EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2011/022

BETWEEN:

SONYA YOUNG

Appellant

and

VYNETTE FREDERICK

Respondent

HCVAP 2011/023

BETWEEN:

NIGEL STEPHENSON

Appellant

and

[1] THE DIRECTOR OF PUBLIC PROSECUTIONS, COLIN WILLIAMS
[2] THE CHIEF MAGISTRATE, SONYA YOUNG

Respondents

HCVAP 2011/024

BETWEEN:

VYNETTE FREDERICK

Appellant

and

[1] THE DIRECTOR OF PUBLIC PROSECUTIONS, COLIN WILLIAMS
[2] THE CHIEF MAGISTRATE, SONYA YOUNG

Respondents

HCVAP 2011/025

BETWEEN:

PATRICIA MARVA CHANCE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS, COLIN WILLIAMS

Respondent

HCVAP 2011/026

BETWEEN:

LINTON LEWIS

Appellant

and

[1] THE DIRECTOR OF PUBLIC PROSECUTIONS, COLIN WILLIAMS
[2] THE CHIEF MAGISTRATE OF SAINT VINCENT AND THE GRENADINES, SONYA YOUNG

Respondents

Before:

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony W. Astaphan, SC, with him, Mr. Grahame Bollers and Mr. Richard Williams, for the Appellants
Mr. Keith Scotland, with him, Ms. Nicole Sylvester and Ms. Kay Bacchus-Browne, for the Respondents

2012: May 30, 31.

Civil appeal – Election complaints – Representation of the People Act, Cap. 9 – Judicial review of Chief Magistrate's refusal to issue private criminal complaints – Judicial review of exercise by DPP of constitutional power to discontinue private criminal complaints – Bias – Unreasonableness – Procedural fairness

The general elections held in Saint Vincent and the Grenadines on 13th December 2010 were contested by the United Labour Party ("the ULP"), the New Democratic Party ("the NDP") and the Green Party. The appellants Dr. Linton Lewis, Ms. Vynette Frederick and Mr. Nigel Stephenson were candidates for the NDP and Ms. Patricia Marva Chance was an elector in one of the constituencies.

Dr. Lewis and Ms. Frederick were unsuccessful at the elections, but Mr. Stephenson was duly elected as a parliamentary representative. All three appellants however, filed criminal complaints against various persons under sections 22(1)(c), 22(3) and 51(3) of the Representation of the People Act.[1] These sections related to, among other things, improper voting practices and various election offences. The Chief Magistrate, Ms. Sonya Young, issued some of the complaints and issued a Certificate of Refusal in relation to others. The Director of Public Prosecutions ("the DPP") took over those complaints that were issued and discontinued all of them.

Ms. Frederick and Ms. Chance applied without notice to a judge in chambers for, and were granted, leave to seek judicial review of the decisions of the Chief Magistrate and the DPP respectively. The Chief Magistrate applied to set aside the leave granted to Ms. Frederick. This was refused, and the Chief Magistrate appealed. The learned trial judge also set aside the grant of leave given to Ms. Chance and refused leave to Ms. Frederick, Dr. Lewis and Mr. Stephenson in respect of the other complaints discontinued by the DPP. They also appealed.

Held: dismissing the appeals of Dr. Lewis, Ms. Frederick, Mr. Stephenson and Ms. Chance; allowing the appeal of the Chief Magistrate and setting aside the costs order made against her; and making no order as to costs, that:

1. It is not sufficient to simply make an allegation of a past association without some other connecting factor, to ground a finding of apparent bias. There was no evidence of the DPP having any association with the ULP since 1998, or of any association with his former law chambers and Dr. Ralph Gonsalves. Such past associations, without more, cannot form a sound basis for allegations of bias.

   Locabail (UK) Ltd. v Bayfield Properties Ltd. [2000] WLR 870 applied.

2. The evidence of the chanting of the word "lesbian" during the political meeting held on 29th August 2010 clearly influenced the learned trial judge's decision to refuse to set aside the without notice order obtained by Ms. Frederick. This evidence having been found to be untrue, the learned trial judge erred in refusing to set aside the order granting leave for judicial review of the Chief Magistrate's refusal to issue the summonses against Dr. Gonsalves.

3. The learned trial judge erred in principle in not setting aside the without notice orders, having found that there was a material non-disclosure by Ms. Frederick, which was intentional. In circumstances where there is a finding of materiality and

[1] Cap. 9, Revised Laws of Saint Vincent and the Grenadines 2009.

where the non-disclosure is intentional, an applicant for a without notice order cannot retain the benefit of an order obtained ex parte.

Brink's MAT Ltd. v Elcombe and Others [1988] 1 WLR 1350 applied.

ORAL JUDGMENT

[1] PEREIRA JA: This is the judgment of the Court. These appeals, heard together by consent, are in respect of decisions made by a judge on applications to set aside previous orders for leave granted for judicial review and in respect of others for leave to bring judicial review proceedings. They arise out of general elections held in Saint Vincent and the Grenadines on 13th December 2010. The elections were contested by the United Labour Party ("the ULP"), the New Democratic Party ("the NDP") and the Green Party. The ULP won eight seats, the NDP won seven seats, and the Green Party failed to win a seat.

[2] The appellants Dr. Linton Lewis, Ms. Vynette Frederick and Mr. Nigel Stephenson, were candidates at the elections for the NDP. Dr. Lewis and Ms. Frederick were unsuccessful. Mr. Stephenson was duly elected as a parliamentary representative. Ms. Patricia Marva Chance is an elector in one of the constituencies.

[3] After the elections, Dr. Lewis, Ms. Frederick, Mr. Stephenson and Ms. Chance filed private criminal complaints against various persons. These complaints were brought under sections 22(1)(c), 22(3) and 51(3) of the Representation of the People Act[2] ("the Act"). Section 22 of the Act concerns the qualifications of a voter to vote in a constituency in which he does not reside. Section 51 creates various election offences. Section 51(3) makes it an offence for a person before or during an election to make a false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate for the purpose of affecting the return of that candidate.

[4] On the day the complaints were filed, the Director of Public Prosecutions ("the DPP") requested that the complainants submit to him copies of all statements

[2] Cap. 9, Revised Laws of Saint Vincent and the Grenadines 2009.

relevant to the complaints. This request was immediately complied with. The following day the Chief Magistrate issued a Certificate of Refusal in relation to some of the complaints. Her decision was the subject of applications for judicial review. The DPP took over the remaining complaints and discontinued all of them the same day. His decisions were also the subject of judicial review applications.

[5] Ms. Frederick and Ms. Chance applied without notice to a judge in chambers for, and were granted, leave to seek judicial review; Ms. Chance on the ground that the decision of the DPP to take over and discontinue the complaints was ultra vires the powers of the DPP, irregular and procedurally improper, unreasonable, biased, or alternatively tainted by bias, illegal, and perverse; Ms. Frederick on the ground that the Chief Magistrate's decision refusing to issue summonses in relation to her complaints against Dr. Ralph Gonsalves was unwarranted, unreasonable, or otherwise bad in law. The Chief Magistrate brought an application to set aside the leave granted to Ms. Frederick. The judge refused to set aside the grant of leave for judicial review granted to Ms. Frederick, and the Chief Magistrate appealed.

[6] Mr. Astaphan, SC has pointed out the general undesirability of judges granting applications for permission to bring judicial review proceedings without notice. In matters of great public interest, for example where it is proposed to make a head of government a party to civil proceedings, or where matters touch and concern a general election, it is clearly in the public interest to order that such an application be served so that all affected parties may be heard on the merits of such an application before granting permission to proceed. Furthermore, it is trite principle that ex parte applications are generally sought only in circumstances of real urgency, for example, in circumstances where there is a danger of 'tipping off', or a risk of dissipation of assets, or where the very matter in respect of which relief is sought may be destroyed. None of these are applicable here. There was no certificate of urgency. We hope that legal practitioners and judges will in future be guided by such considerations.

[7] On 23rd May 2011, the matters came before Thom J, and, after a four-day trial, on 15th November 2011, she delivered a 45 page written judgment. She dismissed the applications of Dr. Lewis, Mr. Stephenson, and one of Ms. Frederick's against the decisions of the DPP. She refused to set aside the leave granted ex parte to Ms. Frederick in respect of the Chief Magistrate's refusal to issue the summons in respect of the criminal complaints against Dr. Gonsalves. Thom J also ordered costs of $5,000.00 to be paid by the Chief Magistrate to Ms. Frederick. The parties adversely affected by the learned trial judge's decisions have now appealed those decisions.

[8] In relation to the claim of irrationality and unreasonableness on the part of the DPP, the learned trial judge concluded, in relation to each appellant, having examined the complaints and the witness statements, having considered the action of the DPP, and having examined the evidence of the DPP in his affidavit, that there was no realistic prospect of success in relation to each of Ms. Frederick, Mr. Stevenson and Dr. Lewis, or of their successfully challenging his decisions on the basis of procedural unfairness, and she dismissed their applications.

[9] The learned trial judge, after referring to the authorities such as Matalulu v Director of Public Prosecutions,[3] R v DPP Ex p. Manning[4] and Sharma v Brown-Antoine,[5] dealing with the issue of a real prospect of success of judicial review, found that this was a clear case where leave ought not to be granted. In respect of Ms. Chance, having conducted a similar analysis, she concluded that leave ought not to have been granted.

[10] In relation to the complaint of apparent bias, she considered the cases of Porter v Magill,[6] Helow v Secretary of State for the Home Department,[7] R v Chelsea College of Art and Design Ex p. Nash (Application for Judicial Review),[8]

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[3] [2003] 4 LRC 712.
[4] [2001] QB 330.
[5] [2007] 1 WLR 780.
[6] [2002] 2 AC 357.
[7] [2008] UKHL 62.
[8] [2000] ELR 686.

General Medical Council v Spackman,[9] Michelle Andrews PC 16 of New Prospect v The Director of Public Prosecutions et al,[10] and other relevant authorities, and, applying the test in Porter v Magill, came to the conclusion that there was no realistic prospect of success on the ground of apparent bias.

[11] The basic challenge that Ms. Frederick, Dr. Lewis and Mr. Stephenson make on this ground is that the judge seemed to have decided the case on the basis of actual rather than apparent bias. They submit that whereas she set out the circumstances that would satisfy the first limb of the Porter v Magill test, she then failed to set out an analysis of the second limb, i.e., the principle that the fair minded observer would have considered that there was a real possibility of bias. It is apparent to us that the judge did not in her judgment explain how she applied the principle, so that is a fair criticism to make of it. That leaves us to assess whether in our view, applying those principles of the fair minded observer as set out in Helow v Secretary of State for the Home Department, the allegations or statements concerning the DPP, which are not controverted, regarding his past association with the ULP and Dr. Gonsalves, are sufficient for the purpose of meeting the criteria for a finding of apparent bias. Mr. Scotland submits, in essence, that the judge appears to have conflated the two different tests for actual bias and apparent bias.

[12] In the Michelle Andrews case, Chong JA [Ag.] delivering the judgment of this Court in an earlier appeal concerning a decision of the same Director of Prosecutions to discontinue private criminal prosecutions, had this to say on the question under what set of circumstances should the court grant leave for judicial review of the exercise by the Director of Public Prosecutions of his constitutional power to discontinue the complaints:

> "[10] In answering this question one must bear in mind the body of case law on this point, all of which is consistent in its findings that this is a 'highly exceptional remedy' (Sharma v Brown-Antoine) and one which should be

[9] [1943] AC 627.
[10] Saint Vincent and the Grenadines High Court Civil Appeal No. 3 of 2008 (delivered 14th July 2008).

'sparingly exercised'[6] [*In a matter of an Application by David Adams for Judicial Review*]. In R v Director of Public Prosecutions, Exp. Kelilene[7] [*[2000] 2AC 326 at page 371*] Lord Steyn had this to say -

> 'My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.'

"[11] With this in mind we must now examine the circumstances under which the court would grant leave for judicial review of the Director of Public Prosecutions' decision to prosecute or discontinue a private prosecution. For guidance we turn to the case of Matalulu v DPP – where the Court stated:

> 'It may be accepted however, that a purported exercise of power (i.e. DPP powers under Section 64) would be reviewable if it were made:
>
> 1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).
> 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.
> 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
> 5. Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specific class of offences.

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

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

"[12] Bearing in mind the Matalulu guidelines, the applicant's reasons for seeking the Court's permission to review the decision of the Director of Public Prosecutions are as listed at pages 29 and 30 of the written submission of Counsel for the second respondent. These are as follows:

> '(1) Bias and bad faith.
> (2) The DPP did not act in accordance with section 64 of the Constitution or 67 of the Criminal Procedure Code.
> (3) Legitimate expectation.
> (4) The accused held the positions of Minister of National Security under which the Police Service falls administratively as well as the portfolio of Minister of Legal Affairs.
> (5) The DPP had no statutory power to discontinue the private criminal complaints.
> (6) A discontinuance can only be effected by a Court of Law.
> (7) A nolle prosequi can only be effected after the preferment of an indictment.
> (8) Notwithstanding the reasons given by the DPP, these reasons are clearly reviewable in that there was sufficient evidence

disclosed upon which a proper inquiry ought to have been conducted.

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

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

Bad Faith

"[14] The learned trial judge found at pages 17 and 18 that there was no evidence of bad faith on the part of the Director of Public Prosecutions. In the absence of strong and compelling evidence of political interference or that the Director Public Prosecutions acted dishonestly, fraudulently or corruptly then the presumption is that the Director of Public Prosecutions acted independently and impartially."

[13] In Locabail (UK) Ltd. v Bayfield Properties Ltd.,[11] the Court of Appeal of England, at paragraph 25, said:

> "25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers… ."

[14] It is not disputed by the DPP that he was the Public Relations Officer of the ULP and also a junior associate in the law firm of Dr. Gonsalves prior to the ULP

[11] [2000] 2 WLR 870.

coming to office some ten (10) years ago. The evidence was that the DPP ceased to be the PRO of the ULP in 1998, and since his appointment to office he was not a member of any political party in Saint Vincent and the Grenadines or participated in any political party activity. Additionally, there was no evidence showing any actual present association or involvement of any kind by the DPP with the ULP, and in particular any of the parties complained against or the law firm of Dr. Gonsalves or indeed of any conduct on the part of the DPP referable in some way to his past offices or association.

[15] Simply to make an allegation of a past association without some other connecting factor would not be sufficient to ground a finding of apparent bias. The evidence was that these were past associations of some previous period. There was no evidence of any association with the party in question since 1998, nor any evidence of any continuing predisposition to be swayed by that party.

[16] Further on bias, Ms. Frederick made an allegation of a disciplinary action brought by her law firm against the DPP, but the judge found that the evidence was devoid of any detail as to what the proceedings concerned, to whom they related, or whether the proceedings were pending or spent. There was required to be some other evidence which showed that these past associations influenced his decision to take over and dismiss the proceedings. There was nothing but the past association, but Locabail makes it clear that this cannot be enough. See also the statement of the court in paragraphs 12-14 of Michelle Andrews. Accordingly, we reject this complaint.

[17] The appellants, in alleging unreasonableness on the part of the DPP, challenge the short time that he gave the complainants to comply with his request to examine the evidence relating to the complaints, the short length of time that he took to examine the evidence and the complaints, and the short length of time he took to dismiss the complaints. They complained about the fact that he obtained information from persons other than the complainants in arriving at his decision. They complain that he did not seek information from the complainants or their

witnesses though he sought from the other political side. They say these matters show that there was no fairness. They submit that this lack of fairness to all the complaining parties translates not only to procedural impropriety but lends itself to a decision that was irrational and perverse.

[18] In the case of Re King's Application[12] in the High Court of Barbados, the Chief Justice, Sir Denys Williams, at page 35 of the judgment of the Court, considered that what an applicant has to show is that the DPP's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power in Wednesbury terms that no DPP properly directing himself could on the evidence reasonably or regularly and properly have formed the decision in question. Williams CJ reminds us that the court has no power to substitute its discretion or the discretion of anyone else for the discretion that the Constitution has conferred on the DPP. Similar sentiments were expressed in the case of Mohit v DPP of Mauritius[13] on the issue of substituting the court's discretion for that of the DPP. It is clear that the DPP has no duty to interview any person or to give any reasons for his decision.[14] In Matalulu, as accepted by this Court, it was held that the Constitution has given to the DPP a very broad discretion which only he can exercise, and in which he can consider a wide range of factors relating to the available evidence, the public interest, and perhaps other matters, which places the threshold for challenging a decision of the DPP very high and to be sparingly exercised. The circumstances when a court will grant leave for judicial review of the Director of Public Prosecutions' decision to prosecute or discontinue a private prosecution have been set out in the Matalulu case and accepted by this Court in the Michelle Andrews case and are not in doubt.

[19] The appellants questioned the way in which the DPP carried out his analysis, and his failure to consider or have regard to relevant considerations such as the desire to ensure fair and free elections as being in the public interest in continuing the prosecutions. The DPP concluded that it was generally undesirable to continue the

[12] (1988) 40 WIR 15.
[13] [2006] 1 WLR 3343.
[14] See Leonie Marshall v The Director of Public Prosecutions [2007] UKPC 4.

prosecutions. He arrived at the conclusion that they did not meet the Prosecutor's Code test which he explained he applied to all the matters. The learned trial judge took all the relevant factors she was required to take into account, and applied the relevant principles of law. If one concludes, as he did, that the evidence does not even meet the evidential test, then it must necessarily be against the public interest to allow such a prosecution to proceed. It was clearly open to the trial judge to accept this evidence which she did and to conclude that this challenge was unlikely to succeed. We agree.

[20] The decided cases show when challenges may be made to the decisions of the DPP. Such a challenge will succeed where one can show by evidence bad faith, fraud, corruption or, dishonesty and the like.[15] The granting of relief against the decision of the DPP not to prosecute is an exceptional remedy. Mere grounds for suspicion will not suffice. All of the cases say that.

[21] If you cannot show that the DPP's decision was perverse and made in bad faith, then all the complaints about irrationality are of no consequence. Mohit says that great weight must be given to the DPP's discretion. The DPP has a very broad overarching power to take over and discontinue prosecutions. Michelle Andrews makes it clear that the court cannot interfere with the DPP's decision-making power merely on a party raising general issues of an appearance of bias. The threshold is very high. In the absence of evidence of fraud, dishonesty, mala fides, or corruption, a court will be very loath to find that the DPP's decision would be reviewable. In this case, there is no allegation of mala fides, dishonesty, corruption or fraud being made against the DPP. His decision to take over and to *nolle pross* was clearly within the amplitude of the power given to him by the Constitution. We see no reason to disturb the judge's decision refusing leave to file judicial review proceedings.

[22] In the suit brought by Ms. Chance concerning an allegation that another voter was not resident in her constituency, the judge concluded that there was no real

[15] See Matalulu v Director of Public Prosecutions [2003] 4 LRC 712.

prospect of success. The DPP had concluded that the matters of which Ms. Chance complained were refuted by the Supervisor of Elections. The DPP was satisfied from the evidence before him that the complaint had no reasonable prospect of success. The judge's decision to set aside the grant of leave was therefore right.

[23] On the Chief Magistrate's application to this Court to admit fresh evidence, to wit the transcript of the actual tape of the speech of Dr. Gonsalves at Park Hill, the Court grants the application. The fresh evidence is the transcript of the audio tape of the political meeting held at Park Hill on 29th August 2010. This is the speech about which Ms. Frederick complained in relation to words allegedly spoken by Dr. Ralph Gonsalves at that meeting. Ms. Frederick had stated in her 16th June 2011 affidavit at paragraphs 6, 7 and 10 that the context in which Dr. Gonsalves used the word "tomboy" in relation to her must be viewed against the backdrop of chants from other persons in attendance at the political meeting of the word "lesbian". It was only after those chants, she deposed, that Dr. Gonsalves used the word "tomboy" in describing her. The Chief Magistrate seeks to produce before us the transcript of the audiotape of the meeting to show in essence that the word "lesbian" was neither used nor chanted at that meeting. She also makes the point that this tape would have been in the possession of Ms. Frederick and her lawyers prior to her swearing that affidavit and lodging her criminal complaints.

[24] This allegation by Ms. Frederick before the Chief Magistrate and the learned trial judge was that the use of the word "tomboy" by Dr. Gonsalves about her must be interpreted in the light of chants by onlookers of the words "lesbian", and "She love woman". The Chief Magistrate asserts that this complaint was persisted in and not corrected, until 26th May 2012, just before this Court's sitting. Ms. Frederick swore two affidavits, one of 23rd May 2012 in which she said that she had listened to the tape and that when Dr. Gonsalves made the comment she heard persons in attendance saying "lesbian" and "She love woman", among other things. Ms. Frederick then swore an affidavit of 25th May 2012 in which she stated that the word "lesbian" was inadvertently inserted in paragraph 6 of her affidavit of 23rd

May 2012. She made no mention of her earlier assertion in her affidavit of 16th June 2011, on which the learned trial judge relied, that the word "lesbian" had been chanted at that political meeting in question. Counsel for Ms. Frederick objected to the introduction of the new evidence on the basis that there had been no complaint made by Ms. Frederick to the Chief Magistrate about the chanting of the word lesbian, but the complaint had been directed at the words used by Dr. Gonsalves.

[25] Having considered the affidavits of Steven Williams with regard to the tapes, the correspondence passing between the attorneys for the parties, and the affidavits of Ms. Frederick, we consider that it is in the interests of justice, and in accordance with the Ladd v Marshall[16] principles, to admit the transcripts into evidence. The result is that the complaint against Dr. Gonsalves falls away by Ms. Frederick's own admission.

[26] The evidence of the chanting of "lesbian" clearly influenced the learned trial judge's decision to refuse to set aside the without notice order obtained by Ms. Frederick. The evidence now is that there was no such chanting. The judge was influenced by evidence we now know to have been untrue. We are obliged to conclude that the learned trial judge was wrong in the circumstances to have refused to set aside the order granting leave for judicial review of the Chief Magistrate's refusal to issue the summonses against Dr. Gonsalves.

[27] The learned trial judge considered the cases of Brink's MAT Ltd. v Elcombe and Others[17] and Edy Gay Addari v Enzo Addari[18] on the issue of material non-disclosure on a without-notice application. Although she found that Ms. Frederick had made a material non-disclosure which was not an innocent one, she exercised her discretion not to set aside the order. She did not elaborate on the circumstances which led her to exercise her discretion in this manner.

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[16] [1954] 1 WLR 1489; [1954] 3 All ER 745, (CA).
[17] [1988] 1 WLR 1350.
[18] British Virgin Islands High Court Civil Appeal No. 2 of 2005 (delivered 27th June 2005).

[28] Brinks MAT focuses and allows that, where the non-disclosure is innocent, the court has a discretion to overlook it. It is not for every omission that an ex parte order will be set aside. When the whole of the facts is considered, the court may well make a new order if the original non-disclosure was innocent, and the order would have been made even if the fact had been disclosed. In the instant case the judge found that the non-disclosure was material and intentional, but she went on nonetheless to exercise her discretion in not setting aside the order. She did not analyse what were the circumstances she took into account. The authorities that bind us indicate that even where there was an innocent non-disclosure, much less where there is a finding of materiality and that the non-disclosure was intentional, an applicant for a without notice order cannot in those circumstances retain the benefit obtained ex parte. The learned trial judge, having found that there was a material non-disclosure by Ms. Frederick which non-disclosure was intentional, erred in principle in not setting aside the without notice orders. We set aside Thom J's decision not to set aside the without notice orders. We would therefore allow the appeal of the Chief Magistrate and set aside the order for costs made against her.

[29] In conclusion, the appeals of Dr. Lewis, Ms. Frederick, Mr. Stephenson and Ms. Chance are dismissed. The appeal of the Chief Magistrate is allowed. In view of the public law nature of these appeals, and in keeping with the normal practice of the court in such matters, there will be no order as to costs.