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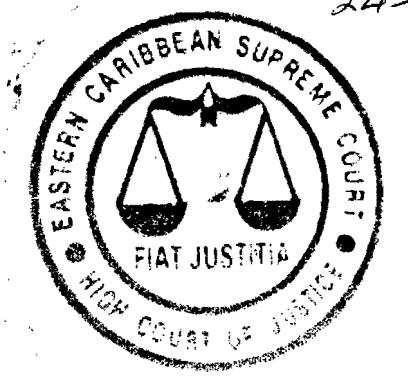


THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 19 OF 2011

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

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

AND

IN THE MATTER OF AN APPLICATION BY LINTON LEWIS FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION OF THE 13TH JANUARY 2011 BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TAKE OVER THE PROSECUTION OF PRIVATE CRIMINAL COMPLAINTS NOS. 15/11 AND 16/11 BROUGHT BY LINTON LEWIS AGAINST CLAYTON BURGIN AND THE DECISION OF THE 13TH JANUARY 2011 OF THE DIRECTOR OF PUBLIC PROSECUTIONS PURPORTING TO WHOLLY DISCONTINUE AND ENTER NOLLE PROSEQUI IN RESPECT OF BOTH PRIVATE CRIMINAL COMPLAINTS

AND IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT CHAPTER 6 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

BETWEEN:

LINTON LEWIS of Cane Hall

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
COLIN WILLIAMS

First Respondent

THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES
SONYA YOUNG

Second Respondent

CLAIM NO. 20 OF 2011

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

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

AND

IN THE MATTER OF AN APPLICATION BY NIGEL STEPHENSON FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION OF THE 13TH JANUARY 2011 BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TAKE OVER THE PROSECUTION OF PRIVATE CRIMINAL COMPLAINTS NOS. 13/11 AND 14/11 BROUGHT BY NIGEL STEPHENSON AGAINST DOUGLAS SLATER AND THE DECISION OF THE 13TH JANUARY 2011 OF THE DIRECTOR OF PUBLIC PROSECUTIONS PURPORTING TO WHOLLY DISCONTINUE AND ENTER NOLLE PROSEQUI IN RESPECT OF BOTH PRIVATE CRIMINAL COMPLAINTS.

AND IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT CHAPTER 6 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

BETWEEN:

NIGEL STEPHENSON of Quetelles

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
COLIN WILLIAMS

First Respondent

THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES
SONYA YOUNG

Second Respondent

CLAIM NO. 21 OF 2011

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

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

AND

IN THE MATTER OF AN APPLICATION BY VYNETTE FREDERICK FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION OF THE 13TH JANUARY 2011 BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TAKE OVER THE PROSECUTION OF PRIVATE CRIMINAL COMPLAINTS NOS. 11/11 AND 12/11 BROUGHT BY VYNETTE FREDERICK AGAINST CECIL MCKIE AND THE DECISION OF THE 13TH JANUARY 2011 OF THE DIRECTOR OF PUBLIC PROSECUTIONS PURPORTING TO WHOLLY DISCONTINUE AND ENTER NOLLE PRESEQUI IN RESPECT OF BOTH PRIVATE CRIMINAL COMPLAINTS.

AND IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT CHAPTER 6 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

BETWEEN

VYNETTE FREDERICK of Murrays Road

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
COLIN WILLIAMS

First Respondent

THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES
SONYA YOUNG

Second Respondent

CLAIM NO. 76 OF 2011

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

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

AND

IN THE MATTER OF AN APPLICATION BY PATRICIA MARVA CHANCE FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW OF THE DECISION OF THE 3RD FEBRUARY 2011 BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TAKE OVER THE PROSECUTION OF PRIVATE CRIMINAL COMPLAINTS NOS. 739/2010 AND 740/2010 BROUGHT BY PATRICIA MARVA CHANCE AGAINST AFI JACK AND THE DECISION OF THE 3RD FEBRUARY 2011 OF THE DIRECTOR OF PUBLIC PROSECUTIONS PURPORTING TO WHOLLY DISCONTINUE AND ENTER NOLLE PROSEQUI IN RESPECT OF BOTH PRIVATE CRIMINAL COMPLAINTS.

AND IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT CHAPTER 6 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990.

BETWEEN:

PATRICIA MARVA CHANCE

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
COLIN WILLIAMS

Respondent

CLAIM NO. 100 OF 2011

BETWEEN:

AND IN THE MATTER OF THE FIRST MAGISTERIAL DISTRICT SERIOUS OFFENCES COURT KINGSTOWN

AND IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 125 SECTION 71(2) REVISED EDITION OF THE LAWS OF SAINT VINCENT AND THE GRENADINES 1990.

AND

IN THE MATTER OF THE CHIEF MAGISTRATE SONYA YOUNG

AND

IN THE MATTER OF SUIT NO. SOC 19/11

AND IN THE MATTER OF THE CIVIL PROCEDURE RULES PARTS 2 AND 56

AND

IN THE MATTER OF THE EASTERN CARIBBEAN SUPREME COURT ACT CAP 18 SECTION 11

VYNETTE FREDERICK

Claimant/Respondent

AND

SONYA YOUNG

Defendant/Applicant

CLAIM NO. 115 OF 2011

IN THE MATTER OF THE FIRST MAGISTERIAL DISTRICT SERIOUS OFFENCES COURT KINGSTOWN

AND IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 125 SECTION 71(2) REVISED EDITION OF THE LAWS OF SAINT VINCENT AND THE GRENADINES 1990.

AND

IN THE MATTER OF THE CHIEF MAGISTRATE SONYA YOUNG

AND

IN THE MATTER OF SUIT NO. SOC 20/11

AND IN THE MATTER OF THE CIVIL PROCEDURE RULES PARTS 2 AND 56

AND

IN THE MATTER OF THE EASTERN CARIBBEAN SUPREME COURT AT CAP 18 SECTION 11

BETWEEN:

VYNETTE FREDERICK

Claimant/Respondent

AND

SONYA YOUNG

Defendant/Applicant

Appearances: Mr. Keith Scotland, Mrs. Kay Bacchus-Browne and Ms. Nicole Sylvester for the Applicants.
Mr. Anthony Astaphan S.C., Mr. Richard Williams and Mr. Grahame Bollers for the Respondents.

2011: May 23 – 25
June 21
November 15

JUDGMENT

[1] **THOM, J**: On November 15, 2010 His Excellency the Governor-General issued a writ that General Elections be held in Saint Vincent and the Grenadines on the 13th day of December 2010. November 26, 2010 was nomination day. The elections were contested by the Unity Labour Party, The New Democratic Party and the Green Party. The Unity Labour Party won eight (8) seats, the New Democratic Party won seven (7) sets and the Green Party failed to win a seat.

[2] The Applicants Dr. Linton Lewis, Ms. Vynette Frederick and Mr. Nigel Stephenson were candidates in the elections for the New Democratic Party. Dr. Linton Lewis and Ms. Vynette Frederick were unsuccessful. Mr. Nigel Stephenson was duly elected as the

Parliamentary Representative for the South Leeward Constituency. Ms. Chance is an elector in the East Kingstown Constituency.

[3] On January 11, 2011 Dr. Linton Lewis filed two private criminal complaints against the successful ULP Candidate for the East St. George Constituency Mr. Clayton Burgin. Ms. Vynette Frederick filed two private criminal complaints against the successful ULP Candidate Mr. Cecil Mckie, and the successful ULP Candidate for the North Central Windward Constituency Dr. Ralph Gonsalves. Mr. Nigel Stephenson filed two private criminal complaints against Dr. Douglas Slater. All of the complaints were under Section 51(3) of the Representation of the People Act. Ms. Patricia Marva Chance on December 7, 2010 filed private criminal complaints against Mrs. Afi Jack under Section 22(1) and 22(3) of the Representation of the People Act.

[4] On the said 11th day of January 2011, the Director of Public Prosecutions (DPP) requested Learned Counsel for the Applicants to submit to him copies of all statements relevant to the complaints on or before 12th January 2011 at 10:30 a.m. Learned Counsel for the Applicants complied with the request of the DPP and provided the statements.

[5] On January 12, 2011 the Chief Magistrate issued a certificate of refusal to issue the summonses in relation to Dr. Ralph Gonsalves.

[6] The Learned DPP took over the complaints against Mr. Clayton Burgin, Mr. Cecil Mckie, and Dr. Douglas Slater and discontinued all of them on the 13th day of January 2011.

[7] The Applicants Dr. Linton Lewis, Ms. Vynette Frederick and Mr. Nigel Stephenson made application for leave to seek judicial review of the decisions of the DPP to take over and discontinue the complaints on the ground that the decisions of the DPP were ultra vires the powers of the DPP's authority, irregular and procedurally improper, unreasonable, biased or alternatively tainted by bias, illegal and perverse. The Applications of the DPP in relation to Ms. Chance and Ms. Frederick's claim for judicial review in relation to the

complaints against Mrs. Afi Jack and Dr. Gonsalves respectively are dealt with later in the judgment.

[8] The Respondents opposed the grant of leave on the grounds that the Applicants have failed to plead or raise an arguable case with a reasonable prospect of success at trial, and the applications are an abuse of the process of the court.

SUBMISSIONS

APPLICANT'S SUBMISSIONS

PROCEDURAL IMPROPRIETY

Apparent Bias

[9] Learned Counsel for the Applicants submitted that the following facts show apparent bias on the part of the DPP:-

(a) The DPP's close association with the Leader of the Unity Labour Party who the complaints directly affect.

(b) The length of the association being about fifteen (15) years.

(c) The past action of the DPP in similar circumstances.

(d) The Unity Labour Party won the election by one seat.

(e) The decision to take over and discontinue was made within 24 hours.

Learned Counsel submitted that the test of apparent bias which the court should apply is the test in ***Porter v Magill*** [2002] 2A.C. 397 and ***Helow v Secretary of State for the Home Department*** [2008] 1WLR 2416.

[10] Learned Counsel also submitted that the principles of res judicata are not applicable in judicial review proceedings and referred the Court to the case of ***R v Secretary of State For The Environment, Ex Parte Hackney London Borough Council And Another*** [1984] WLR 592.

Procedural Unfairness

[11] Learned Counsel submitted that when making administrative decisions, public officials have a duty to act fairly to persons who would be affected by the decision. Learned

Counsel urged the court to adopt the test stated in ***R v Chelsea College of Art and Design exp. Nash*** [2000] ELR 686 at paragraph 48 as follows:

> "Would a reasonable person, viewing the matter objectively and knowing all the facts which are known to the court, consider that there was a risk that the procedure adopted by the tribunal in question resulted in an injustice or unfairness?"

[12] Learned Counsel also referred the Court to the statement of Lord Wright, in ***General Medical Council v Speckman*** [194] A.C. 627 at pp. 644-645:

> "If the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have arrived at in the absence of the departure from the essential principles of justice."

[13] Learned Counsel submitted that procedural fairness required that the DPP should have recused himself from the matter and allowed one of his senior officers to make the decision. Also, the short time which elapsed between when the DPP received the statement and when the DPP made the decision to take over and discontinue showed that there was procedural unfairness. Further the DPP never interviewed the Applicants or their witnesses.

IRRATIONALITY

[14] Learned Counsel submitted that the DPP's decision was irrational in view of the cogent and compelling evidence of the Applicants and their witnesses. The DPP had no proper basis for discontinuing the complaints.

Respondents' Submissions

Apparent Bias

[15] Learned Senior Counsel submitted that the allegations of bias are an abuse of process. The principles of res judicata apply. The issue of bias of the DPP based on past association with Dr. Ralph Gonsalves was determined in the ***Michelle Andrews*** case and the Applicants cannot relitigate the issue. Further, there is a presumption that the DPP will act independently and impartially. This presumption can only be rebutted by strong and compelling evidence of political interference, bad faith, fraud, corruption or misbehavior all of which require a specific and dishonest intent. There is no evidence in

the affidavits filed by the Applicants which show bad faith, or collusion between the DPP and Dr. Gonsalves or the Unity Labour Party. There is also no evidence of interference or influence by Dr. Gonsalves or members of the Unity Labour Party in the DPP's decision.

[16] Learned Senior Counsel also submitted that the plea of bias having been made on past association, such allegations of bias are not sustainable against persons appointed by an independent Commission to a Constitutional office.

Procedural Fairness

[17] Learned Counsel referred the Court to the affidavit of the DPP where he deposed that after reviewing the complaints and the evidence of the Applicants and having reviewed the Code for Prosecutors he decided that the material produced by the Applicants did not meet the evidential stage test of the Code in that there were no material particulars of the alleged false statement as required by Section 51 of the Representation of the People Act. There was no evidence of the alleged false statement nor was there sufficient evidence to meet the test of a reasonable prospect of conviction.

[18] The evidential material provided by the Applicants was not voluminous. A total of 9 witness statements were submitted each being no larger than two (2) pages. Thus, the DPP did not require a lengthy period of time to review the matter.

IRRATIONALITY

[19] Learned Senior Counsel submitted that the Applicants have not made any proper plea or adduced any evidence on their affidavit to show that the reasons advanced by the DPP for his decisions to take over and to discontinue the complaints are irrational or perverse.

COURT'S ANALYSIS

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

> "(2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any court of law (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(3) The powers of the Director of Public Prosecutions under subsection (2) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(4) The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (2) of this section shall be vested in him to the exclusion of any other person or authority:

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

(5) ...

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

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

[22] In ***Matalulu v Director of Public Prosecutions*** [2003] 4 LRC p.712 the court in considering section 114 (4) of the Constitution of Fiji which is in similar terms to section 64 of the Constitution of Saint Vincent and the Grenadines stated the grounds on which the Director of Public Prosecutions' decision could be reviewed as follows:

"(1) In excess of the Director of Public Prosecutions' constitutional or statutory grants of power such as an attempt to institute proceedings in a court established by a disciplinary law.

(2) When, contrary to the provisions of the Constitution, the Director of Public Prosecutions could be shown to have acted under the direction or control

of another person or authority and to have failed to exercise his or her own independent discretion, if the Director of Public Prosecutions were to act upon a political instruction the decision could be amenable to review.

(3) In bad faith, for example dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

(4) In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the Court involved.

(5) Where the Director of Public Prosecutions has fettered his or her discretion by a rigid policy e.g. one that precludes prosecution of a specific class of offences.

There may be circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the Director of Public Prosecutions may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

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

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

Prosecution of Offences Act 1985. It was nevertheless accepted by the Divisional Court in that case that the power to review a decision of the Director of Public Prosecutions not to prosecute was to be sparingly exercised.

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

[23] In ***Leonie Marshall v Director of Public Prosecutions*** P.C. No. 2 of 2006 Lord Carswell in delivering the decision of the Privy Council stated at paragraph 17:

> "The position and functions of the D.P.P. are such that judicial review of his decisions, though available in principle is a highly exceptional remedy (***Shama v Brown-Antoine*** [2006] U.K. P.C. 57 paragraph 14). Where policy considerations came into the decision it is particularly difficult for a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in ***Matalulu v D.P.P.*** [2003] 4 LRC 712, 735-6 which was cited with approval by the Board in ***Mohit v The Director of Public Prosecutions of Mauritius*** [2006] U.K. P.C. 20:
>
> > "It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the D.P.P.'s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. The approach subsumes concerns about separation of powers."

[24] The grounds upon which judicial review may be sought were set out by Lord Diplock in ***Council of Civil Service Union v Minister for the Civil Service*** to include:

(a) illegality

(b) irrationality

(c) procedural impropriety.

Lord Diplock explained the terms in the following manner:

> "By "illegality" as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not par excellence is a justifiable question to be decided in the event of dispute by those persons, the judges, by whom the judicial power of the State is exercisable.
>
> By "irrationality" I mean what by now can be succinctly referred to as Wednesbury unreasonableness (see ***Associated Provincial Picture House Ltd v Wednesbury Corp.*** (1947) 2 AER p. 680). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, or else there would be something badly wrong with our judicial system.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act within procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

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

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; ***R v Legal Aid Board, Exp. Hughes*** (1992) 5 Admin. L.R. 623, 628; Fordham Judicial Review Handbook 4th Edition (2004) p. 426 – But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the criminal standard of proof in ***R (N) v Mental Health Review Tribunal (Northern Region)*** [2005] E.W.C.A. Civ. 1605, [2006] 468 paragraph 62 in a passage applicable mulatis mutandis to arguability:
>
> > ".. the more serious the allegations or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability) but in

the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities"

It is not enough that a case is potentially arguable. An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen: ***Matalulu v Director of Public Prosecutions*** [2003] 4 L.R.C. 712, 733."

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

"Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review. See, for example, ***R v Director of Public Prosecutions, Ex parte C*** (1995) 1 Cr. App. R. 135. But as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision is entrusted by Parliament to the Director as head of an independent professional prosecuting service, answerable to the Attorney-General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute on experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defects. It will often be impossible to stigmatize a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high since judicial review is the only way by which the citizen can seek redress against a decision not

to prosecute and if the test were too exacting an effective remedy would be denied"

[27] I will apply these principles to the Applications.

Apparent Bias

[28] I will deal first with the submission of the Respondents that the issue of apparent bias is res judicata. It is settled law that parties are not allowed to relitigate the same issue upon which the Court has adjudicated unless in a case of fraud or collision. In ***R v Secretary of State for the Environment Ex parte Hackney London Borough Council*** [1984] WLR p.592 referred to by Learned Counsel for the Applicants, both Lord Justice Dunn and Lord Justice Donaldson MR expressed doubt whether the doctrine of res judicata was applicable in judicial review proceedings. However this issue was considered by the House of Lords in ***Thrasyvoulou v Secretary of State for the Environment and Others*** [1990] 2A.C. 273 and the Court found that the doctrine of res judicata was applicable in public law proceedings. The matter was recently considered by the United Kingdom Supreme Court in the case of ***R(on the application of Coke-Wallis)(Appellant) v Institute of Chartered Accountants in England and Wales (Respondent)*** [2011] UKSC1 where the Court applied the decision in ***Thrasyvoulou***.

[29] In the present case the allegations on which the plea of apparent bias is premised are not exactly the same as in the ***Michelle Andrews case***. I therefore find that the principle of res judicata does not bar the Applicants from raising the issue of apparent bias.

[30] It is settled law that the test to be applied when the issue of apparent bias is raised is the test outlined by Lord Hope in ***Porter v Magill*** [2000] 2WLR, 37 at p.84 as follows:

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[31] The fair minded and informed observer is described by Lord Hope in ***Helow v Secretary of State*** [2008] 1WLR 2416 in the following manner:

> "The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the

argument. She is not unduly sensitive or suspicious, as Kirby J observed in ***Johnson v Johnson*** [2000] 1C.L.R 488 at 509. Her approach must not be confused with that of the person who has brought the complaint. The real possibility test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges like everybody else have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is informed. It makes the point that before she takes a balanced approach to any information she is given, she will take the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[32] The Applicants' affidavit evidence on the ground of bias are all the same. In the affidavit of Dr. Linton Lewis the evidence is at paragraphs 10, 31 and 32. Similar evidence is to be found in the affidavit of Mr. Nigel Stephenson at paragraphs 33, 54 and 55, and in the affidavit of Ms. Vynette Frederick at paragraphs 10, 37 and 38, 43 – 46. Ms. Frederick provided additional evidence at her paragraphs 2 and 40.

[33] Paragraphs 10, 31 and 32 of Dr. Lewis' affidavit read as follows:

"10. ...Moreover, the Application (sic) will contend that there is implied bias on the very likelihood of bias in the actions of the DPP given his historical political affiliation to the Accused and the Unity Labour Party and that the Director of Public Prosecutions and more so since his appointment as DPP has clearly illustrated a bias towards the Unity Labour Party Government, the Prime Minister and members of the Unity Labour Party and has shown since his appointment as Director of Public Prosecution to have acted in an unreasonable, irrational matter (sic) in the exercise of his powers and discretion in relation to members or persons affiliated with the New Democratic Party. This fact is borne out by the manner in which he acted in 18th July 2007 when the DPP took over the prosecution of a candidate of the New Democratic Party Mr. Daniel Cummings as evidenced in Claim 268 of 2007...

31. The DPP has in the history of his holding the office discontinued all private complaints relating to the Unity Labour Party Government or its

representatives. This must be viewed in the context of the DPP being a former P.R.O. of the Labour Government, former Senator of the Labour Government and a Junior Associate in the Chambers of Ralph E. Gonsalves who is now at the helm of the Labour Government. Further, since his appointment as DPP, the DPP has demonstrated through his actions or bias or pre-disposition towards the Unity Labour Party Government, the Honourable Prime Minister and the Labour Party Government. This is evidenced by his conduct in the ***case of Daniel Cummings***.

32. The decision to prosecute or to discontinue prosecution must be an independent prosecutorial discretion and or not subject to political pressure. I contend that the DPP's decision to discontinue is affected by political persuasion and or political pressure in all of my circumstances of the case."

[34] Miss Frederick's also deposed in paragraphs 2 and 40 of her affidavit as follows:

"2. I am an Attorney-at-Law and a candidate at the General Election held on the 13th December 2010. The First Respondent is the Director of Public Prosecutions of Saint Vincent and the Grenadines, an independent office established pursuant to Section 64 of the Constitution, who has the power to institute, undertake, take over and discontinue criminal proceedings. The First Respondent previously held the positions of Public Relations Officer and Senator of the Unity Labour Party, the Government of the day in Saint Vincent and the Grenadines. Prior to his appointment as DPP the First Respondent worked in the legal chambers of Dr. Ralph Gonsalves. The then proposed appointment of the First Respondent was unanimously opposed by the Bar Association of Saint Vincent and the Grenadines at a general meeting held prior to his appointment on the ground that his actual involvement with the ruling party would impair the perception of independence of the office of the Director of Public Prosecutions.

40. What is even more disturbing is that when I instructed my attorney to examine my mater I raised my concern that I am convinced that if criminal proceedings were instituted that the DPP will discontinue my matter. It was my hope that he would have recused himself from my matter given the fact that the firm in which I am associated are involved in the initiation of disciplinary proceedings as against him. This was communicated to my attorneys by way of letter dated the 26th November 2010. A copy of this letter was submitted to the DPP on the 12th January 2011 before he made the decision to take over and discontinue my matter."

[35] The DPP in his affidavit in response to each Applicant does not deny being the P.R.O. of the U.L.P., a U.L.P. Senator, or a Junior Associate in the law Chambers of Dr. Ralph Gonsalves.

[36] The DPP deposed that he ceased to be P.R.O. of the U.L.P. in 1998. Since his appointment to the office of DPP he has not been a member of any political party in Saint Vincent and the Grenadines or participated in any political party or political activities.

[37] The associations between the DPP and the U.L.P. and Dr. Gonsalves' Law Firm are all past associations. The DPP has been appointed to the office of DPP four years ago, in February 2007, having acted in the office of DPP continuously from September 2003. There is no evidence showing any association or involvement of any kind by the DPP with the U.L.P. and in particular Mr. Clayton Burgin, Mr. Cecil Mckie, Dr. Douglas Slater, or Dr. Gonsalves or the Law Firm in which the DPP previously practiced since his appointment to the office of the DPP. There is no evidence of political interference. Ms. Frederick in Exhibit "VF3" which was referred to at paragraph 40 of her affidavit stated "It is my hope that he will recuse himself in light of the fact that our chambers instituted disciplinary proceedings against him". Ms. Frederick in her affidavit does not indicate whether the proceedings are pending or whether they have been determined and the outcome, also whether the proceedings related to Ms. Frederick or to a client of the Firm.

[38] Reference has been made by the Applicants to decisions of the DPP which were impugned by bias. However, no details were given of these decisions which were impugned by bias based on the DPP's relations, past or otherwise with the U.L.P. and or Dr. Gonsalves or any person. Reference was made to the ***case of Daniel Cummings***. A careful reading of the judgment shows that the Learned Judge decided that the DPP could not simply take over a criminal private prosecution, and do nothing about it. He had to either proceed with the prosecution or discontinue it. The DPP had on 18th July 2007 taken over the private criminal complaint filed by Mr. Daniel Cummings and the Application for Judicial Review was filed on the 20th August 2007. At that time, approximately one month after taking over the complaint the DPP had not taken any steps to proceed with the prosecution or discontinue it. It is not clear from the judgment what date if any was fixed by the Magistrate for the hearing of the matter. ***The Daniel Cummings case*** was not decided on the issue of apparent or actual bias.

[39] The present Applications are distinguishable from the case of ***Exparte Pinochet***. ***Exparte Pinochet*** [1999] [House of Lords] 6BHRC1 was not decided on the ground of apparent bias but on the ground that Lord Hoffman at the time of the hearing was a Director and Chairman of AICL which is wholly controlled by Amnesty International. Lord Hoffman therefore had a relevant interest in the matter by being a Director and Chairman of AICL; he was therefore automatically disqualified from hearing the matter in accordance with the fundamental principle that a man may not be a judge in his own cause. This was made clear in the judgment of Lord Browne-Wilkinson at page 13.

[40] Unlike Lord Hoffman, there is nothing to show that the DPP has had any involvement or association with the U.L.P., the candidates of the U.L.P, Dr. Slater or Dr. Gonsalves.

[41] It is not disputed by the DPP that the time between the receipt of the witness statements and exhibits and the taking over and discontinuance by the DPP was less than 24 hours. There were only two charges filed by each Applicant. The charges were the same. All charges were brought under Section 51(3) of the Representation of the People Act. The statements and exhibits submitted to the DPP were not voluminous. A total of nine witness statements were filed, none of which were more than four pages long. Indeed, one half of them were less than four pages long. Similarly, the supporting documents were not voluminous but merely a few pages. In view of these circumstances, I am of the opinion that a period of 10 hours as alleged by the Applicants was adequate time within which to thoroughly examine and consider the material that was presented to the DPP.

[42] The Applicants also raised the issue that the Chief Magistrate issued summonses in these cases but did not do so in others. The fact that the Chief Magistrate did so is of no moment. The role of the Chief Magistrate and the DPP are different. The matters to be considered by the Chief Magistrate when determining whether to issue a summon are not the same as the matters to be considered by the DPP when determining whether to continue or discontinue criminal prosecutions. When all of these matters are taken into

account, applying the test as laid down in ***Porter v Magill and Helow*** I am of the opinion that there is no realistic prospect of success of this ground of apparent bias.

Irrationality and Unreasonableness

[43] It was submitted on behalf of all of the Applicants that there was overwhelming evidence in support of the charges brought by the Applicants. They also submitted that the Learned DPP did not interview any of the Applicants or their witnesses.

[44] The DPP is not required prior to making a decision not to prosecute to interview all or any of the potential witnesses who have given witness statements. The DPP may find it necessary to do so depending on the circumstances of a particular case such as where there are material inconsistencies in the evidence before him.

[45] I agree that there is no legal obligation on the DPP to give reasons for his decision not to prosecute, see ***Exparte Manning***. However, in these matters the DPP has given reasons for his decision. His reasons are set out in paragraphs 12, 13 and 14 of his affidavit in response to Dr. Lewis' affidavit. Similar statements are made in the Affidavit of the DPP in relation to the Application by Mr. Nigel Stephenson at paragraphs 15, 16 and 17, and in relation to the Application by Ms. Vynette Frederick at paragraphs 20, 26, 27 and 28.

[46] The DPP deposed that he applied the Full Code Test as outlined in the Draft Prosecutor's Code. This test is a two-stage test, being the Evidential Stage Test and the Public Interest Stage Test. The Evidential Stage Test does not only include the strength of the Prosecution's case but also the strength of the Defence's case, such as whether there is an innocent explanation. Where the Evidential Stage Test has been met the Prosecutor then goes on to consider the Public Interest Test, whether there are factors against the prosecution which far outweigh those findings in favour of prosecution.

[47] The charges were all brought under Section 51 (3) of the Representation of the People Act. This provision is similar to the U.K. provision being Section 106 of the U.K. Representation of the People Act which was considered in ***R v Woolas*** [2010] AER p.60,

where the Court decided that there was a distinction between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct.

[48] Section 51 (3) reads:

> "Any person who before or during an election for the purpose of affecting the return of a candidate or prospective candidate at such election, makes or publishes any false statement in fact in relation to the personal character or conduct of such candidate is guilty of an illegal practice and liable to a fine of seven hundred and fifty dollars and to imprisonment for one year."

[49] The elements required to be proved are:

(a) The Accused must have made a false statement of fact in relation to the personal character of the complainant.

(b) The false statement of fact must have been made before or during an election period.

(c) The false statement of fact must have been made for the purpose of affecting the return of the complainant.

(d) At the time when the false statement of fact was made the complainant must have been either a candidate or a prospective candidate.

[50] I will deal with each Application separately.

Dr. Linton Lewis

[51] The DPP in his affidavit in response to Dr. Lewis' application outlined his reasons for discontinuing the charges at paragraphs 14 of his affidavit dated March 18, 2011 and at paragraphs 6, 7 and 8 of his affidavit dated March 24, 2011. They read as follows:

> "14. In relation to this matter, having perused all the evidence provided to me, from all the parties, and subjected the material before me to the Full Code Test, I determined that the matter ought to be discontinued.
>
> 6. After a review of the complaints and statements provided by the Applicants' Attorneys, I decided that the complaints and prosecutions could not reach far less meet the evidential stage test for the following among other reasons.

(a) There were no material particulars of the alleged false statements in fact made against the Applicant as required by Section 51 of the Representation of the People Act as alleged or at all.

(b) There were no evidence of the alleged false statement in fact and certainty, none sufficient to show or meet the test of a reasonable prospect of conviction.

(c) There was no material particulars or evidence to show or establish that the motive, intent or purpose of the accused Mr. Clayton Burgin, even if an alleged false statement in fact was properly pleaded or capable of being substantiated, was for the purpose of affecting the return of the Applicant.

7. In my view the failure to meet the evidential test was sufficient for me to take over and discontinue the charges and prosecutions.

8. However, I also considered whether or not it was in the public interest. I formed the view after consideration of all of the facts and the Public Interest Stage of the Code that it was not in the public interest for the charges and prosecutions to proceed any further. Some of the factors I considered were:

(a) I was not satisfied that in view of paragraph 7.14 a prosecution was in the public interest.

(b) The election was held on the 13th December 2010.

(c) The Applicant lost his seat in the general election by some 283 votes.

(d) There was no public interest in any prosecution.

[52] The particulars of the charges filed by Dr. Lewis state:

> "On the 23rd November 2010 Clayton Burgin while addressing the electorate gathered at an election rally for the Unity Labour Party in Belmont made the following false statement of fact in relation to the personal character or conduct of Linton Lewis for the purpose of affecting the return of Linton Lewis a prospective candidate at the General Elections on the 13th December 2010, more particularly,
>
> > "You know what Linton is going around saying? He done win already. I understand that recently he went to a supermarket in Calliaqua and he met a lady there and he said to the lady, "I am going to sue you. I hear you said that I rape a 13 year old," but the lady say, "I never say that but you just mentioned it, is it true?" That's what the lady ask him, since 2005 he has been threatening to sue people for one thing or the other. You can rest assured in East St. George and West St. George and Marriaqua you can rest assured that as a candidate for the Unity Labour Party your 13 year old is safe with us."

[53] Dr. Lewis submits that the statement implies that he either had sex with an underage girl and now wanted to sue about it or that he has nefarious intentions towards all 12 – 16 years old girls.

[54] As pointed out in ***Woolas*** the statement complained of must be a false statement of fact. In ***Woolas*** the court gave the following guidance in determining the making of an election address as follows:

> "In ascertaining the meaning of the election address it is necessary to consider what the words used would mean to an ordinary and reasonable reader of them in the constituency. Such a reader is neither naïve or unduly suspicious. He would not analyze the words like a lawyer and so the court should be wary of conducting an over elaborate analysis of the words used or taking an over literal approach. ***Skuse v Granada Television*** (1996) EMLR 278 at 285 – 287."

[55] And at paragraph 74

> "In determining this question we have borne in mind that, having regard to the importance of free speech in general and to the importance of free speech in the particular context of a general election, and having regard to the requirement that a breach of Section 106 must be established to the criminal standard of proof, a statement should only be characterized as one of fact where there is a clear assertion of fact... We have borne in mind that what may appear to be a statement of fact may be an inference from other matters and therefore a comment or judgment."

[56] The ordinary and reasonable listener in the constituency would interpret the statement to mean that Dr. Lewis had threatened to sue persons for several things, and an example is given that he threatened to sue a woman who he alleged made certain statements about him which the woman denied. When the statement is examined carefully Mr. Burgin does not suggest any part of the conversation as a fact. Mr. Burgin rather made a statement of fact that the conversation took place between Dr. Lewis and a woman and that Dr. Lewis had threatened to sue the women and several persons.

[57] There is no clear assertion of fact by Mr. Burgin that Dr. Lewis raped a 13-year-old girl or that he had intentions to so do as alleged. Having regard to the standard of proof under Section 51(3) being proof beyond reasonable doubt and what was said in ***Woolas*** that in

order for a statement to be considered a statement of fact there must be a clear assertion of fact, in this case there was not such a clear assertion of fact. There is no realistic prospect of success that the DPP's decision to discontinue on the ground of insufficient evidence was irrational or unreasonable.

Ms. Vynette Frederick

[58] The evidence in support of the charges brought by Ms. Vynette Frederick is contained in the witness statement of Mr. Ken Roberts. The relevant part is paragraph 6:

> "Some time in or about October 2010 Mr. Cecil McKie the proposed candidate for the Unity Labour Party said to me that he would like me to support him in the upcoming general elections. I told him you know my position already and he then said to me you rather support a girl who loves girls. I then said to him, what you mean she is a lesbian and he said yes."

[59] There is no doubt that the statement complained of is a statement of fact that Ms. Frederick is a lesbian. A statement that a person is a lesbian is a statement in relation to the person's sexual orientation. It relates to the personal character of Ms. Frederick. Ms. Frederick in her witness statement stated that the statement complained of is false.

[60] Was the alleged statement made for the purpose of affecting the return of the complainant? The evidence of Mr. Ken Roberts is that Mr. McKie made the statement to him while Mr. McKie was seeking to get him to support Mr. McKie in the general election instead of Ms. Frederick. There is therefore evidence which shows that the statement was made, for the purpose of affecting the return of Ms. Frederick.

[61] When the statement was made was the complainant a candidate or a prospective candidate? Mr. Ken Roberts alleged that the statement was made in or about October 2010. The elections were held on December 13, 2010. The evidence of Ms. Frederick is that she was selected by the N.D.P. in 2009 to be a candidate for the N.D.P. in the General Elections which were held on December 13, 2010. The General Elections were constitutionally due to be held in March 2011. The Representation of the People Act defines a candidate as follows:

""Candidate" in relation to an election means a person who is:

(a) elected to serve in the House of Assembly at the election; or

(b) nominated as a candidate at the election or is declared by himself or by others to be a candidate;

on or after the day of the publication of the notice of election in accordance with the election rules for the election or after the dissolution or vacancy in consequence of which the writ for elections was issued."

[62] Under paragraph 3 of the Election Rules the Supervisor of Elections is required to give notice of the election after the Governor-General issued the writ. Thus a person could be a candidate before nomination day. The Act, however, does not define the term prospective candidate. The term prospective candidate is only used once in the Act and that is in Section 51(3) the section under which the complaints were made. Having regard to the definition of candidate and the provisions of Section 51 (3) which seeks to prevent persons from affecting the outcome of Elections by the use of false statements of facts in relation to the personal character or conduct of a person who is seeking political office, a person who has been declared a candidate for the general elections by a political party would be a prospective candidate. Ms. Frederick adduced evidence that she was selected by the NDP in 2009 and the statement was made in October 2010 and the election held in December 2010. There is therefore evidence that when the statement was made Ms. Frederick was a prospective candidate.

[63] While there is evidence of each ingredient of the offences, the DPP has deposed in his affidavit that Mr. McKie in a written statement denied having such conversation with Mr. Ken Roberts. Mr. Ken Roberts in his witness statement does not seem to recall when the alleged conversation took place. He does not state where this conversation took place. I bear in mind the decision of the Privy Council in ***Matalulu*** that the DPP's decision to discontinue may be based on judgment about the prospect of success. The DPP is empowered to make such judgment even though it may be wrong in law or mistaken on the facts. The decision of the DPP will include an assessment of how strong the evidence would be at the end of the trial and an assessment of the defence. In this case, having regard to the witness statement of Mr. Ken Roberts and the affidavit of the DPP of the

statement of denial by Mr. McKie, I do not find that there is realistic prospect of success that the DPP's decision to discontinue was irrational, perverse or unreasonable.

Mr. Nigel Stephenson

[64] Both Mr. Stephenson and his witness Mr. Wayne Grant in their witness statements alleged that Dr. Slater made a false statement directly and by innuendo that Mr. Stephenson was a pedophile. The transcript of Dr. Slater's statements was attached to both witness statements.

[65] An examination of the transcript shows that Dr. Slater stated that Mr. Stephenson was not brave enough to attend in person before the Returning Officer on Nomination Day. Dr. Slater then asked the rhetorical question whether Mr. Stephenson did not attend because he was afraid the Police would arrest him or he was afraid of David Browne. Dr. Slater then proceeds to refer to an article written by one Wade Kajo Williams. Dr. Slater stated that Mr. Williams in his article suggested that tax evaders, persons who owned Government Agencies large sums of money, violent cutlass yielding (sic) individuals, those who impregnate 13 years old girls, and those who defraud the NIS, their nomination should be rejected. Dr. Slater then goes on to give an explanation of pedophilia and ends his discourse by saying, "It is interesting what is the reason for him not turning up."

[66] Having examined the words, I am of the opinion that an ordinary and reasonable listener in the constituency of South Leeward who is not naïve or unduly suspicious as described in ***Woolas*** would find the words to mean that Dr. Slater found it strange and unusual that Mr. Stephenson did not attend before the Returning Officer on Nomination Day and suggested possible reasons why Mr. Stephenson did not attend. Dr. Slater statement is a comment on Mr. Stephenson non-attendance at the nomination centre. Dr. Slater at no time made any statement of fact that Mr. Stephenson was a pedophile. Dr. Slater did not in any way link Mr. Stephenson to pedophilia.

[67] In relation to this application by Mr. Stephenson there is no evidence of one of the salient ingredients of the offence under Section 51 (3) being there must be a false statement of fact. I therefore find that there is no realistic prospect of success that the D.P.P.'s decision

to discontinue the private criminal charges by Mr. Stephenson was irrational, perverse or unreasonable.

No. 76 of 2011

BETWEEN:

PATRICIA MARVA CHANCE

and

THE DIRECTOR OF PUBLIC PROSECUTION

[68] On February 25, 2011 leave was granted on the ex parte application of Ms. Chance to file judicial review proceedings in relation to the decision of the DPP of February 3, 2011 to discontinue private criminal complaints Nos. 739 of 2010 and 740 of 2010 which Ms. Chance had instituted against Ms. Afi Jack under section 22 (1) (c) and 22 (3) of the Representation of the People Act.

[69] On March 4, 2011 pursuant to the said Order of Court Ms. Chance filed a Fixed Date Claim in which she sought judicial review of the DPP's decision.

[70] On March 23, 2011 the DPP made an application for an Order that the order granting leave be set aside, the application for leave be dismissed and the Fixed Date Claim be dismissed.

[71] At the hearing of the application the DPP relied on two grounds:

(a) Material non-disclosure and/or misrepresentation on the part of Ms. Chance and her legal advisers.

(b) Based on the established principles on which leave for judicial review is granted, leave should not have been granted.

[72] In relation to material non-disclosure and/or misrepresentation Learned Senior Counsel on behalf of the DPP submitted that the following constituted material non-disclosure:

(a) Ms. Chance and her legal advisers failed to make enquiries of the Supervisor of Elections in relation to Mrs. Afi Jack.

(b) The failure to bring to the attention of the Learned Judge the Court of Appeal decision in the ***Michelle Andrews*** case.

(c) The decision in ***Daniel Cummings*** was misrepresented.

(d) The failure to bring to the attention of the Learned Judge the provisions of the Representation of the People Act which governs registration of voters and objections to registrations.

[73] Learned Counsel for Mr. Chance submitted:

(a) That the material non-disclosure was not pleaded in the application and therefore should be struck out.

(b) The material non-disclosure must be material non-disclosure of facts not law.

(c) The fact that enquiries were not made of the Supervisor of Elections was not a material non-disclosure. Further the fact that objections were made strengthens Ms. Chance's case.

[74] It is settled law that where an ex parte application is made to the court there must be full disclosure of all material facts see ***Brink's Mat Limited V Elconbe*** (1988) 1 WLR 1350, and ***Eddy Addari V Enzo Addari No. 2 of 2005 (CA (BVI))***. The non-disclosure referred to by the Respondent is not disputed. Having reviewed the instances of material non-disclosure and misrepresentation referred to by the Applicant, I am in agreement with the submissions of Learned Counsel for Ms. Chance that there is no merit in the Applicant's submissions. Ms. Chance brought charges under Section 22(1)(c) and (3) of the Representation of the People's Act which reads as follows:

> "22(1) Any person who --
> (a) .....
> (b) .....
> (c) Does not have the requisite residential qualifications for inclusion in the register of voters;
> And who willfully makes a false claim to be included in the register of voters is guilty of an offence and liable to a fine of seven hundred and fifty dollars and to imprisonment for six months.

22(3) Any person who knowingly makes a false statement for the purpose of being registered as a voter is guilty of an offence and liable to a fine of seven hundred and fifty dollars and to imprisonment for six months."

[75] In view of the charges brought against Mrs. Jack, on an application for leave for judicial review is was not incumbent of Ms. Chance to enquire of the Supervisor of Elections whether any person had made objections to Mrs. Jack's registration. The hearing and determination by the Supervisor of Elections of objections of third parties is not a bar to the institution of proceedings under Section 22(1)(c) or (3). Also ***Michelle Andrews case*** is a decision of the Court of Appeal from this very jurisdiction and ***Daniel Cummings case*** was decided by the Learned Judge thus there could have been no misrepresentation of the case to the Learned Judge.

[76] In relation to the second ground the submission of both parties are the same as in Nos. 19, 20, and 21. My findings in relation to the ground of bias are therefore the same.

[77] In relation to ground of irrationality and unreasonableness, Learned Senior Counsel submitted that an important factor for the consideration of the DPP was whether there existed sufficient evidence to establish a realistic prospect of a conviction. If the DPP was not so satisfied and or was not so satisfied that the prosecutions were in the public interest, the DPP was required to intervene and discontinue the prosecutions. The DPP's evidence and reason establish beyond peradventure that he was not satisfied that there was any evidence capable of showing any realistic prospect of a conviction.

[78] Learned Counsel for Ms. Chance submitted that there was overwhelming evidence in support of the charges and that a prosecution was in the public interest.

[79] The DPP in his affidavit gave reasons for his decision at paragraphs 12 and 13, 16 - 19 as follows:

"12. On the 1st February 2011 I write (sic) to the Supervisor as requested. A true copy of my letter to Supervisor of Elections is now produced and shown to me and is exhibited herewith marked "C.W."

13. On the 3rd February 2001 I received a letter from the Supervisor of Elections. The Supervisor enclosed a number of documents for my consideration and said;

> '..... I wish to inform your office that there was no objection made to the Supervisor of Elections regarding the registration of Mrs. Jack. I was informed by the Registering Officer of the verbal complaint made by Ms. Leslie Jack on the 11th November, 2010.
>
> I subsequently visited Mrs. Jack's mother at her workplace and interviewed her as to where Mrs. Jack presently resides. Based on what she said and the evidence provided by the Registering Officer and her Assistant, I instructed the Production Unit to effect the transfer....'

14. I reviewed the documents I had received from Mrs. Kay Bacchus and the documents and letter from the Supervisor of Elections.

16. After a review of the complaints and statements provided by the Applicant's Attorney and the Full Code Test I decided that the complaints and prosecutions could not reach far less meet the evidential stage test of reasonable prospect of a conviction for the following among other reasons:

16.1 The documents and statements from the Supervisor of Elections were compelling if not conclusively against any reasonable prospect of conviction;

16.2 The statements sent to me by the Applicant's Attorney at Law, even if accepted, were directly and frontally contradicted by the documents and information provided to me by the Supervisor of Elections;

16.3 I was satisfied with the cogency of the Supervisor's response and relied on her inquiries and investigations. I believed her inquiries and decision to direct that Mrs. Jack be transferred and registered were unanswerable; and

16.4 There was no formal or official objection to Mrs. Jack's name on the Register.

17. In my view, the manifest failure to meet the evidential test required for possible prosecution was sufficient for me to take over and discontinue the charge and prosecutions. I concluded that there was no reasonable prospect of a conviction.

18. However, I also considered whether or not it was in the public interest to discontinue the matter. I formed the view after consideration of all of the facts and the Public Interest Stage Test of the Code that it was not in the

public interest for the charges and prosecutions to proceed any further. Some of the main factors considered by me were:

18.1 The factors referred to in paragraphs 16 and 17 above.

18.2 At the election the register of voters was conclusive to Mrs. Jack's right to vote.

18.3 There was no public interest in any prosecution justifying a prosecution."

[80] Ms. Chance swore an affidavit in support of the charges and also filed three other affidavits that are relevant to Mrs. Jack, being the affidavit of Ms. Kaleen Edwards of Calder and Mr. Andrew Chance of Walvaroo, and Ms. Alencia Edwards of Belair.

[81] Ms. Kaleen Edwards' affidavit consist of three paragraphs 1 and 2 and they read as follows:

"1. I recall on Thursday 11th November 2010, I was at C.W. Prescott Primary School when my attention was drawn by Patricia Chance to a Rasta lady who had her hair wrapped in a white head tie.

2. This Rasta lady was having her picture taken by the Electoral Officer for registration purposes for East Kingstown. This lady I discovered was Afia Hall Jack who does not reside in East Kingstown but resides at Belair with her husband and kids."

[82] The relevant paragraphs of Mr. Andrew Chance's affidavit are paragraphs 3-6. They read as follows:

"3. On the 13th December 2010 I was an inside agent at polling station "EKL" at the Technical College in the East Kingstown Constituency.

4. Further on the 13th December 2010 I was present in the said polling division where Afia Jack attended and voted. I approached her and asked her if she knew she was not qualified to vote because she does not live in the area, in the presence of the Presiding Officer Mr. Nolwin McDowall. However, she ignored the question and continued to vote.

5. She went into the back of the polling station which was the designated area to vote. I then saw her come with the ballot and placed the ballot into the ballot box and left.

6. I ticked her name on the voter's list, and then I wrote the number at which she voted at. She was the 198th person to vote at polling station 'EKL'."

[83] The relevant paragraphs of Ms. Chance's affidavit are paragraphs 3-5 and they read as follows:

> 3. On the 13th December 2010 I was at Polling Station EKL at the Technical College in the East Kingstown Constituency working as an alternate to the inside agent.
>
> 4. Further, on the 13th December 2010 I was present outside of the polling station when I say (sic) Afi Jack arrive at the said polling station with her family members and joined the line of persons waiting to enter the polling station to vote.
>
> 5. After a lengthy wait I saw Mrs. Jack go into the polling station, where she remained for some time inside the polling station until I saw her emerge from within the station. She came outside and left."

[84] Ms. Alencia Edwards deposed in her affidavit as follows:

> 1. I live in Belair in the Constituency of West Saint George.
>
> 2. Mrs. Affie (sic) Jack is my neighbor (Mrs. Jack); her house is 2 houses away from mine.
>
> 3. Mrs. Jack lives in Belair with her husband and 4 children one of whom is a baby. Mrs. Jack's mother, who had broken her leg, also used to live with them while her leg was in the cast.
>
> 4. Mrs. Jack and her family have lived in Belair next door to me continuously for over 2 years now. I say this because about 2 years ago she and her children attended a neighborhood children's birthday party given by one of our other neighbors. We live as a family in our community and invite each other to functions at each other's homes.
>
> 5. I last saw Mrs. Jack and her family on Sunday last when we passed each other in the road on our way to our respective churches.

[85] In relation to these charges the burden of proof would be on the prosecution and proof must be beyond a reasonable doubt. The DPP was therefore required to consider whether the evidence was capable of such proof.

[86] Both charges relate to Mrs. Jack registering to vote in a constituency in which she was not ordinarily resident.

[87] The evidence of Mrs. Kalean Edwards does not indicate that she knew Mrs. Afi Jack prior to November 11, 2010. In paragraphs 1 and 2 of her affidavit she refers to Mrs. Jack as a Rasta Lady. There is no evidence in the affidavit of Mrs. Edwards that she knew the husband of Mrs. Jack, that she is familiar with the Belair area, that she visits there regularly and she is familiar with where Mrs. Jack lives and during the requisite qualifying period of three months Mrs. Jack was living at Belair.

[88] Mr. Andrew Chance's affidavit does not show that he knew Mrs. Jack prior to the election day. His affidavit does not show that he is familiar with the household of persons in the "EKL" polling division, that he was so familiar with all of those persons during the requisite qualifying period for registration of three months. Mr. Chance's evidence is that he asked Mrs. Jack if she knew she was not qualified to vote in the area and she ignored him. Voters are not expected to answer questions or respond to comments of political agents inside a polling station. In fact, under the House of Assembly Election Rules, political agents have no right to ask voters any questions. A challenge of a voter must be made to the presiding officer. Questions can only be put to voters by the presiding officer and further the questions that can be put are restricted.

[89] Mrs. Chance's affidavit contains no evidence pertaining to where Mrs. Jack resided during the requisite period. Her affidavit shows that Mrs. Jack and members of her family voted at Polling Division "EKL".

[90] Ms. Alencia Edwards in her affidavit states that Mrs. Jack has lived in Belair continuously for over two years. She lives two houses away from Mrs. Jack.

[91] This evidence of Ms. Alencia Edwards is contrary to the evidence that the DPP deposed he received from the Supervisor of Elections. This is the gravamen of Ms. Chance case. The fact that the evidence before the DPP is contradictory and the DPP decides not to proceed with the prosecution of the matter would not make his decision irrational or unreasonable. I am reminded of the statement of Lord Bingham in ***Manning's case*** that the exercise of judgment of the DPP involves an assessment of the strength by the end of

the trial of the evidence against the defendant and the likely defects, how the case is likely to fare if brought to trial. I bear also in mind that Ms. Alencia Edwards' statement lacks detail of Mrs. Jack residence during the specific qualifying period before registration. Ms. Edwards mentioned that she saw Mrs. Jack and her children two years ago and she last saw them approximately six weeks after the election. There is no evidence that she saw or in any way interacted with Mrs. Jack during the relevant qualifying period.

[92] As stated earlier leave was granted ex parte to Ms. Chance. When leave is granted ex parte it should only be set aside where there is a clear case that leave ought not to have been granted.

[93] Having regard to the learning in the cases of ***Matalulu***, ***Manning and Sharma*** the evidence adduced by Ms. Chance and the Affidavit of the DPP I find that there is no realistic prospect of success of judicial review of the decision of the DPP to discontinue being irrational. This is a clear case where leave ought not to have been granted.

Nos. 100 and 115 of 2011

BETWEEN:

VYNETTE FREDERICK

and

SONYA YOUNG

[94] On the 11th day of January 2011 the Applicant Ms. Frederick filed two private criminal complaints under Section 51(3) of the Representation of the People Act at the Magistrate's Court.

[95] On the 12th day of January 2011 the Respondent the Chief Magistrate issued a certificate of refusal in relation to both complaints.

[96] At the request of Ms. Frederick's Attorney made on January 13, 2011, on January 17, 2011 the Chief Magistrate gave reasons for her decision not to issue the summonses.

[97] On March 17, 2011 Ms. Frederick was granted leave by His Lordship Justice Bruce-Lyle to seek judicial review of the decision of the Chief Magistrate.

[98] On May 13, 2011 Ms. Fredericks filed Fixed Date Claims seeking judicial review.

[99] On May 31, 2011 the Chief Magistrate filed Application in relation to both Fixed Date Claims in which the following reliefs were sought:

(a) That the Fixed Date Claim be struck out on the ground that it was not filed within 14 days of the Order granting leave;

(b) The leave granted be set aside and the application for leave be dismissed on the following grounds:

(i) Material non-disclosure;

(ii) Leave ought not to have been granted since there is no basis for the grant of leave.

[100] On June 16, 2011 Ms. Frederick filed an application to strike out the Chief Magistrate's application on the ground that the application was not made within the time stipulated in CPR 2000.

PROCEDURAL ISSUES

[101] It was submitted by Learned Counsel for Ms. Frederick that the Application by the Chief Magistrate was not made within the 14 days stipulated by Part 11.16 of CPR 2000; the application should therefore be struck out.

[102] Learned Senior Counsel on behalf of the Chief Magistrate submitted in response that Ms. Frederick could not rely on Part 11.16 since the Order did not contain the statement pursuant to 11.16(3) telling the Respondent of the right to make an application under Part 11.16.

[103] In relation to the Fixed Date Claim Learned Senior Counsel submitted that leave to apply having been granted on the 17th day of March 2011, the Fixed Date Claim having been filed on the 13th day of May 2011 it is an indisputable fact that the Applicant failed to file the Claim for judicial review within 14 days of the grant of the Order contrary to Part 56.4(11) which provides that leave must be conditional on the claim for judicial review being filed within 14 days.

[104] Learned Counsel for Ms. Fredericks submitted in response that the Order of the Court did not stipulate that leave was granted on condition that the Claim is filed within 14 days in keeping with Part 56.4 (11).

[105] Under Part 26.9 of CPR 2000 the Court has general powers to rectify procedural errors where the consequences of failure to comply with a rule, direction or order of the Court are not specified. No consequences are specified for failure to file an application within the time specified under Part 11 and also no consequence is specified for failure to file the Claim within 14 days of leave being granted and in this case the condition was not stipulated in the Order even though on the Draft Order in Claim No. 115 the Learned Judge did amend the Draft Order to include a condition that the Claim must be filed on or before the 30th March 2011. The overriding objective of the Court is to hear matters on their merit. No prejudice would be suffered by either party. I will therefore exercise the power granted under Part 26.9 (3) and make an order to put matters right and I so do.

MATERIAL NON-DISCLOSURE

[106] Learned Senior Counsel submitted the following as material non-disclosure:

(i) the written ruling of the Respondent which was specifically requested by Ms. Frederick was not submitted to the Court;

(ii) the natural and ordinary meaning or the local and colloquial meaning of "tomboy".

(iii) The Claimant failed to draw to the attention of the Learned Judge the relevant law in ***Exparte Choudhury***.

[107] Learned Senior Counsel submitted that had the above disclosure been made to the Learned Judge he would not have granted leave to the Claimant.

[108] Learned Counsel for Ms. Frederick in response did not dispute that the matters referred to by the Respondent were not disclosed to the Court but submitted that the non-disclosure was innocent and did not impact on the application before the Honourable Court. It would have been more helpful to Ms. Frederick if the reasons were disclosed especially as the Chief Magistrate concluded that the statement did not amount to an attack on Ms. Frederick's personal character or conduct, which was clearly erroneous. Further, even if the Court found that there was material non-disclosure the Court should in keeping with the decision in the case of ***Brinks Mat*** exercise its discretion and not set aside the leave granted.

[109] Ralph Gibson LJ in ***Brink's Mat Ltd*** outlined the principles by which a Court should be guided when considering whether there was material non-disclosure on an application for interlocutory relief. This approach was adopted by the Court of Appeal in ***Edy Gay Addari v Enzo Addari*** No.2 of 2005 where the Court stated:

> "2. The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisors. See ***Rex v Kensington Income Tax Commissioners***, per Lord Cozens-Handy M.R. at p.504, citing ***Dalglish v Jaruie*** [1850] 2 Mac G 231, at 238 and Browne-Wilkinson J. in ***Thermax Ltd. v Schott Industrial Glass Ltd.*** [1981] F.S.R. 289 at 295.
>
> 6. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the relevance was not perceived is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> 7. Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded: per Lord Denning M.R. in ***Bank Mellat v Nikpour*** at p.87. The Court has a

discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> "... when the whole of the facts, including that of the original non-disclosure, are before the Court it may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed": per Glidewell L.J. in ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc.***"

[110] The Chief Magistrate's reasons for the decision was presented to the Applicant within a week after the decision was made.

[111] Ms. Frederick in her affidavit dated 16th June 2011 stated in paragraphs 4 and 5 as follows:

> "4. It is contended by the Respondent/Defendant that there was not full and frank disclosure, there was no attempt on my part to mislead or misrepresent anything to the Honourable Court.
>
> 5. The non-disclosure if the Court so finds was innocent and did not impact on my application before the Honourable Court. In fact it would have been more helpful to me if the reasons were disclosed especially as the Chief Magistrate concluded that the statement did not amount to an attack on my personal character or conduct."

[112] However, in the Affidavit in support of the exparte application for leave and dated 10th March 2011 of Ms. Frederick, stated at paragraph 13 as follows:

> "I have requested through my lawyer Nicole Sylvester reasons from the Chief Magistrate for her refusal to issue my complaints as being frivolous and vexatious. True copy of my letter of request to (sic) reasons is produced and marked V.F. 4."

[113] The letter exhibited as "V.F. 4" shows that the request was made to the Chief Magistrate on 13th January 2011. While Ms. Fredericks stated clearly that she requested reasons from the Chief Magistrate, Ms. Fredericks did not disclose that the Chief Magistrate had given reasons for her decision within one week of the decision and four days after the request was made by Ms. Frederick's Attorney. This would have led the Learned Judge to believe that despite the request for reasons for the decision, the Chief Magistrate had not provided reasons for her refusal to issue the summonses.

[114] It cannot be said that the relevance of the Chief Magistrate's reasons for the decision was not perceived by the Applicant since the application was for leave to seek judicial review of the decision of the Chief Magistrate. The reasons given by the Chief Magistrate for refusal to issue the summonses were relevant and important in the Learned Judge's consideration of whether there was a realistic prospect of success that the Chief Magistrate had erred in law in refusing to issue the summonses. In the circumstances I find that this was indeed a material non-disclosure and it was not an innocent non-disclosure. The general rule is that where an exparte order was obtained without full and frank disclosure of material facts the order will be discharged. However, the Court has a discretion having taken into account all of the relevant facts not to set aside the order or to make a new order notwithstanding the original material non-disclosure. Having regard to the circumstances of this case, I will not exercise my discretion and set aside the order on this ground.

NO REASONBLE PROSPECT OF SUCCESS

[115] Learned Senior Counsel submitted that leave granted without notice may be set aside if it is clear that leave ought not to have been granted. Leave ought not to have been granted in these cases since there is no basis in law or fact for the setting aside of the Chief Magistrate's decision. A reviewing court may only intervene if:

(a) The Magistrate misdirected herself in law, or

(b) The Magistrate's findings of fact were perverse.

[116] Also Ms. Frederick has failed to plead any material misdirection of law or that the Chief Magistrate's findings of law and fact on the information that was before her was perverse. Learned Counsel referred the Court to the cases of ***R v Chief Metropolitan Stipendiary Magistrate, Exparte Choudhury*** [1990] 3 WLR 986 at 992.

[117] Learned Queen's Counsel further submitted that it is manifestly the case that the Chief Magistrate formed the considered view that the words complained of were incapable of bearing the rather strained and absurd meaning advanced by Ms. Frederick.

[118] Learned Counsel for Ms. Frederick submitted that the reasons for refusal were erroneous in law and in fact. The reasons given by the Chief Magistrate showed that the Chief Magistrate took extraneous matters into account to conclude that the statement was not a representation of fact, it was an expression of opinion.

[119] Learned Counsel also submitted that Ms. Frederick in her affidavit dated June 16, stated at paragraphs 6 and 7, and it is not disputed that there was a pause between son and tomboy. During the pause, persons who attended the meeting were shouting "lesbian". When the two statements are read together the meaning submitted by the Applicant is a meaning which the ordinary and reasonable person in the constituency listening to the address of Dr. Gonsalves would ascribe to the statement that Ms. Frederick was a lesbian. "Tomboy" was used in a specific sense to mean a boy.

[120] Learned Counsel further submitted that the information disclosed an offence known to the law being an offence under Section 51 (3). The Chief Magistrate erred in concluding that the statement complained of was not a statement of fact. It could not be proven true or false and did not amount to an attack on Ms. Frederick's personal character or conduct. The issue whether the information could be proven true or false was not a matter for the Chief Magistrate to determine at that stage. The Chief Magistrate was required to consider whether there was prima facie evidence of a criminal offence which calls upon the offender to answer. Learned Counsel referred the Court to the case of ***R v Stratford Magistrate Court*** [2004] EWHC Admin 2506.

[121] It is not disputed that a Magistrate has a discretion whether or not to issue a summons but that discretion is not unfettered. The approach which a Magistrate should adopt when considering whether to grant a summons is set out by Lord Widgery CJ in ***R v West London Metropolitan Stipendiary Magistrate Exparte Klahn*** [1970] WLR p. 933 at 935:

> "The duty of a Magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding whether or not to issue a summons. As Lord Goddard CJ stated in ***R v Wilson*** at pp. 46-47:
>
> > 'A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his

judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons.'

It would appear that he should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute.

In addition to these specific matters, it is clear that he may and indeed should consider whether the allegation is vexatious: see ***R v Bros.*** (1901) 85 LT 581. Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly, he should consider the whole of the relevant circumstances.

In the overwhelming majority of cases, the Magistrate will not need to consider material beyond that provided by the informant. In my judgment however, he must be able to inform himself of all relevant facts...

The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons."

[122] The Chief Magistrate stated the following as her reasons for refusing to issue the summons.

(a) The statement was not a representation of fact.

(b) Expressions of opinion are inherently not falsifiable.

(c) Ergo the statement could not be proven true or false.

(d) The statement did not amount to an attack on the personal character or conduct of the informant.

[123] In summary, the Chief Magistrate found that the statement complained of was not a statement of fact and the statement did not relate to the personal character or conduct of Ms. Frederick. These are essential ingredients of the offence under Section 51(3).

[124] It is not disputed that the statement was an oral statement made at a political meeting. As stated earlier in determining the meaning it is necessary to consider what the words used would mean to the ordinary and reasonable person in the constituency who listened to the address.

[125] The statement complained of must be a statement of fact, not a comment or opinion. The fact that a statement of fact is stated in the form of a rumor does not prevent it from being a statement of fact. It could be successfully argued that the statement shows Dr. Gonsalves did not simply stop at saying, "They say she is a tomboy". His further statement, "Ah mean, Bayliss would be a very unfortunate fellow if he send a daughter to study law, and came back and get a son, ... a tomboy," shows the context in which he was using "tomboy" was not simply a "tomboy", but a male. That the ordinary and reasonable person in the constituency would find the statement to mean that Ms. Frederick left to study law a female and she returned a male.

[126] It could also be successfully argued that a statement that a woman is a male relates to her sexual orientation, and that a statement relating to a person's sexual orientation, their sexuality, relates to the person's personal character or conduct. It relates to moral conduct.

[127] In the circumstances of this case, I find that Ms. Frederick has an arguable case with a realistic prospect of success that the Chief Magistrate misdirected herself in finding that two of the essential ingredients of the offence were not prima facie present. I find there is no reason to set aside the order granting leave.

[128] The Applicants withdraw the claim in relation to the Attorney-General during their submissions.

CONCLUSION

[129] In conclusion I find that the Applications of Dr. Linton Lewis, Mr. Nigel Stephenson and Ms. Vynnette Frederick have no realistic prospect of success and therefore leave to seek judicial review is refused. In relation to the Applications by the DPP for leave granted to Ms. Chance to be set aside and the application for leave and the Claim to be dismissed, I find that leave ought not to have been granted to Ms. Chance as there is no realistic prospect of success of her Claim for judicial review of the DPP's decision to discontinue

the private criminal complaints brought against Mrs. Jack. In relation to the Applications by the Chief Magistrate to set aside leave granted to Ms. Frederick and for the application for leave and the Claim for judicial review of the Chief Magistrate's decision to refuse to issue summonses in relation to two private criminal complaints against Dr. Ralph Gonsalves I find that there is no reason to set aside the order granting leave.

COSTS

[130] The general rule as stated in Part 56 of CPR 2000 is that no order for costs may be made against an Applicant for an administrative order unless the Court considers the Applicant has acted unreasonably in making the application or in the conduct of the application.

[131] I am of the opinion that the Applicants Dr. Linton Lewis, Mr. Nigel Stephenson and Ms. Vynnette Frederick did not act unreasonably in making the applications or in the conduct of the applications.

[132] IT IS ORDERED:

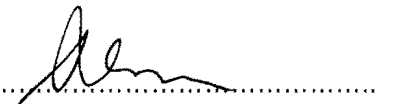
(a) Claim Nos. 19, 20, and 21 of 2011 are hereby dismissed.

(b) Claim No. 76 of 2011 is hereby dismissed. The Order granting leave to seek judicial review and dated February 25, 2011 is hereby set aside and the application for leave is dismissed.

(c) The Applications to dismiss Claim Nos. 100 and 115 of 2011 and to set aside the orders granting leave and dismiss the applications for leave are hereby dismissed. The Respondent shall pay Ms. Frederick costs in the sum of $5000.00.

[133] IT IS FURTHER ORDERED THAT:

(a) The first hearing of Claim Nos. 100 and 115 of 2011 will be held on November 30, 2011.



Gertel Thom
HIGH COURT JUDGE