Police Act and the common law right of a citizen to prosecute his matter.

71. The issue of the 'Political Interference' is raised by the Claimants in this matter. Matters directed at both, giving rise to this concern and, negativing it, are raised in the evidence and crystallized in the submissions of counsel. Applying the usual test for the grant of leave – *the Sharma te*st - having regard to the fact that all the evidence on this issue has not been led, but for the most part merely referred to, there is here disclosed an issue that may need to be resolved by the court.

72. On this issue, I refer to para 35 of the Respondents written submissions. It would be an exercise in futility to attempt to improve on the adequacy (which in no small measure attains this stature because of its brevity) of the submission therein contained and I can do nothing else but adopt it in its entirety and set it out below for the readers convenience : " *There is no reason to suggest*

[1] Antigua's criminal justice system, statutory enactments and social dynamics are not identical to that of the UK.
[2] Per Lord Bingham at p 72 (para 15).
[3] See DPP v Kurt Mollison [2003] 2 WLR 1160.

that the Applicant's complaint that the first Respondent's decision to prosecute him was subject to political influence cannot be dealt with by the magistrate presiding at his criminal trial. There is no reasoned basis upon which this case can be distinguished from ***Sharma v Brown- Antoine*** *where leave to apply for judicial review of a decision was denied because the complaint of political interference could be fairly resolved within the criminal process. While in that case the charge was laid indictably, the Privy Council in* ***Panday v Virgil*** *has made clear that the Sharma principle applies just as well to summary criminal proceedings. Accordingly, this Honourable Court is bound by the highest authority to deny leave to pursue this ground because the Applicant has an alternative remedy."*

73. There is an alternative remedy available to the Claimant to deal with the political interference issue. That is, at the hearing of the criminal trial at the Magistrates Court.

74. I am appreciative of the assistance rendered to the Court by Mr. Douglas Mendes S.C. and Mr. Anthony W. Astaphan S.C. in this matter, not least of which were the oral submissions at the close of the trial.

75. For the reasons provided above, IT IS HEREBY PROVIDED that:
    (i) Judgment for the Respondents;
    (ii) The Application for leave for Judicial Review is dismissed in its entirety;
    (iii) The issue of the alleged political interference in the institution of the subject criminal proceedings against the claimant/applicant, can properly be dealt with at the trial in the Magistrates Court;
    (iv) Costs to the Respondents pursuant to the CPR 2000.

David C. Harris
High Court Judge
Antigua and Barbuda