

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/023

BETWEEN:

STEADROY C. O. BENJAMIN

Appellant

and

[1] THE COMMISSONER OF POLICE

[2] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondents

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice Pereira (formerly George-Creque)

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC, and Mr. Hugh Marshall Jr. for the Appellant

Mr. Douglas L. Mendes, SC, and Mr. Kendrickson Kentish for the Respondent

2010: December 8;

2011: September 19.

Civil appeal – Leave to apply for Judicial Review – Interpretation of section 88 of the Antigua and Barbuda Constitution Order 1981 – The Police Act, Cap. 330, Revised Laws of Antigua and Barbuda 1992 – Whether the Director of Public Prosecutions is empowered to direct or instruct the police not to lay a criminal charge against an individual – Whether the decision to charge the appellant was influenced by political considerations

The appellant, Steadroy Benjamin, is an attorney-at-law and was, at the material time, the Leader of Her Majesty's Opposition in the Parliament of Antigua and Barbuda. On 7th August 2008, he was charged with a summary offence relating to an endorsement on an application form for an Antigua and Barbuda passport. The Director of Public Prosecutions had however, previously instructed the police not to institute a criminal charge against the appellant; the police ignored the instruction and charged him.

The appellant sought leave to apply for judicial review of the decision of the Commissioner of Police to charge him, on the ground that he was charged by the police in defiance of a direction given by the Director of Public Prosecutions and the decision to charge was at the direction or under the control or influence of the Attorney General and the Minister of Justice and Public Safety. The respondents, the Commissioner of Police and the Attorney General of Antigua and Barbuda, opposed the appellant's application for leave to apply for judicial review. The learned judge refused the application for leave, holding that the power to direct others not to prosecute is an entirely different power to that given to the Director of Public Prosecutions under section 88 of the Antigua and Barbuda Constitution Order 1981; it is not an incidental power to those set out in section 88, but an intrusive power. The appellant appealed the entire decision of the learned judge. More specifically, he appealed the orders dismissing the application for leave to apply for judicial review and directing that he pay the respondents' costs.

Held: allowing the appeal (Baptiste J.A. and Edwards J.A. a majority, with Pereira J.A. dissenting), setting aside the orders made by the learned judge, quashing the charge preferred against the appellant, and ordering that the parties make written submissions on costs within 14 days of delivery of this judgment, that:

1. When one considers the full amplitude of the powers conferred upon the Director of Public Prosecutions, it would take an overly austere reading of the Constitution to hold that notwithstanding the power to discontinue proceedings brought by police, the Director of Public Prosecutions lacks the power – a power which arises by necessary implication – to instruct the police not to institute criminal proceedings against an individual. The nature of a constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which it is founded. A construction of the Constitution which leads to the police disregarding instructions of the Director of Public Prosecutions not to prosecute by relying on their power to institute proceedings under the **Police Act**, would be narrow, ungenerous and not purposive.

Attorney General of Grenada v The Grenada Bar Association Grenada Civil Appeal No. 8 of 1999 (delivered 21st February 2000) followed; **Reyes v The Queen** [2002] UKPC 11 applied.

2. The Director of Public Prosecutions may exercise his power to institute and undertake (or not to institute and undertake) criminal proceedings in person, or through other persons acting under or in accordance with his general or special instructions. While the Constitution does not state who these "other persons" are,

there is nothing to suggest that the police do not fall within this category. In fact, the very nature of their prosecutorial work compels the conclusion that they do. In this regard, the persons envisaged by section 88(4) of the Constitution would include the police. (per Baptiste J.A. and Edwards J.A.).

3. Given the lynchpin role played and the paramountcy occupied by the Director of Public Prosecutions in the conduct of criminal prosecutions, the Court can find no warrant for interpreting the Constitution in a manner limiting or restricting the instructions that the Director of Public Prosecutions can give the police. The Constitution should be interpreted in a manner giving implied or ancillary powers to the Director of Public Prosecutions. In the present case, he acted well within these powers in instructing the police not to institute a criminal charge against the appellant. The police were therefore obligated to follow his instructions.
4. The power of the police to prosecute persons pursuant to section 23(1) of the **Police Act** does not exist in isolation. It has to be viewed within the matrix established by the Constitution giving overarching power to the Director of Public Prosecutions with respect to criminal proceedings and as such, is subject to his powers under section 88 thereof.
5. Police officers do not enjoy the same security of tenure as the Director of Public Prosecutions, nor would they possess his qualification, training and expertise. Although an officer of the executive branch of Government, the powers of the Director of Public Prosecutions are quasi-judicial in nature and this makes him the final arbiter on decisions to prosecute by the State. In that regard, police officers are subject to the overall control and direction of the Director of Public Prosecutions.
6. Whilst the police should, as a counsel of prudence, adhere to the direction or instruction of the Director of Public Prosecutions 'not to charge' a person, they are not obliged, as a matter of law, to do so. The constitutional powers of the Director of Public Prosecutions as currently framed, do not extend to giving to him a power to instruct or direct the police 'not to charge' or 'to charge' a person. In the present case therefore, the instruction or direction of the Director of Public Prosecutions 'not to charge' the appellant was ultra vires his powers. (per Pereira J.A.).
7. In essence, section 88 of the Constitution gives power to the Director of Public Prosecutions to institute and undertake criminal proceedings. Implicit in that power 'to institute' must be the power to decide 'not to institute or prosecute', but that is as far as the Director of Public Prosecutions is concerned in the exercise of his own constitutional discretion given under section 88. This section does not give

the Director of Public Prosecutions a discretion to direct anyone else (including the police) as to what to do or not do in respect of the taking of a decision 'to charge' or 'not to charge' a person. (per Pereira J.A.).

8. Given the very wording of section 88 of the Constitution, which expressly recognises the unfettered right of the citizen and any other authority (which would include the police) to initiate criminal proceedings, it was not intended for all initiation of criminal charges for all practical purposes to first have to obtain the fiat of the Director of Public Prosecutions. Were it that the Director of Public Prosecutions had the unrestricted right to issue such directions in his sole discretion, then he would be empowered to select which offences and for what person or class of persons a criminal charge should be initiated. Such a power would be truly a remarkable power, which one would expect to be expressed in the clearest of terms in the Constitution and not left to be implied. The retention of the right of a private person to bring a criminal prosecution is an important safety net where those vested with the authority to bring and conduct a criminal prosecution decline to do so without just cause. (per Pereira J.A.).

Gouriet v Union of Post Office Workers and Others [1978] A.C. 435 applied.

JUDGMENT

- [1] **BAPTISTE, J.A.:** The appellant was charged by the police with a summary offence relating to an endorsement on an application form for an Antigua and Barbuda passport and sought leave to apply for judicial review. The learned judge dismissed the application for leave and ordered costs to the respondents pursuant to **Civil Procedure Rules 2000** ("CPR 2000"). The appellant appeals the entire decision of the judge, more specifically, the orders dismissing the application for leave to apply for judicial review and that he pay the respondents' costs.

Background to the application, grounds and opposition

- [2] The appellant is an attorney at law and at the material time was the Leader of Her Majesty's Opposition in the Parliament of Antigua and Barbuda. After reviewing the appellant's file which Corporal Cordel O'Garro had compiled in relation to the subject investigations, the Director of Public Prosecutions instructed the police not

to institute a criminal charge against him. The police ignored the instruction and proceeded to charge the appellant on 7th August 2008. On 23rd September 2008, two additional charges were laid against the appellant. The appellant sought leave to apply for judicial review of the decision of the Commissioner of Police to charge him on 7th August 2008. No application was made to challenge the decision to charge in respect of 23rd September 2008. The grounds upon which the appellant relied were that the police charged him in defiance of a direction given by the Director of Public Prosecutions and the decision to charge was at the direction or under the control or influence of the Attorney General and the Minister of Justice and Public Safety. The respondents opposed leave to apply for judicial review on the grounds that: (i) the Director of Public Prosecutions is not empowered to direct the police and the police are not obliged to comply with any direction not to lay a charge; (ii) that the complaint of political interference could be pursued in the criminal trial; and (iii) there was no sufficient, admissible or cogent evidence tendered in support of the application.

Reasons for refusing leave

- [3] The learned judge refused leave, holding that the power to direct others not to prosecute is an entirely different power to that given to the Director of Public Prosecutions under section 88 of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution"). It is not an incidental power to those set out in section 88 but is an intrusive power. Further, the learned judge reasoned that if it were the intention of Parliament and the framers of the Constitution to subject the police to the control of the Director of Public Prosecution in the manner indicated, that would have been done, noting that Parliament has passed various acts that require the consent of the Director of Public Prosecutions before a prosecution can be commenced under them. The learned judge held that the complaint of political influence could be dealt with by the magistrate presiding at the criminal trial and accordingly denied leave to pursue the political interference ground because the applicant had an alternative remedy.

Grounds of Appeal

- [4] In the grounds of appeal the appellant alleges that:
- (1) the learned judge failed to properly construe the provisions of section 88 of the Constitution;
 - (2) the learned judge erred in law and misdirected himself in failing to properly consider that the **Police Act**¹ and the common law right of prosecution, if any, must be read subject to the provisions of the Constitution;
 - (3) the learned judge erred in law and misdirected himself in relying on newspaper articles which were not before the court, as authoritative statements on the powers of the Director of Public Prosecutions; and as such the appellant had no opportunity to comment on them;
 - (4) the learned judge erred in law and or misdirected himself when he misdescribed the instructions of the Director of Public Prosecutions as mere advice which the police were entitled to ignore;
 - (5) the trial judge erred in law and or misdirected himself in failing to properly consider and or apply the evidence and the relevant law;
 - (6) the learned judge erred in law and or misdirected himself by failing to consider and give effect to the fact that the important facts and political context and pressure were not denied by the respondents;
 - (7) the learned judge erred in law and or misdirected himself in that having found that this was an exceptional case warranting judicial review, he failed to grant leave and ordered, among other things, that the undisputed evidence of political context and pressure ought to be dealt with by the magistrate; and
 - (8) the learned judge erred in law and or misdirected himself by failing to properly consider the applicable principles relating to the award of costs under part 56 of the CPR 2000.

¹ Cap. 330, Revised Laws of Antigua and Barbuda 1992.

Central question

- [5] Central to this appeal is the question whether the Director of Public Prosecutions is empowered to direct or instruct the police not to lay a criminal charge against an individual. If the answer is in the affirmative, this would be dispositive of the appeal in favour of the appellant as the police would be bound in law to comply with the instruction unless of course the instruction is set aside by the court. The resolution of this issue revolves around a proper interpretation of the Constitution. At the hearing of the appeal it was common ground that no leave was required on the issue whether the Director of Public Prosecutions could instruct or direct the police not to prosecute, as this raised issues concerning the interpretation of the Constitution and alleged contravention of section 88 of the Constitution in respect of which sections 119 and 120 of the Constitution would be engaged. Section 119 of the Constitution provides a right of direct access to the High Court when a person alleges a contravention of section 88 of the Constitution. Section 120 (1) of the Constitution provides that where any question as to the interpretation of the Constitution arises in any court of law established for Antigua and Barbuda other than the Court of Appeal, the High Court or a court-martial and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court. This Court therefore will not approach the case from the standpoint of determining whether leave ought to have been granted to apply for judicial review on this ground - the Director of Public Prosecutions' direction point. The political interference point may be a moot point depending on the disposal of the central issue.

Submissions of appellant

- [6] Mr. Astaphan SC submits, on behalf of the appellant, that the learned judge wholly failed to properly construe and or consider the relevant provisions of section 88 of the Constitution which governs and prescribes the powers, duties and obligations of the Director of Public Prosecutions. Mr. Astaphan SC argues for a purposive

construction of the Constitution stating that the Director of Public Prosecutions has certain implied, incidental and ancillary powers over all prosecutions by the State. One such power would be the power or authority to decide whether or not the State, here, the police, should prosecute or institute proceedings. While recognizing that the police have the right to prosecute pursuant to the **Police Act** of Antigua and Barbuda, Mr. Astaphan SC observes that such right predates the Constitution and must be read subject to the provisions of section 88 thereof. The right of the police to prosecute is subject to the powers of the Director of Public Prosecutions under section 88 of the Constitution and therefore the police cannot lawfully disregard his instructions. Given the constitutional role and function of the Director of Public Prosecutions the police were bound to act on his instructions. Mr. Astaphan refers to the powers of the Director of Public Prosecutions to institute proceedings and also to discontinue criminal proceedings without having to take them over and submits that the Director of Public Prosecutions ought to have the implied authority to instruct that proceedings ought not to be instituted, if the prosecuting authority is the police.

- [7] Mr. Astaphan SC further contends that if a particular or threatened prosecution is unwarranted or would be an abuse or is not in the public interest, the Director of Public Prosecutions is obligated to act. He need not await harm to the individual or to the public interest before he can properly or lawfully act. He must be constitutionally permitted to act before such harm is done.

Respondents' submissions

- [8] Mr. Mendes SC, for the respondent, points out that section 88 of the Constitution does not vest exclusive power to institute and undertake criminal proceedings in the Director of Public Prosecutions. The Constitution recognizes that persons and authorities other than the Director of Public Prosecutions can institute criminal proceedings. The police have a separate and independent power to prosecute under the **Police Act** of Antigua and Barbuda, and were duty bound to prosecute the appellant on being satisfied that there were reasonable grounds for suspecting

that he had committed an offence. If the framers of the Constitution intended that the Director of Public Prosecutions should have power to prevent others from prosecuting they would have said so. To the extent that the Director of Public Prosecutions purported to prohibit the police from instituting or undertaking criminal proceedings against the appellant in the first instance, he acted ultra vires the Constitution.

[9] Mr. Mendes SC observes that the police power to institute criminal proceedings is recognized by and predates the Constitution and the Constitution does not place any express fetter on the power. Section 88 of the Constitution does not empower the Director of Public Prosecutions to prohibit anyone from instituting or undertaking criminal proceedings. What the framers did was to give the Director of Public Prosecutions the power to initiate prosecutions himself and the further power to take over and discontinue prosecutions brought by the police. Mr. Mendes SC argues that the police could only lawfully accept instructions not to lay a charge where there is a clear provision in law mandating that they do so. The absence of any express power in section 88 to direct the police not to prosecute is set against the time-worn mechanism of requiring the police to obtain the consent of the Director of Public Prosecutions in certain specific cases. This is the mechanism traditionally employed when parliament desires to control the police power to prosecute. In short, the Constitution recognises the police's independent power to decide whether or not to prosecute and did not make that discretion subject to any overarching power by the Director of Public Prosecutions to direct which prosecution ought to be brought. It stopped short of that in giving him the power to take over and discontinue prosecutions only.

[10] Mr. Mendes expresses the concern that if the Director of Public Prosecutions has an implied power to prevent prosecutions, it is difficult to discern on the basis of what principle that power would be confined to prosecutions which the police might wish to commence. Mr Mendes points out that the right of a private person to initiate criminal proceedings is firmly entrenched in the common law and can only

be displaced by clear legislative prescription.² Mr Mendes contends that absent specific legislative provision, the power which the police have traditionally exercised to lay criminal charges is nothing more than the right of the private citizen to do so. Mr Mendes referred to **Lund v Thompson**,³ where Diplock J said:⁴ "Although, in all but an infinitesimal number of cases, 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 is exercising the right of any member of the public to lay an information and to prosecute an offence." Mr Mendes submits that it is not possible to imply a power on the part of the Director of Public Prosecutions to prevent private persons from prosecuting and there is no principled basis for saying that the police should be treated differently.

Discussion

- [11] The decision whether or not a person should be prosecuted is the most important step in the prosecutorial process. It encompasses an evaluation or assessment of the evidence, its reliability and adequacy, the application of the relevant law and a determination as to whether or not a prosecution is appropriate in all the circumstances. A decision to prosecute or not to prosecute should not be informed by political considerations or other undue or improper influence or pressure. Having reviewed the police file in this matter, the Director of Public Prosecutions would have brought into play his experience and expertise, assessing the strength of the evidence against the defendant, as well as the defence case and make an informed judgment as to whether or not a prosecution should be instituted. This was not a case in which the Director of Public Prosecutions considered it proper that criminal proceedings should be instituted and undertaken against the appellant and accordingly so instructed the police.

² *Giebler v Manning* [1906] 1 K.B. 709; *Regina (Gladstone Plc) v Manchester City Magistrates' Court* [2005] 1 W.L.R. 1987.

³ [1959] 1 Q.B. 283

⁴ At page 285.

[12] The police ignored the instruction of the Director of Public Prosecutions and proceeded to charge the appellant, founding such power in the **Police Act**. Section 23(1) of the **Police Act**, provides, among other things, that it shall be the duty of all police officers to preserve the peace and prevent and detect crimes and other infractions of the law. Police officers also have the duty to summon before a magistrate and to prosecute persons found committing any offence, or whom they may reasonably suspect of having committed any offence or who may be charged with having committed any offence.

Purposive interpretation of Constitution

[13] Did the Director of Public Prosecutions act in excess of the powers conferred upon him by the Constitution by instructing the police not to charge the appellant? The answer depends upon a proper interpretation of the Constitution. The tenets of constitutional interpretation are well known and I gratefully adopt the principles of interpretation enunciated in the following cases. The nature of a constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded: per Byron CJ in **Attorney General of Grenada v The Grenada Bar Association**.⁵ In **Reyes v The Queen**,⁶ Lord Bingham stated at paragraph 26:

“As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.”

A constitution calls for a generous interpretation, avoiding what has been called the austerity of tabulated legalism.⁷ In **Attorney-General of the Gambia v**

⁵ Grenada Civil Appeal No. 8 of 1999 (delivered 21st February 2000) at paragraph 7.

⁶ [2002] UKPC 11.

⁷ Lord Wilberforce in *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* [1980] A.C. 319 at 328.

Momodou Jobe,⁸ Lord Diplock said:⁹ “A Constitution ... is to be given a generous and purposive interpretation.”

[14] In **Frederick Alexander James v Commonwealth of Australia and the State of New South Wales and Others**,¹⁰ the Privy Council stated:

“It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.”

Sections 88 and 89 of the Constitution

[15] The Director of Public Prosecutions undoubtedly occupies a pre-eminent position in Antigua and Barbuda with respect to criminal proceedings. The source and origin of his pre-eminence is the Constitution. The powers and functions of the Director of Public Prosecutions are provided for in section 88 which states:

“(1) The Director of Public Prosecutions shall, subject to section 89 of this Constitution, have power in any case in which he considers it proper to do so –

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence against any law;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;
- (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 Prosecutions by paragraph (b) and (c) of subsection (1) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

⁸ [1984] A.C. 689.

⁹ At page 700.

¹⁰ [1936] UKPC 52.

(3)...

(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 other person or authority."

- [16] Section 89 applies to offences against any law relating to official secrets, mutiny, or incitement to mutiny and any offence under any law relating to any right or obligation of Antigua and Barbuda under international law. In the case of any such offence, the Attorney General may give general or special directions to the Director of Public Prosecutions as to the exercise of the powers conferred upon him by section 88 and the Director of Public Prosecutions shall act in accordance with those directions.
- [17] The Constitution recognizes that persons and authorities other than the Director of Public Prosecutions can institute and undertake criminal proceedings. The Director of Public Prosecutions is also empowered under the Constitution to discontinue criminal proceedings brought by the police. When one considers the full amplitude of the powers conferred upon the Director of Public Prosecutions it would take an overly austere reading of the Constitution to hold that notwithstanding the power to discontinue proceedings brought by the police, the Director of Public Prosecutions, lacks the power, a power which arises by necessary implication, to instruct the police not to institute criminal proceedings against an individual.
- [18] A corollary of the power to institute and undertake criminal proceedings is the power not to institute or undertake such proceedings. The Director of Public Prosecutions may exercise his power to institute and undertake (or not to institute and undertake) criminal proceedings in person, or through other persons acting under or in accordance with his general or special instructions. While the

Constitution does not state who these “other persons” are, there is nothing to suggest that the police are not within the category of persons acting under and in accordance with the general or special instructions of the Director of Public Prosecutions, within the purview of section 88(4) of the Constitution. In fact, the very nature of their prosecutorial work compels the conclusion that they are. There is nothing novel in the Director of Public Prosecutions giving instructions to the police. The Constitution itself contemplates that situation. Given the lynchpin role played and the paramountcy occupied by the Director of Public Prosecutions in the conduct of criminal prosecutions I can find no warrant for interpreting the Constitution in a manner limiting or restricting the instructions that the Director of Public Prosecutions can give the police. The Constitution should be interpreted in a manner giving implied or ancillary power to the Director of Public Prosecutions. The Director of Public Prosecutions acted well within his implied or ancillary power in instructing the police not to institute a criminal charge against the appellant. The police were therefore obligated to follow his instructions.

- [19] The power of the police to prosecute persons pursuant to section 23(1) of the **Police Act** does not exist in isolation. It has to be viewed within the matrix established by the Constitution giving overarching power to the Director of Public Prosecutions with respect to criminal proceedings and as such is subject to his powers under section 88 thereof. The proper administration of justice undoubtedly requires a close working relationship between the police and the Director of Public Prosecutions. A polemical relationship does not conduce to the attainment of that objective. In the same manner, public confidence in the administration of justice would be undermined or impaired if the police ignore the instruction of the Director of Public Prosecutions, acting within his implied or ancillary powers, not to institute a charge against an individual, and proceed to charge that individual in the face of that instruction. Such disregard would undermine the constitutional role and function of the Director of Public Prosecutions. Paying regard to the paramountcy accorded to the Director of Public Prosecutions by the Constitution in criminal proceedings, where the Director of Public Prosecutions, having reviewed the

police file, instructs the police not to institute proceedings, the police cannot disregard the instructions.

[20] While it is true that the Director of Public Prosecutions and the police are empowered to institute criminal proceedings, the Constitution indubitably accords the Director of Public Prosecutions greater power in the conduct of criminal proceedings. The Constitution could not on the one hand bestow power on the Director of Public Prosecutions to give general or special instructions to the police, empower the Director of Public Prosecutions to discontinue criminal proceedings and on the other hand contemplate or countenance the police disregarding instructions of the Director of Public Prosecutions not to prosecute, by relying on their power to institute proceedings under the **Police Act**. A construction of the Constitution which leads to that result would be narrow, ungenerous and not purposive and runs the risk of treating the language of the Constitution as if it were found in a will, a deed or a charter party¹¹. Police officers do not enjoy the same security of tenure as the Director of Public Prosecutions, nor would they possess his qualification, training and expertise. Although an officer of the executive branch of Government, the powers of the Director of Public Prosecutions are quasi-judicial in nature and make him the final arbiter on decisions to prosecute by the State. In that regard, police officers are subject to the overall control and direction of the Director of Public Prosecutions.

[21] It is, of course, quite easy to contend as Mr. Mendes SC does, that the course open to the Director of Public Prosecutions was to discontinue the criminal proceedings brought by the police against the appellant. Mr. Astaphan SC, adverted to the absurd situation which would exist where a Director of Public Prosecutions is empowered to discontinue a complaint the very day it is filed but has no authority to instruct that a charge should not be instituted after the police investigations are complete. I agree with Mr. Astaphan that if the Director of Public Prosecutions can discontinue criminal proceedings at any stage before

¹¹ Lord Bingham in *Reyes v The Queen* [2002] UKPC 11.

judgment is delivered, he ought to have the implied, incidental or ancillary power to instruct the police not to institute criminal proceedings and the Constitution should be so construed. It would certainly be injurious to the administration of justice for a prosecution to be instituted against an individual in defiance of the instructions of the Director of Public Prosecutions and for that person to be taken through the criminal justice system, with all what is therein entailed, while awaiting the Director of Public Prosecutions to discontinue the matter. The potential for abuse and injustice would certainly be great. Mr. Astaphan SC submits, and I agree, that the Director of Public Prosecutions ought to be constitutionally permitted to act before irreparable harm is caused to an individual by an unwarranted prosecution. In my judgment, that would be achieved by giving a purposive and generous interpretation to the Constitution thus avoiding the austerity of tabulated legalism. I note here that Mr. Mendes' argument with respect to laws which require the consent of the Director of Public Prosecutions, do not affect the conclusion that section 88 of the Constitution must be purposively construed. I agree with Mr. Astaphan SC that the learned judge was required to construe the powers of the Director of Public Prosecutions in a purposive way, giving such powers as are necessary, ancillary or incidental to the express powers conferred by the Constitution. The learned judge however failed to do so.

Private prosecution

- [22] The relationship between the Director of Public Prosecutions and a private prosecutor is evidently different from the relationship between the Director of Public Prosecutions and the police. The Director of Public Prosecutions is not in a position to instruct a private citizen instituting a private prosecution. In any event a private individual is under no obligation to comply with instructions from the Director of Public Prosecutions. A private individual would not be a person acting under the general or special instruction of the Director of Public Prosecutions within the purview of the Constitution. However, the Director of Public Prosecutions would be free to utilize his powers under section 88(1)(c) of the

Constitution to bring an end to a private prosecution if he thought it were appropriate to do so.

Political influence

[23] Taking into account the manner the case was presented in the court below and applying the relevant law, I would have agreed with the learned judge's decision to refuse leave on the political influence point on the grounds that that there was an alternative remedy in the abuse of process jurisdiction vested in the magistrate presiding at the trial and that the complaint of political influence could fairly be resolved within the criminal process. It, however, having been recognised on appeal that no leave was required to pursue the Director of Public Prosecutions' direction point in the court below, it would have been quite appropriate in the circumstances and would make good sense to ventilate the political influence point in that court.

[24] For all the above reasons I would allow the appeal; set aside the orders made by the learned judge; and quash the charge preferred against the appellant. The parties are to make written submissions on costs within 14 days of delivery of this judgment.

Davidson Kelvin Baptiste
Justice of Appeal

[25] **EDWARDS, J.A.:** I agree with the reasoning and most of the conclusions and result of this appeal as determined by my learned brother Baptiste J.A. I wish to express my thoughts on the limits of the police powers to prosecute and the mandatory nature of the instructions of the Director of Public Prosecutions under section 88 of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution"). Before stating them I wish to put our approach to this appeal in a proper perspective having regard to the unusual nature of the application that Harris J. determined. The title to the application and the application for leave to

apply for judicial review peculiarly raised substantial questions of law concerning the interpretation of section 88 of the Constitution although there was no originating motion before the Court for determination as sections 119 and 120 of the Constitution and CPR 56.1 require.

[26] Section 119 of the Constitution states:

"119.-(1) Subject to the provisions of sections 25(2), 47(8)(b), 56(4), 65(5), 123(7)(b) and 124 of this Constitution, any person who alleges that any provision of this Constitution (other than a provision of Chapter (II) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened and to make a declaration accordingly.

(3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration is made has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under any law in proceedings in the High Court.

(4) ...

(5) A person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of this Constitution alleged by him is such as to affect his interests.

(6) The rights conferred on a person by this section to apply for a declaration and relief in respect of an alleged contravention of this Constitution shall be in addition to any other action in respect of the same matter that may be available to that person under any other law or any rule of law.

(7) ..."

[27] Section 120 states:

"120.-(1) Where any question as to the interpretation of this Constitution arises in any court of law established for Antigua and Barbuda (other than the Court of Appeal, the High Court or a court-martial) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court.

(2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if the decision is the subject of an appeal to the Court

of Appeal or Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, Her Majesty in Council.”

[28] The trial judge in dealing with this unusual application applied the test in **Mass Energy Limited v Birmingham City Council**¹² enunciated by Glidewell L.J. This test suggests that where the court has had the benefit of detailed inter partes argument of such depth and in such detail, and the court has most if not all of the documents in front of it that if leave were granted, it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing; and where the court is in as good a position as would be the court at the substantive hearing, then the proper approach ought to be that the court should grant leave only if satisfied that the applicant’s case “is not merely arguable but is strong; that is to say, is likely to succeed.”

[29] On applying this test the trial judge identified the substantive issues peculiar to the application¹³ to be:

“(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 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; (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 ...”

[30] The judge thereafter determined these issues and interpreted section 88 of the Constitution in the manner stated by my brother Baptiste J.A. It was against this background that Senior Counsel for the parties at the hearing of the appeal requested and we agreed to treat Harris J’s interpretation of section 88 of the Constitution as if it has been raised under section 119 of the Constitution and decided by him since Harris J. actually determined the matter.

¹² [1994] Env. L.R. 298 at pages 307 and 308.

¹³ At paragraph 14 of his judgment.

Police Powers to Investigate and Prosecute

- [31] The police have the capacity to initiate and carry out criminal investigations for almost all indictable and summary offences except some regulatory offences which are brought by officers of Government Departments or Local Authorities with or without the consent of the Director of Public Prosecutions. For summary offences in the Magistrate's Court the police are empowered to prosecute such offences. For indictable offences, the police usually have conduct of marshalling the evidence for the preliminary inquiry, and after the defendant is committed to stand trial, the Director of Public Prosecutions and his agents take over the prosecution for the trial on indictment in the High Court with a jury.
- [32] Section 22 of the **Police Act**¹⁴ specifies a variety of offences ranging from indictable offences, summary offences including breach of the peace, loitering, and vagrancy, and other offences under the **Small Charges Act**.¹⁵ The police may arrest persons for such offences whom they reasonably suspect to have committed such offences; or who in the presence of the police offend in any manner against any law where their names and residence are unknown to the police. They may also arrest persons where they know that warrants for those persons' apprehension are outstanding after they have been charged.
- [33] Section 26(2) of the **Magistrate's Code of Procedure Act**¹⁶ provides that:
- “(a) It shall be lawful for any police officer, to lay any information or make any complaint in the name of the Commissioner of Police and conduct any such proceedings on his behalf. (b) Every such information or complaint shall be signed by the police officer laying or making the same and such police officer shall be deemed for all purposes of this Act other than [sic] those specified in this subsection to be the complainant...”
- [34] The relevant provisions of section 23 of the **Police Act** lists the duties of all police officers to include –

¹⁴ Cap. 330, Revised Laws of Antigua and Barbuda 1992.

¹⁵ Cap. 405, Revised Laws of Antigua and Barbuda 1992.

¹⁶ Cap. 255, Revised Laws of Antigua and Barbuda 1992.

“(1)(e) to summon before a Magistrate and to prosecute persons found committing any offence, or whom they may reasonably suspect of having committed any offence or who may be charged with having committed any offence; ...”

[35] Section 31 of the **Police Act** states that:

“Where any police officer lays an information or complaint against any person before a Magistrate or any person alleged to have committed an offence is apprehended and brought before a Magistrate who is trying or enquiring into the matter of the information, complaint or charge any other police officer shall have the same privileges as to addressing the Magistrate and examining the witnesses adduced in the matter as the police officer in whose name the information, complaint or charge is laid or made would have had.”

[36] Those provisions are to be contrasted with the provisions dealing with private prosecutions under the **Magistrate’s Code of Procedure Act**. Section 26(1) provides that:

“It shall be lawful for any person to make a complaint against any person committing an offence punishable on summary conviction unless it appears from the enactment on which the complaint is founded that any complaint for such offence shall be made only by a particular person or class of persons.”

Section 74 states that:

“The person bringing the charge and the person charged may conduct their own case or may appear by counsel or solicitor.”

[37] It is evident from the relevant provisions under the **Police Act** that whenever the police make a complaint or charge a defendant in the name of the Commissioner they are acting in an official capacity as public officers, rather than as private citizens.¹⁷ The former practice and law as to bringing prosecutions which we inherited from England have been varied by our statutory provisions existing in the **Police Act**.

¹⁷ Section 127 of the Constitution states ‘public office’ means any office of emolument in the public service and includes an office of emolument in the Police Force;”

[38] Formerly the police in England were in the same position as all other subjects of the Crown in regard to the bringing of prosecutions.¹⁸ Until 1829 there was no legal duty to prosecute other than the general right of all persons to prosecute. After the **Metropolitan Police Act 1929** as amended and **The Police Act 1964** were enacted a statutory legal duty to enforce the law and prosecute was given to the police in England.

[39] In **Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn**,¹⁹ despite the submissions of the respondent's counsel that no statute or common law imposes a legal duty on the Commissioner of Police of the Metropolis to prosecute, and that the police have a private right to prosecute in common with all other subjects, and only assume as a matter of practice the job of prosecuting, the Court held otherwise. Edmund Davies L.J. found this proposition to be "a bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law." Denning M.R. held that it was:

"The duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no [*sic*] suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought."

[40] Salmon L.J. stated it this way:

"I reject that argument. In my judgment the police owe the public a clear legal duty to enforce law – a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently... Of course, the police have a wide discretion as to whether or not they will prosecute in any particular case."

[41] There can be no doubt therefore that criminal proceedings instituted by the police in Antigua and Barbuda are brought in the public interest based on their clear statutory powers to charge persons for criminal offences as part of their public duty

¹⁸ See Stephen's History of the Criminal Law of England (1883) Vol. 1 page 493.

¹⁹ [1968] 2 Q.B. 118 per Edmund Davies L.J. at pages 148-149, Lord Denning M.R. at page 136 A, Lord Salmon L.J. at page 138 G.

to enforce the law. This is in contrast to private prosecutions which are not brought by private citizens under any public duty of law enforcement.

The Powers of the Director of Public Prosecutions

- [42] The office of Director of Public Prosecutions was created by section 87 of the Constitution for the appointment of a barrister practising for 7 years or more, to that office, subject only to the directions of the Attorney General concerning offences relating to official secrets, mutiny, and the rights of the State under international law. The Director of Public Prosecutions can be removed from office only for inability to perform his functions or misbehaviour, on the recommendation of an investigating tribunal and the advice of the Judicial and Legal Services Commission.
- [43] The Director's primary job is to consider the weight of the evidence against potential defendants, give directions concerning the charge to be brought against suspects, and prosecute persons charged where there is sufficient evidence to prove a criminal offence provided it is in the public interest to do so. That consideration must be conducted without bias whoever the potential defendant may be. The fairness of a prosecution necessarily demands that the prosecution will be instituted only in those cases where there is sufficient evidence and the proceedings are in the public interest. The general presumption is that the Director of Public Prosecutions in the exercise of his constitutional powers will with competence, impartiality and integrity; assess the information submitted to him by the police. It must be assumed that the Director will not allow cases meeting the standard of reasonable prospect of conviction to escape prosecution, nor the innocent to be prosecuted where no charge has been laid. Criminal prosecutions should not be motivated by corruption, or political, class, social or economic interests. The Director of Public Prosecutions may be regarded therefore as gatekeeper of the criminal prosecutions process in Antigua and Barbuda. As such, his existence and role ought to be respected by the police. Though the prosecutorial powers of the police and the Director of Public Prosecutions co-exist

the constitutional powers of the Director of Public Prosecutions may supercede the powers of the police in some cases, by virtue of section 2 of the Constitution.²⁰

- [44] Unlike the Director of Public Prosecutions, the police are generally not legally qualified prosecutors who, without the assistance of legally qualified persons or prosecutors, know and appreciate the law, the charge to be laid against a suspected person, and the quality of the evidence necessary to successfully prosecute to obtain a conviction for the offence to be charged. The framers of the Constitution were aware of this when they enacted section 88 of the Constitution. I hasten to add however that there are police prosecutors who have the ability to function almost at the level of a legally qualified prosecutor in rare cases.
- [45] While the police have the exclusive mandate to investigate criminal offences and to arrest and charge suspects, the Director of Public prosecutions unlike the prosecuting authority in the United States of America and the Netherlands, has no investigative powers. Consequently, the Director of Public Prosecutions is completely dependent on the cooperation of the police in the performance of his public duties. This is not the case for the police who clearly have the statutory capacity to initiate and carry out criminal investigations, lay charges and complaints, and then prosecute those charges without reference to the Director of Public Prosecutions.
- [46] The framers of the Constitution included the provision in section 88(4) expressly permitting the Director of Public Prosecutions to give instructions to persons acting under and in accordance with his instructions, where he considers it proper to institute criminal proceedings against any person before any court.²¹ In that regard, the persons envisaged by section 88(4) would include the police in my view.

²⁰ Section 2 states: "This Constitution is the supreme law of Antigua and Barbuda and, subject to the provisions of this Constitution, if any other laws is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

²¹ See section 88(1)(a).

[47] In exercising his powers under section 88(1)(a), given the symbiotic relationship which the framers of the Constitution obviously intended should exist between the Director of Public Prosecutions and the police, there has to be communication between the Director of Public Prosecutions and the police, requesting the file with evidence concerning any particular case in which he considers it proper to determine whether criminal proceedings against that potential defendant should be instituted before any court. The framers of the Constitution did not expressly deal with this matter of commonsense. They must have thought that it went without saying. In **Regina v Orpin**²² Lord Widgery C.J., speaking of a provision (repealed) in the **Courts Act 1971** providing that lay Justices when sitting with a judge of the Crown Court were themselves to be treated as judges of that court, said that in arriving at decisions the full court must play its part. He continued thus:

"All one need add today is really a glimpse of the obvious, so obvious that no doubt the draftsman did not think it necessary to put it in the Courts Act 1971, namely, that in matters of law the lay justices must take a ruling from the presiding judge in precisely the same way as the jury is required to take his ruling when the jury considers its verdict."

[48] Francis Bennion in his text **Statutory Interpretation**²³ also points out that:

"Drafters are often silent on points of detail, simply because it is not possible to express every aspect of a matter. Common sense may be needed in working out the detail...where the court fails to employ common sense it may be right to conclude that the decision is arrived at *per incuriam* and should, when opportunity offers, be overruled."

In addition to this I agree with learned Senior Counsel Mr. Astaphan that section 16(3) of the **Interpretation Act**²⁴ is applicable in interpreting section 88. Section 16(3) states:

"(3) Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or as are incidental to the doing thereof."

²² [1975] Q.B. 283 at 287.

²³ 4th Ed. at pages 473 to 474.

²⁴ Cap. 224, Revised Laws of Antigua and Barbuda 1992.

- [49] Guided by rules of construction particularly the Commonsense Construction Rule, so as not to defeat the purpose of section 88(1)(a) of the Constitution, and by parity of reasoning and common sense, if the Director of Public Prosecutions is given a clear discretion to decide which potential defendant to institute criminal proceedings against, it follows axiomatically that he also has a discretion to decide not to institute criminal proceedings against that potential defendant in my view.
- [50] By the creation of the constitutional office of the Director of Public Prosecutions, it was obviously intended that the capacity of the police to institute and prosecute criminal offences should continue subject to the limitations placed on it by section 88 of the Constitution.
- [51] What are these limitations? It would seem that the answer lies in the words "The Director of Public Prosecutions shall ... have power in any case in which he considers it proper to do so" appearing in section 88(1). These words plainly convey that the framers of the Constitution intended that the Director of Public Prosecutions in the public interest shall have a very wide discretionary power to supervise the bringing of criminal charges whether by his own office or by the police, or other persons or authority against persons suspected of committing criminal offences. He may opt to exercise his very wide discretionary power in three different ways: (i) whenever he considers it proper to determine whether or not a potential defendant should be charged with a criminal offence; (ii) whenever he considers it proper to take over and continue any criminal proceedings pending before a court, subject to the right of any person or authority who has instituted these criminal proceedings to withdraw these proceedings with the leave of the court; and (iii) whenever he considers it proper to discontinue any criminal proceedings pending before the court before it is determined.
- [52] In order to consider and determine whether it is proper to exercise any of his powers under section 88(1), the Director of Public Prosecutions, before the charge is laid, would have to review the relevant investigation files with evidence and

other information in the case of section 88(1)(a), and do the same thing after the charge is laid in the case of section 88 (1)(b) and (c). That supervisory power may not be applied in every case. The Director of Public Prosecutions has a discretion to institute or not to institute criminal proceedings against a potential defendant, and to decide which cases to intervene in after a defendant is charged, and when not to intervene.

[53] Where the Director of Public Prosecutions intervenes before the police have charged a potential defendant, and his considered decision in exercising his discretion under section 88(1)(a) of the Constitution is not to institute criminal proceedings, any plan that the police previously had or subsequently have to institute criminal proceedings in the course of their public statutory duty would be in conflict with the Director of Public Prosecution's ruling not to institute criminal proceedings. It is in such circumstances that that intention of the police must yield to the decision of the Director of Public Prosecutions, having regard to section 2 of the Constitution in my humble view. This does not mean that the Director of Public Prosecutions can tell the police not to investigate a crime or carry out criminal investigations generally, or not to enforce the law. That is within the sole province of the police.

[54] Consequently, once the police file of the appellant was submitted to the Director of Public Prosecutions, and he ruled that no criminal proceedings should be taken against the appellant, the police were obligated to abide by that decision of the Director of Public Prosecutions.

[55] It is for these reasons as well as the reasons stated by my brother Baptiste J.A. that I am of the view that the learned judge erred in his interpretation of section 88 of the Constitution. I agree with the result of the appeal as stated at paragraph 24.

Ola Mae Edwards
Justice of Appeal

- [56] **PEREIRA J.A:** This appeal raises a very important and novel question: that is, whether the powers of the Director of Public Prosecutions (“DPP”) as set out in section 88 of the **Antigua and Barbuda Constitution Order 1981** (“the Constitution”) include, by implication, a power to direct or instruct the police ‘not to charge’ a person. There are no decided cases on the point. This matter came up on appeal arising from the refusal of the learned trial judge to grant leave for judicial review of the decision by the police to disregard the direction of the DPP ‘not to charge’ the appellant. Counsel for the parties agreed at the hearing of the appeal that the sensible course was to treat the appeal as one in respect of the substantive matter in respect of the constitutional point of law raised on the extent of the DPP’s powers under the Constitution.
- [57] The other issues raised in the proceedings below, stating them as succinctly as I can, concerned whether the disregard by the police of the DPP’s instruction ‘not to charge’ infringed the separation of powers doctrine, and further whether ‘the decision to charge’ was influenced by political considerations. It is accepted that the issue raised on the constitutional point, would not have required leave for judicial review, being a free standing right given by the provisions of the Constitution²⁵ to seek the Court’s determination thereon.
- [58] I have had the privilege of reading the draft judgments of my learned sister and brother. This makes it unnecessary for me to set out the background to the case or to recite the various provisions of the Constitution engaged (save to such extent as may be necessary to my opinion). These have been eloquently addressed by my learned colleagues. I propose to focus mainly on the constitutional point as it is on the interpretation of the relevant constitutional provision,²⁶ on which I differ from the conclusion, arrived at by my learned colleagues. May I state at the onset, that I am in full agreement with the well-established principle of according the Constitution a broad and purposive construction to which my learned brother, Baptiste J.A., refers and the cases cited by him in reliance. My learned sister has

²⁵ See: Sections 119 and 120 of the Constitution.

²⁶ Section 88.

dealt extensively in her judgment on the powers of the police to investigate and prosecute and also the powers of the DPP given by the Constitution to also prosecute. I am in full agreement with the opinions expressed in paragraphs 29 to 41 of her judgment.

[59] My learned colleagues have concluded, in essence, that the constitutional powers of the DPP extend, by implication, to directing or instructing the police 'not to charge' a person. It must be most rare for the police not to follow a direction or instruction given by the DPP. Indeed it may be said to be foolhardy for the police to ignore or disregard the instructions of the DPP given the constitutional role and powers of the DPP where it is to be expected that such directions and instructions would only come after careful consideration of all the circumstances by the DPP. More importantly however, is the fact that the DPP, irrespective of whether the police or a private citizen has initiated the charge or prosecution, has the overarching power under the Constitution to shut down those proceedings at any time after their commencement right up to the time prior to delivery of any judgment thereon. Accordingly, whilst I agree that the police should, as a counsel of prudence, adhere to the direction or instruction of the DPP 'not to charge' a person, I do not agree that the police are obliged, as a matter of law, to do so. In my view, the constitutional powers of the DPP as currently framed, do not extend to giving to the DPP a power to instruct or direct the police 'not to charge' a person or on the flip side of the coin 'to charge' a person. Indeed were it intended to extend to the giving of such power the framers could have easily inserted such language.

[60] It is beyond question that the police have investigative powers in performance of their public duty, as policemen, and also that they may initiate and prosecute criminal offences. This duty has its origin in the common law in much the same way as a private citizen, although a private citizen is not under a strict duty, as is the case with the police. A private person nevertheless enjoys in similar manner

the right to initiate and prosecute a criminal offence.²⁷ In practice, the bulk of summary offences are charged and prosecuted to completion without any reference or intervention whatsoever by the DPP. Clearly then the police invariably would themselves take a decision as to whether or not a particular set of facts or circumstances warrant the initiation and prosecution of a criminal charge. Undoubtedly, they possess this power which is not only rooted in the common law but is now buttressed by statute. That power does not take away, nor does it in any way conflict with the power of the DPP under section 88 of the Constitution also to initiate and prosecute a criminal charge. Section 88, in essence, gives power to the DPP also to institute and undertake criminal proceedings. Implicit in that power 'to institute' must be the power to decide 'not to institute or prosecute', but that is as far as the DPP is concerned in the exercise of his own constitutional discretion given under section 88. What Section 88 does not give to the DPP, in my view, is a discretion to direct anyone else (including the police) as to what to do or not do in respect of the taking of a decision 'to charge' or 'not to charge' a person.

[61] In short, the DPP, the police and private subjects, have the power to initiate and prosecute a criminal charge. Their respective powers enjoy a well-established and peaceful co-existence. The DPP's powers are by virtue of the Constitution. The police powers are by virtue of the common law now buttressed, as I said above, by statute, namely the **Police Act**,²⁸ and the private citizen's power by virtue of the common law. Section 88 of the Constitution which accords power to the DPP to initiate and prosecute expressly recognises the existence of the power of the police as well as private citizens, or other bodies or authorities to initiate and prosecute a criminal charge. Such authorities as the Comptroller of Customs and the Revenue Commissioner springs to mind. As was stated, in essence, in **Scopelight Ltd. and Others v Chief Constable of Northumbria Police Force**

²⁷ See: *Giebler v Manning* [1906] 1 K.B. 709, *Regina (Gladstone Plc) v Manchester City Magistrates' Court* [2005] 1 W.L.R. 1987, *Ewing v Davis* [2007] 1 W.L.R. 3223.

²⁸ Cap. 330, Revised Laws of Antigua and Barbuda 1992.

and Another²⁹ the DPP is not the sole arbiter of the public interest in criminal matters.

[62] No doubt a suggestion to the effect that the police could direct the DPP 'not to charge' or 'to charge' a person would be met with an immediate frown of disapproval. Similarly, why doesn't the thought that the DPP may direct or instruct the police 'not to charge' or 'to charge' a person meet with the same frown? This may be so because of the constitutional pre-eminence of the DPP. But what is the pre-eminence given to the DPP under the Constitution? The answer to my mind lies in the very language used in sec. 88 to which I now turn.

[63] Section 88(1)(a) states as follows:

"The Director of Public Prosecutions shall, have power in any case in which he considers it proper to do so -
(a) to institute and undertake criminal proceedings against any person before any court(...) in respect of any offence against any law".

This provision is clear. The DPP has the power to institute (and by implication the power not to institute) and undertake any criminal proceedings. As a practical consideration he would require the co-operation of the police. But nevertheless he, in his wisdom, is empowered to decide whether to initiate criminal proceedings or not but that is solely at his instance, as DPP and not to decide for the police whether to initiate or not, as being at the instance of the police.

[64] Section 88(1)(b) says:

"The Director of Public Prosecutions shall, have power in any case in which he considers it proper to do so -
(a) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority."

This provision is also clear. It recognises not only the ability of other persons such as private subjects, but also persons acting on behalf of the State, such as the police, or any other body or authority which may be granted such power, to initiate and undertake criminal proceedings. What this provision then goes on to do is to

²⁹ [2009] EWCA Civ. 1156.

give to the DPP the overarching power to take over and continue those proceedings whilst at the same time preserving the person's or authority's right to withdraw those proceedings - with the leave of the court.³⁰ For the sake of argument it may be asked: what would happen were a person or authority to withdraw the proceedings where the DPP took them over and was continuing them? Could the DPP override a person's or authority's decision to withdraw the proceedings by directing or instructing that the proceedings not be withdrawn? I think not. What is open to the DPP to do however is to initiate and undertake his own set of proceedings which may engage the same subject matter against the same person. He alone and no one else (save where he delegates this function to another³¹ can then withdraw them if he deems it proper to do so.

[65] Section 88(1)(c) says:

"The Director of Public Prosecutions shall ... have power in any case in which he considers it proper to do so -

(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.**" (My emphasis)

There is no ambiguity in this provision. This again speaks to the overarching power of the DPP in this instance to discontinue criminal proceedings without regard for who initiated them – be it the police or a private subject. Because of this power it is argued by senior counsel Mr. Astaphan that it would seem to be a waste of time for the DPP not to have the power to direct the police 'not to initiate' proceedings at all when the DPP can in any event discontinue them. It is accepted that the DPP has no power to direct a private citizen not to initiate a charge. But here also, notwithstanding the lack of this power to direct a private citizen 'not to bring' a charge, yet in similar fashion, the DPP holds the overarching power to shut them down, once they have been initiated. Following this argument, this would amount to a similar waste of time. Taking this argument to its logical conclusion it would tend to suggest that all initiation of criminal charges should for

³⁰ See section 88(2) of the Constitution.

³¹ See section 88(4) of the Constitution.

all practical purposes first obtain the fiat of the DPP. This was obviously not intended given the very wording of section 88, which expressly recognises the unfettered right of the citizen and any other authority (which in my view would include the police) to initiate criminal proceedings. Further, there are many bits of legislation which authorise a body, authority or person to initiate criminal proceedings but only on obtaining the consent of the DPP. Were it that the DPP had the unrestricted right to issue such directions in his sole discretion, then such provisions in other laws would be unnecessary. Furthermore, as senior counsel Mr. Mendes posited, the DPP would then be empowered to select which offences and for what person or class of persons a criminal charge should be initiated. I agree with Mr. Mendes that such a power would be a truly remarkable power, and thus a power which one would expect to be expressed in the clearest of terms in the Constitution and not left to be implied. As Lord Diplock pointed out in **Gouriet v Union of Post Office Workers and Others**³² the retention of the right of a private person to bring a criminal prosecution is an important safety net where those vested with the authority to bring and conduct a criminal prosecution decline to do so without just cause. Lord Diplock opined thus:³³

“In English public law every citizen still has the right, as he once had a 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 bring criminals to justice, and the creation in 1879 of the office of the 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.”

I agree entirely with this opinion.

[66] It seems to me that counsel for the appellant has placed undue emphasis on the practical end result where the DPP may decide to shut down the proceedings once

³² [1978] A.C. 435.

³³ At pages 497-498.

initiated, rather than on the fairness and transparency of the process in arriving at the end result which, in my humble view, is where the focus ought to be. A direction to the police not to charge, does not entail the taking of an action in a public forum (the criminal court), but rather, as was the case here, a direction conveyed through a private communication and taken necessarily prior to the commencement of criminal process. Both sub-paragraphs (b) and (c) necessitate a decision being taken in a public forum and contemplate that criminal proceedings have already been initiated. I would venture to say that in as much as a crime is a wrong against the State that it is accordingly in the public's interest to be aware and informed by the public nature of the proceedings as to when a decision is being taken by the DPP to either take over and conduct a prosecution or to discontinue one. In this regard I adopt the sentiments expressed by Lord Diplock as set out in the preceding paragraph. Even though section 88 does not say that the DPP must provide reasons for either taking over and continuing or for discontinuing a prosecution, again the very language employed in section 88 ensures that his decision cannot be capricious or biased but must certainly meet the test of fairness in the light of public scrutiny.

[67] Before leaving this point, I wish to mention the text by Dana S. Seetahal, **Commonwealth Caribbean Criminal Practice and Procedure**³⁴ on which counsel for the appellant places reliance for urging that the police **must follow the advice** or direction of the DPP. At page 54 of the learned author's treatise the following statements are made:

"Although the privilege of charging an offender lies within the domain of the police, the DPP is in charge of all prosecutions. As such, before charges are laid, the DPP may give advice to the police as to whether charges should be laid in any particular case. This will be especially true of cases of public interest and other serious matters such as murder cases and those that are complex. The police thus work closely with the DPP **and must follow his advice**, since he may step in at any time and 'take over' any criminal proceedings under his constitutional powers. He may direct the police to institute charges against any person before any court (other than a court-martial) and may also discontinue proceedings at any stage before judgment. Naturally, the DPP need not exercise all his

³⁴ 2nd Ed., Chapter 4.

powers personally, and constitutionally he may delegate the exercise of his powers to certain specified persons. Such persons, usually legal officers employed in the Office of the DPP, are, however, subject to the general or specific instructions of the DPP.” (My emphasis)

[68] Whereas I agree with much of what the learned and well respected author has said above, for the reasons given above, I respectfully disagree with her statement to the effect that the police **must follow** the advice or direction of the DPP if that statement is meant to convey that the police must as a matter of law so do, as distinct from expressing an opinion as to the inevitable outcome of the proceedings given the DPP’s overarching power to ‘take over’ and discontinue the proceedings. As counsel Mr. Mendes has rightly pointed out, no authority has been cited by her in making this statement. Accordingly it can only be taken as the learned author’s expression of her own view based on the practical end result given the DPP’s constitutional powers as she said, “to step in at any time and ‘take over’” the proceedings, the intention being to bring them to an end.

[69] For the above reasons, I hold that the DPP does not have the power under the Constitution to direct or instruct the police ‘not to charge’ and his instruction or direction to this effect was ultra vires his powers. In my view the learned trial judge was accordingly right in so concluding.

The separation of powers point

[70] Having so concluded I consider that I should address very briefly the argument advanced by Counsel for the appellant to the effect that the police, in ignoring the direction of the DPP, usurped the function of the court in deciding whether the DPP exceeded his power and thus infringed against the separation of powers doctrine. I agree with Mr. Mendes that the DPP’s direction was ultra vires his constitutional powers and accordingly the direction was invalid. The police were not obliged to follow an invalid direction. The DPP cannot be equated to a judge or court of law. Neither the DPP nor the police, have the authority to pronounce on what the DPP’s constitutional powers are. That role and power of interpreting

the constitution reside in the court. Accordingly I find no merit in this argument and reject it.

The political influence point

[71] On this point I can do no better than adopt paragraph 72 of the judgment of the learned trial judge who in turn adopted a passage from the written submissions of counsel for the respondents and with which I entirely agree, as follows:

"... There is no reason to suggest 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 Browne-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."

There is simply no distinguishing feature on the facts and circumstances of this case which takes it out of the principles expounded by the Privy Council in the **Sharma**³⁵ and **Panday**³⁶ cases.

Conclusion

[72] For the foregoing reasons, I would dismiss the appeal.

Janice Pereira
Justice of Appeal

³⁵ Sharma v Browne-Antoine and Others [2007] 1 W.L.R. 780.

³⁶ Panday v Virgil (Senior Superintendent of Police) [2008] 3 W.L.R. 296.