THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2018/0188

In the Matter of sections 33 and 34 of the Constitution of Saint Christopher and Nevis and the National Assembly Elections Act Cap. 2.01 of the Revised Laws of Saint Christopher and Nevis.

In the Matter of an Application by Wingrove George for leave for Judicial Review of a decision made by the Senior Magistrate on the 15th day of December, 2017 in respect of two warrants issued against him in relation to the purported offence of misconduct in public office for allegedly suspending the announcements of the election results and failure to take proper steps to ensure the timely announcement of the election results for Constituency Number 4 and Constituency Number 8 contrary to common law; and an order of certiorari in quashing the said information and any decisions taken or made on the said Informations pursuant to Part 56 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as Amended).

In the Matter of an Application by Wingrove George for leave for Judicial Review of a decision made by the Director of Public Prosecutions on the 15th day of December, 2017 in respect of two criminal Informations filed against him in relation to the purported offence of misconduct in public office for allegedly suspending the announcements of the election results and failure to take proper steps to ensure the timely announcement of the election results for Constituency Number 4 and Constituency Number 8 contrary to common law; and an order of certiorari quashing the said decision and any decisions taken or made on the said decision pursuant to Part 56 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as Amended).

BETWEEN:

WINGROVE GEORGE

Applicant

and

1. THE SENIOR MAGISTRATE
2. THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Appearances:

Mr. Anthony Sylvester with Mrs. Angelina Gracy Sookoo-Bobb for the Applicant
Mr. Dane Hamilton Q.C., with him, Mr. Victor Elliot-Hamilton for the Respondents

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2018: November 30
2019: January 15

JUDGMENT

[1] VENTOSE, J.: The Applicant was the Acting Supervisor of Elections of the Federation of Saint Christopher and Nevis having been appointed on 24 February 2014 by the Governor General. Writs for the elections of members of the National Assembly were published in the Official Gazette on 27 January 2015 for elections to be held on 16 February 2015 and for the names of the elected members to be certified to the Governor General no later than 18 February 2015. The Governor General revoked the Applicant's appointment as Acting Supervisor of Elections on 24 June 2015.

[2] Two years and nine months later on 15 December 2017, the Applicant was arrested and charged with two offences. The Information laid against him is as follows:

> For that you, between the 16th day of February, 2015 and the 17th day of February, 2015, in Basseterre, in the Parish of St. George in the Magisterial District "A" in the Federation of St. Christopher and Nevis, whilst carrying out public functions in the public office of Acting Supervisor of Elections for the Federation of St. Christopher and Nevis to supervise the conduct of Elections of Representatives in the Federation of St. Christopher and Nevis, misconducted yourself in the said public office, in that, having received the results from the Returning Office for Constituency Number 4, and without reasonable explanation or justification, you failed to carry out your duty to ensure that announcements of the election results for Constituency Number 4 was done in a timely manner by suspending the announcements of the election results and failed to take any or proper steps to ensure the timely announcement of the election results for Constituency Number 4 Contrary to Common Law.

[3] The same charge is made in relation to Constituency Number 8 (the "Informations"). Warrants were also issued in a similar form as the Informations for Constituencies Number 4 and Number 8 (the "Warrants").

[4] The Applicant avers that as Supervisor of Elections he was not aware of any requirement for the election results to be broadcast in the media and that he disseminated the results for all constituencies via the media on 17 February 2015. He also avers that the newly elected administration was sworn into office on 18 February 2018 and that he is not aware of any petitions being filed within 21 days of the election or to date. The Applicant states that the Informations were issued by the First Respondent and laid by the Second Respondent approximately 22 months after the expiration of the 21 day requirement for filing an election petition. He also states that he was granted bail in the sum of $25,000.00 with conditions, namely: (1) Applicant must surrender his travel documents; (2) Applicant shall report to the police station every Monday and Friday between 6:00 a.m. and 12:00 p.m. until the final determination of the criminal matter; and (3) two sureties shall stand for bail for the Applicant.

[5] The Applicant on 26 June 2018 filed an application with supporting affidavit for leave to apply for judicial review seeking the following: (1) an order granting leave to apply for judicial review of the decision of the First Respondent in relation to the Warrants and an order of *certiorari* to quash the Warrants and any decision made

thereunder; (2) an order granting leave to apply for judicial review of the decision of the Second Respondent in relation to the Informations and an order of *certiorari* to quash the Informations and any decision made thereunder; (3) an interim injunction prohibiting the First Respondent from adjudicating on the Warrants; (4) an interim injunction preventing the Second Respondent or any person from proceeding with the Informations or Warrants; and (5) an interim order staying or suspending the terms and conditions of the Applicant's bail.

[6] In the proposed substantive claim the applicant wishes to seek *inter alia*:

(1) A declaration that the arrangement of elections, election offences and related and incidental matters are exclusively governed by the Constitution and National Assembly Elections Act CAP 2.01 of the Revised Laws of Saint Christopher and Nevis and not the common law;

(2) A declaration that the purported information and or warrants do not disclose an office or election offence under section 91 of Part IV of the Elections Act or at all;

(3) A declaration that the Senior Magistrate acted in excess of jurisdiction or do (sic) not have jurisdiction to issue, adjudicate upon or take any decision on the purported Informations and/or warrants as they disclosed no offence under section 91 of Part IV of the Elections Act or at all;

(4) A declaration that the Director of Public Prosecutions acted in excess of jurisdiction or do (sic) not have jurisdiction to prosecute the Application under the purported Informations and or warrants under section 91 of Part IV of the Elections Act or at all;

(5) An order of certiorari to move to this Honorable Court to quash

a. The Informations laid by the Second Respondent against the Applicant

b. The decision to issue and the consequential warrants issued by the First Respondent against the Applicant;

c. The decision to arrest and or then release the Applicant on conditional bail;

(6) A permanent injunction or stay restraining or prohibiting the Respondents, whether by themselves or individually, their servants, agents, subordinate or otherwise however from acting on the said or similar Informations or warrants.

The Applicable Test for Leave

[7] In Sharma, Lord Bingham and Lord Walker stated the test for leave to apply for judicial review as follows:

> (4) 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, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (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 civil standard of proof in R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:
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> > "… the more serious the allegation 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.
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> 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 processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.

[8] The test for leave to apply for judicial review explained in Sharma is that there must be an arguable ground for judicial review having a realistic prospect of success. It is a flexible test that cannot be judged without reference to the nature and gravity of the issue to be argued. The more serious the allegation the more evidence that would be required for an allegation to be proved on the balance of probabilities.

[9] In Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited) (HCV2009/04798 dated 23 October 2009), Sykes J stated that:

> There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'....
>
> The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach.' An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law, unreasonable without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions".

[10] The court should grant leave only if it is satisfied that the applicant's case is not merely arguable but is strong and likely to succeed (Mass Energy Ltd v. Birmingham City Council [1994] Env. L.R. 298). The question therefore is whether the Applicant has 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.

The Respondents' Answer: Alternative Remedy

[11] The central pillar of the Respondents' opposition to the application for leave to apply for judicial review is that judicial review is ordinarily unavailable when an alternative remedy exists. The Respondents submit that since the criminal court has the jurisdiction to order a stay of the prosecution that constitutes an abuse of process and the criminal trial itself provides a remedy against a prosecution case that is weak but not inherently an abuse, a judicial review challenge to a decision to commence criminal proceedings is generally impermissible. The decision of the Privy Council in Sharma v Brown-Antoine [2006] UKPC 57; [2007] 1 WLR 780 (2006) 69 WIR 399 is cited for the view that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy that is only granted in exceptional circumstances.

[12] The Respondents submit that: first, there are sufficient protections in the criminal court that the Applicant may safely rely on. Second, the magistrate hearing the matter may dismiss the charge after hearing evidence presented by the

prosecution if the evidence lead by the prosecution fails to support a *prima facie* case that the Applicant committed the offence as charged. Third, the magistrate may also hear any application made by the Applicant as to abuse of process on the grounds identical to the grounds raised by the Applicant in his application for leave. Fourth, if the Applicant is in fact committed to stand trial, the Applicant can make an application before the trial judge to quash the indictment on the ground that the indictment discloses no offence known to law or that the prosecution of the offence is an abuse of process, and the trial judge also has the discretion to withdraw the charge if no evidence can properly be put before the jury, or the trial judge may direct the jury as to how to treat the evidence presented against the Applicant. Fifth, the Applicant has not raised any issue in his application for leave, which could amount to exceptional circumstances justifying his use of the judicial review jurisdiction of the High Court. Sixth, the Applicant has not sought any relief that cannot ordinarily be obtained in the criminal court process and that the grounds on which the Applicant seeks to challenge the prosecution of the offence can properly be brought in the criminal courts.

[13] CPR 56.3(3)(e) states that an application for leave to apply for judicial review must state whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. The Applicant accepts that the ordinary and well-established principle emerging from the decision of the Privy Council in Sharma is that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy granted in exceptional circumstances. However, the Applicant submits that the instant case falls within the exceptional circumstances category because the matters raised in the application for leave to apply for judicial review could not be raised or resolved within the context of the criminal trial. The Applicant contends that his case is exceptional because the Respondents are seeking to usurp the powers and provisions in the Elections Act and have decided to prosecute the Applicant for elections offences which do not exist in law as pleaded by them nor are they offences which can be brought against him or in the manner or timeframe within which they were brought.

[14] It is not the function of the court on a judicial review application to entertain discussion on the merits of the claim itself, *a fortiori* on an application for leave to apply for judicial review. The question of whether the Applicant owed a duty at common law in respect of the matters found in the Informations and Warrants is a matter for the judge in the criminal trial. To the extent to which I invited counsel for the parties to submit submissions and authorities on "whether there is a common law obligation 'to take any or any proper steps to ensure the timely announcement of elections results'", I was wrong to do so. Consequently, I express no views on this as it rests properly with the judicial officer seized with the criminal proceedings.

[15] In Sharma, the Deputy Director of Public Prosecutions (the "DPP") authorized the prosecution of the Chief Justice of Trinidad and Tobago for attempting to pervert the course of justice for allegedly attempting to influence the course of a trial being conducted by the Chief Magistrate. The Chief Justice denied the allegations and sought judicial review of the decision of the Deputy DPP to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the judicial review proceedings. The issue for the Privy Council was whether the decision to prosecute the Chief Justice, by whosoever made, should be examined by way of judicial review, or whether the criminal process should be allowed to take its course.

[16] In a joint judgment Lord Bingham of Cornhill and Lord Walker of Gestingthorpe outlined the following governing principles:

> (2) It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure.

(5) It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review… It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: "rare in the extreme"; "sparingly exercised"; "very hesitant"; "very rare indeed"; "very rarely". In R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 371, Lord Steyn said:

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

With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see Mohit, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy… In Wayte v United States (1985) 470 US 598, 607, Powell J described the decision to prosecute as "particularly ill-suited to judicial review."

The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

> (i) "the great width of the DPP'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" …
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> (ii) "the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account" (counsel's argument in Mohit, above, para 18, accepting that the threshold of a successful challenge is "a high one");
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> (iii) the delay inevitably caused to the criminal trial if it proceeds (Kebilene, above, p 371; Pretty, above, para 77);
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> (iv) "the desirability of all challenges taking place in the criminal trial or on appeal" (Kebilene, above, p 371; and see Pepushi, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-

> established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself … But, as Lord Lane CJ pointed out with reference to abuse applications in Attorney-General's Reference (No 1 of 1990) [1992] QB 630, 642,
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> > "We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay."
>
> (v) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts… (some internal citations omitted)

[17] The Privy Council in Sharma made clear that: (1) it is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgement on the facts of each case; (2) a decision to prosecute is ordinarily susceptible to judicial review; (3) judicial review of a prosecutorial decision is a highly exceptional remedy; (4) if the DPP surrenders what should be an independent prosecutorial discretion to political instruction (or persuasion or pressure) the decision is subject to challenge in judicial review proceedings; (5) decisions have been successfully challenged where the decision is not to prosecute where the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy; and (6) the desirability of all challenges taking place in the criminal trial or on appeal. This joint judgment focuses on the issue of the judicial review of the decision of the DPP itself.

[18] The second joint judgment in Sharma of Baroness Hale of Richmond, Lord Carswell and Lord Mance has not received the attention it deserves for it focuses on the reasons why the criminal process is better suited than a judicial review application for a challenge to a prosecutorial decision. There it was stated that:

> 31. The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could

> properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court …
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> 34. Viewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise. The suggestion of improper political interference in or influence over the prosecuting decision is distinct in principle from the question whether the proposed charge has any basis – the decision to charge may have been entirely proper, without the charge being in any way sustainable. But there is in this case some potential overlap in some of the evidence relevant to each of these matters, and a risk that they would not be easily severable in the evidence or judgment given on any judicial review hearing. A criminal judge would we think be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial) and, if the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the Chief Justice might hope to gain by judicial review proceedings. That was, as we see it, the approach taken by Lord Steyn in Ex p. Kebilene.

[19] The issue in Sharma was whether the appellant's grounds of challenge to the decision to prosecute founded as they were on the suggestion of improper political interference or influence over the prosecuting decision rather than whether the charge had any basis, were more appropriate in the criminal proceedings rather than in an application for judicial review. In the case at bar, the Applicant does not allege any improper political interference or influence over the prosecuting decision. The Applicant in each of the orders he seeks challenges the decision of the Magistrate and the DPP on jurisdictional grounds. The Applicant states that such matters belong to the special jurisdiction of the election court for which

special timelines are provided. The Applicant's challenge is unlike the case in Sharma where there were factual disputes in respect of the DPP's decision-making process.

[20] The second joint judgment is making clear that the trial judge in the criminal process should deal with issues relating to the decision making process in respect of the decision to prosecute because the evidence may be relevant to both the abuse of process aspect and the charge itself. Where the applicant alleges that a particular criminal offence properly belongs to a different regime that has its own special features does this mean that such an issue falls outside the purview of the criminal judge? Only on an application for judicial review can the Applicant challenge the jurisdiction of the Respondents in respect of the prosecution for the common law offence of misconduct in public office for actions during the election.

[21] A resolution of this issue does not require evidence from the parties for it to be resolved and moreover the Applicant is making the claim that the Respondents have no jurisdiction at all. It cannot be said that the criminal proceedings would be better placed to deal with such a point where all the evidence of the prosecution and defence would be adduced. As the second joint judgment notes (at [31]):

> It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court …

[22] Similarly the Court of Appeal in Brandt v Director of Public Prosecutions (MNIHCVAP2018/0003 dated 29 November 2018) stated that:

> [9]. The issue in the Sharma case involved a factual investigation into the decision of the Deputy Director of Public Prosecutions to bring criminal proceedings against the former Chief Justice and yet their Lordships had no difficulty in finding that it could be resolved in the criminal proceedings. (Emphasis added)

[23] The court on an application for judicial review would have the power to restrain the further pursuit of any criminal proceedings against the Applicant if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court because any such charge properly belongs to the special jurisdiction

of the High Court pursuant to the Elections Act. However, the *a priori* question is whether as a matter of law such a charge properly belongs to the special jurisdiction of the High Court. The dispute between the parties relates to a question of law, not a question of fact in respect of the decision making process of the DPP exemplified by the decision in Sharma.

[24] The Applicant cites in support the decision of Gangar v Espinet [2009] 4 LRC 260 for the principle that judicial review is available in a criminal prosecution if: (a) it is based on the interpretation of a statute or (b) there are exceptional circumstances. The Applicant submits that his case falls squarely within the exceptions provided for in Gangar in that the case at bar turns on the interpretation of the Elections Act. The Applicant further argues that the conduct of elections in Saint Christopher and Nevis is governed strictly by the Constitution and the Elections Act, and since there is no specific offence therein which allows the Respondents to prosecute the Applicant, such an offence does not exist and therefore the Respondents' actions are *ultra vires* and unlawful. The Applicant also argues that this is an exceptional case for two reasons. Firstly, questions concerning elections must be determined with expediency. Secondly, the actions of the Respondents amount to the creation of duties and offences during the conduct of elections other than those found in the Elections Act. The Applicant submits that this amounts to tabulated legalism and that it is therefore not only convenient but in the Applicant's and the public interest for such matters to be determined quickly on a judicial review application and not be subject to the usual prosecutorial process and possible appeals.

[25] In Gangar, two charges were laid against the appellant, a member of Parliament of Trinidad and Tobago, alleging that he made false declarations as to his financial affairs for two calendar years contrary to section 27(1)(b) of the Integrity in Public Life Act 1987 (the "1987 Act"). At his trial, the magistrate rejected the appellant's argument that: first, the offences charged were subject to a six months' limitation period so that the respondent had no *jurisdiction* to proceed with them; and, secondly (and in the alternative) the two charges should be heard together. He

sought judicial review of the two rulings by the magistrate. The Privy Council stated:

> 24. The Board turn finally to the respondent's submission based on section 9 of the Judicial Review Act 2000 that judicial review proceedings should not have been brought here in any event. Section 9 provides:
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> > "The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances."
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> 25. Their Lordships are quite satisfied that the circumstances here were exceptional and that judicial review provided an appropriate way of deciding the two rulings under challenge. Clearly it was convenient to obtain an early binding decision on whether the two charges should be decided separately or together. Equally it was convenient, indeed highly desirable, to decide at an early stage whether or not the charges were statute barred, a pure question of statutory construction. As Kangaloo JA observed (at para 30):
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> > "I can see no useful purpose being served by going through a full-blown hearing before a Magistrate with all the concomitant expenditure, stress and inconvenience and a possible conviction, only to be vindicated on appeal in the criminal proceedings, when a judicial review application, based solely on questions of interpretation of statutes, is available."
>
> Their Lordships agree.

[26] The Respondents submit that while the Privy Council in Gangar concluded that judicial review was an appropriate avenue to challenge the propriety of the prosecution, Gangar is distinguishable on the facts. The Respondents further submit that the application in Gangar was a challenge to preliminary findings on the identified issues by a magistrate following which a trial was inevitable. The Respondents contend that in the case at bar the Senior Magistrate has made no such findings and that only disclosure has taken place, which means that the application for leave to apply for judicial review is premature given the alternative remedy available to the Applicant.

[27] The question that arises here is whether the Applicant's case is exceptional to fall within the "exceptional circumstances" category mentioned in Sharma to grant leave to an applicant to apply for judicial review of a prosecutorial decision or

whether as in Gangar the circumstances in the Applicant's case were exceptional to allow the application for judicial review to proceed. The case at bar is unlike Sharma because the Applicant is not alleging as the Chief Justice did in Sharma that his prosecution (at [3]):

> … involves an accusation of improper, politically-motivated, interference in the prosecution process by the Prime Minister and the Attorney General; of politically-inspired dishonesty by the Chief Magistrate, a subordinate but important figure in the judicial hierarchy; and of improper, politically-inspired, decision-making and conduct by the Deputy Director, the Assistant Commissioner and the Commissioner, respectively an attorney discharging the important functions of the Director of Public Prosecutions and two of the most senior police officers in the state.

[28] The Applicant's case is similar to Gangar in that the appellant in Gangar challenged two rulings of the magistrate one of which was directed at the *jurisdiction* of the magistrate to adjudicate on the criminal matter, namely, that the offences charged were subject to a six months' limitation period so that the magistrate had no jurisdiction to proceed with them. Similarly, the Applicant argues that the magistrate has no *jurisdiction* to proceed to hear the Warrants and Information because, first, there was no legal requirement for elections results to be broadcast live via the media or at all; second, this matter falls within the election jurisdiction of the court and no election petition was filed within 21 days after the election; third, neither section 91(6) nor any section under Part VI of the Elections Act create any offence which could be laid in the form of Informations or issued as Warrants by the Second and First Respondent respectively; and fourth, the statutory obligation for a return without undue delay or neglect is placed on the returning officers all of whom duly complied because the writs were all delivered to the Governor General by 18 February 2015, the deadline stated in the Writ of Elections proclaimed by the Governor General and published in the Official Gazette. While the facts of Gangar may be different, the issue is the same, namely, whether the magistrate has jurisdiction to proceed to determine the criminal matter.

[29] All of their Lordships in Sharma were not persuaded that the Chief Justice's complaint in relation to the prosecutorial decision making process could not

properly be resolved within the criminal trial. The Applicant's case is not based on a challenge to the prosecutorial decision making process, but on various reasons advanced why the DPP and the Senior Magistrate have no jurisdiction in relation to the Warrants and the Informations. The question of the jurisdiction of inferior courts and public officers to make decisions has been the hallmark of the common law in relation to judicial review of administrative actions. It is important to look first to the grounds on which the Applicant challenges the decision to prosecute. If they relate to or are focused on the manner of the *exercise* of the decision to prosecute or require any factual investigation into the decision of the DPP to bring criminal proceedings, the Sharma rule applies and the court *must* dismiss the application for leave to apply for judicial review. That is the point emphasized by the second joint judgment in Sharma. The grounds on which the Applicant seeks to challenge the decision are not based on the exercise by the DPP of his wide prosecutorial discretion alleging improper motives but are based on grounds, which relate solely to whether the DPP and the Senior Magistrate have jurisdiction in respect of the Warrants and Informations. These grounds do not require any factual investigation into the decision of the DPP to bring criminal proceedings against the Applicant. The Sharma rule therefore does not apply to the case at bar.

[30] The court must ensure that it does not allow the civil jurisdiction of the High Court to impermissibly encroach on matters that properly belong to the criminal jurisdiction of the High Court. The court must resist attempts to do so particularly on applications for leave to apply for judicial review that relate primarily to the exercise of the discretion of the DPP to prosecute or require a factual investigation into the decision of the DPP to bring criminal proceedings. In Brandt, the Court of Appeal stated that:

> [10]. This Court must guard against the use of constitutional motions to derail or delay proceedings in the Civil and Criminal Divisions of the High Court. I find that this appeal, and the application before Belle J, involved in essence, the singular issue of the construction to be given to section 141 of the Penal Code, which is a matter eminently suitable for resolution by a judge of the High Court in the sufficiency hearing. It is wholly inappropriate for this Court, or the High Court in its constitutional jurisdiction, to be made to tread upon the criminal

> jurisdiction of the High Court in the manner undertaken by the Appellant. The procedure used by the Appellant to bring this matter to the High Court as a constitutional claim is entirely wrong and improper. (Emphasis added)

[31] The Respondents object to the application for leave to apply for judicial review on the basis that there are no special circumstances warranting bringing an application for leave to apply for judicial review because these matters can be dealt with in the criminal trial. When one has regard to the orders sought by the Applicant, the first encapsulates the main issue in this application, namely, whether the Constitution and the Elections Act govern exclusively all matters relating to elections, including prosecutions, thereby making the prosecution for misconduct in public office relating to elections at common law unlawful. It is important that the civil and criminal jurisdictions of the High Court remain separate. Therefore, the question of whether the common law offence of misconduct in public office properly belongs to the election court, a jurisdictional issue, falls within the domain of judicial review par excellence. Therefore, the Respondents' objection to the application for leave to apply for judicial review fails.

The Applicant's Case: Arguable Ground of Review

[32] As explained in Sharma above, the test for leave is whether the Applicant has any arguable grounds for judicial review having a realistic prospect of success. The arguments at the hearing on the application for leave to apply for judicial review naturally focused primarily on whether the Elections Act precludes the prosecution for the common law offence of misconduct in public office in respect of matters relating to elections in Saint Christopher and Nevis. The essential question that arises is whether there is an arguable ground for judicial review having a realistic prospect of success that the Applicant can be the subject of criminal prosecution for an offence at common law for misconduct in public office independent of a specific offence created by the National Assembly Elections Act CAP 2.01 of the Revised Laws of Saint Christopher and Nevis (the "Elections Act").

[33] Before answering this central question, I will first outline the role of the Supervisor of Elections within the electoral framework of the Federation of Saint Christopher and Nevis and then address the arguments of the Applicant and Respondents.

Supervisor of Elections

[34] Such is the importance of the Supervisor of Elections in the electoral process in Saint Christopher and Nevis that the framers of the Constitution felt it imperative that that office should be created by the Constitution. Section 34 of the Constitution provides that:

> (1) There shall be a Supervisor of Elections whose duty it shall be to exercise general supervision over the registration of voters in elections of Representatives and over the conduct of such elections.
>
> (2) The functions of the office of Supervisor of Elections shall be exercised either by the person holding or acting in such public office as may for the time being be designated in that behalf by the Governor-General or, if the Governor-General so decides, by such other person who is not a public officer as may for the time being be so designated.
>
> (3) A person shall not enter upon the duties of the office of Supervisor of Elections until he or she has taken and subscribed the oath of allegiance and the oath of office.
>
> (4) For the purposes of the exercise of his or her functions under subsection (1), the Supervisor of Elections may give such directions as he or she considers necessary or expedient to any registering officer, presiding officer or returning officer relating to the exercise by that officer of his or her functions under any law regulating the registration of voters or the conduct of elections, and any officer to whom any such directions are given shall comply with those directions.
>
> (5) The Supervisor of Elections may, whenever he or she considers it necessary or expedient to do so and shall whenever so required by the Commission, report to the Electoral Commission on the exercise of his or her functions under subsection (1); he or she shall also submit every such report to the Minister for the time being responsible for matters relating to the election of Representatives; and that Minister shall, not later than seven days after the National Assembly first meets after he or she has received the report, lay it before the Assembly together with such comments thereon as he or she may have received from the Commission.
>
> (6) In the exercise of his or her powers under subsection (2) the Governor-General shall act in his or her own deliberate judgment after consulting the Prime Minister, the Premier and the Leader of the Opposition.

> (7) In the exercise of his or her functions under subsection (1), the Supervisor of Elections shall act in accordance with such directions as he or she may from time to time be given by the Electoral Commission but shall not be subject to the direction or control of any other person or authority.
>
> (8) The Supervisor of Elections shall exercise such other functions in relation to elections (whether to the National Assembly or to local government authorities) as may be prescribed by or under any law enacted by Parliament.

[35] It is of critical importance that section 34(1) creates a general duty on the Supervisor of Elections in specific terms, namely, "whose **duty** it shall be to **exercise general supervision** over the registration of voters in elections of Representatives and over the conduct of such elections".

Applicant's Grounds for Review

[36] The Applicant avers that the Informations laid by the Second Respondent: discloses no offence known to election law; are bad in law; and that the Respondents acted *ultra vires* or without jurisdiction when they failed properly to construe and consider the following. First, all matters relating to elections including election offences are solely and exclusively governed by the Constitution and the Elections Act, so there is no power and or jurisdiction to impose or import common law offences in the electoral process.

[37] Second, section 91(6) of the Elections Act does not create an offence that could be laid in the form of Informations by the Second Respondent or issued as Warrants in the first instance by the First Respondent. Section 91(6) provides for any allegation of undue delay in the return of a successful candidate to be determined on an election petition, entitling an aggrieved person to the sum of $500.00, costs and in addition to all damages sustained. Third, the purported Information laid by the Second Respondent and the Warrants issued thereon by the First Respondent do not identify in any way the offence created by or which in any way falls under Part VI of the Elections Act.

[38] Fourth, the legal implications or consequences of the Informations being filed and the Warrants being issued by the Senior Magistrate instead of an election petition

being filed within 21 days of the elections in and issued from the High Court amounts to an attempt to circumvent the express intention of the Elections Act or an attempt to usurp the election jurisdiction of the High Court. Fifth, the Respondents have no standing under the Elections Act to carry out the actions complained of. The Second Respondent had no jurisdiction or standing to file the purported Informations or the First Respondent to issue the purported Warrants.

[39] The Applicant submits that there is no dispute that the alleged actions of the Applicant which the Respondents sought to create into an offence falls within the meaning of elections as defined in section 2 of the Elections Act as follows:

> "election" means an election of a member or members to the National Assembly;

[40] The Applicant submits that the meaning to be given to the word "election" as used in the Elections Act should be that ascribed to it by the Supreme Court of India in NP Ponnuswami v Returning Officer, Namakkal Constituency (1952) SCR 218 where Fazal Ali J stated:

> It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature.

[41] The Applicant further submits that the drafters of the Elections Act intended to use the wider meaning of the word "elections" and it includes the return of elections results pursuant to section 91 of the Elections Act. The Applicant states that the case at bar must be considered within the context and circumstances and be read in light of the long title of the Elections Act, which provides that it is:

> AN ACT to make provision for the constitution and powers of the National Assembly; arrangements for elections; for election petitions; for election offences; and for related or incidental matters

[42] In the Applicant's view, this means that the Elections Act deals comprehensively and exclusively with elections matters. As a result, the Applicant contends that if the alleged actions of the Applicant are not classified as an election offence under the Elections Act it therefore means that Parliament never intended that such

actions should be criminal in nature or that unless provision is made for the subject offences under the Elections Act, it cannot be created, imported or imposed by virtue of the common law. The Applicant submits that this case falls within the election jurisdiction of the court citing Grant v Herbert et al (SKBHCVAP2012/0001 dated 14 July 2017) for the view that "the relevant legislation 'created an entirely new jurisdiction in a particular court' with a 'very peculiar jurisdiction'" (at [8]).

[43] Section 94 of the Elections Act provides that:

> 94. Petitions against elections.
>
> A petition complaining of an undue return or undue election of a member of the National Assembly (in this Act called an election petition) may be presented to the High Court by any one or more of the following persons, that is to say,
>
> (a) some person who voted or had a right to vote at the election to which the petition relates;
>
> (b) some person claiming to have had a right to be returned at such election;
>
> (c) some person alleging himself or herself to have been a candidate at such election.

[44] Section 95(1)(a) of the Elections Act provides that:

> 95. Presentation of election petition and security for costs.
>
> (1) The following provisions shall apply with respect to the presentation of an election petition:
>
> (a) the petition shall be presented within twenty-one days after the return made by the returning officer of the member to whose election the petition relates, unless it questions the return or election upon an allegation of corrupt practices and specifically alleges a payment of money or other reward to have been made by any member, or on his or her account, or with his or her privity, since the time of such return, in pursuance or in furtherance of such corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of such payment;

[45] Section 94 of the Elections Act identifies specifically the matters covered by an election petition and section 95(1)(a) provides the timelines within which such election petitions must be brought. The jurisdiction of the High Court in relation to the election of members of the National Assembly is governed by section 36(1) of the Constitution which provides as follows:

> 36. Determination of questions of membership.
>
> (1) The High Court shall have jurisdiction to hear and determine any question whether
>
> (a) any person has been validly elected as a Representative;
>
> (b) any person has been validly appointed as a Senator;
>
> (c) any person who has been elected as Speaker from among persons who were not members of the National Assembly was qualified to be so elected or has vacated the office of Speaker; or
>
> (d) any member of the Assembly has vacated his or her seat or is required, by virtue of section 31(4), to cease to perform his or her functions as a member of the Assembly.

[46] The Applicant cites in support the decision of Stevenson J in Skerrit et al v Paquette et al (Claim No. DOMHCV2015/0166 dated 18 April 2018). In that case the trial judge had to consider whether or not a magistrate had the jurisdiction to hear and decide what was essentially an election offence, even where the House of Assembly Elections Act (the "DA Elections Act") states that an offending party is liable to "summary conviction". Section 56 of the DA Elections Act created the offence of treating as follows:

> 56. Definition of treating.
>
> The following persons shall be deemed guilty of treating within the meaning of this Act:
>
> 1. every person who corruptly, by himself or by any other person, either before, during, or after an election, directly or indirectly, gives, or provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, or provision to or for any person, for the purpose of corruptly influencing that person, or any other person, to vote or to refrain from voting at the election, or on account of that person or any other person having voted or refrained from voting at the election;

2. every voter who corruptly accepts or takes any such food, drink, entertainment, or provision.

[47] A person found guilty of "treating" is liable on summary conviction to a fine of five thousand dollars or to imprisonment for six months: section 59 of the DA Elections Act. Section 61 of the DA Elections Act provides that:

> 61. Disqualification for bribery, etc.
>
> Every person who is convicted of bribery, treating, or undue influence, or personation, or of aiding, counselling or procuring the commission of the offence of personation shall (in addition to any other punishment) be incapable during a period of seven years from the date of conviction -
>
> 1. of being registered as an elector, or voting at any election of a member of the House of Assembly;
>
> 2. of being elected a member of the House of Assembly or if elected before his conviction, of retaining his seat as such member.

[48] The effect of section 61(2) is that if a sitting member of the House of Assembly is convicted of treating, he or she shall be incapable of retaining his or her seat as such member.

[49] Part VI of the DA Elections Act deals with election petitions. The relevant part of section 68 provides that as a general rule a petition shall be presented within 21 days after the return made by the returning officer of the member to whose election the petition relates. What therefore does the election petition cover? That is governed by section 65 which provides as follows:

> 65. Petitions against disputed elections.
>
> A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the High Court by any one or more of the following persons:
>
> 1. some person who voted or had a right to vote at the election to which the petition relates;
>
> 2. some person claiming to have had a right to be returned at the election;
>
> 3. some person alleging himself to have been a candidate at the election.

[50] Section 65 of the DA Elections Act states clearly that an election petition is the method by which a person may make a complaint in respect of an undue return or undue election of a member of the House of Assembly. An election petition covers nothing else. As will be seen later, words in elections legislation are to be narrowly construed.

[51] Stevenson J held that where section 59 of the DA Elections Act makes reference to "summary conviction" for the offence of treating which would mean the complaint is to be heard by the Magistrate, this is in conflict with section 40(1) of the Constitution of Dominica which provides that any question regarding the election of a candidate to the House of Assembly must be dealt with by the High Court, and in her view this must be done by way of election petition which is subject to very strict rules of procedure, including and not restricted to the requirement that the election petition must be brought within 21 days of the election. Stevenson J continued that the attempt to charge the claimants who were all duly elected and sworn in members of the House of Assembly with the election offence of treating under the DA Elections Act must be dealt with by the High Court, and must be brought by way of election petition.

[52] Section 40(1)(a) of the Constitution of Dominica provides that the High Court shall have jurisdiction to hear and determine any question of whether any person has been validly elected as a Representative or Senator. Section 61 of the DA Elections Act relates not simply to qualifications for membership but also disqualifications for membership. If a person is convicted of treating he or she shall be incapable during a period of seven years from the date of conviction of being elected a member of the House of Assembly. In addition, if a person is so convicted for the same period he shall be incapable of retaining his seat as a member of the House of Assembly.

[53] The answer to the question of whether Part VI dealing with election petitions, particularly the time limits as set out section 68, applies to section 56 and 59 of the DA Elections Act depends on the intention of the drafters of sections 61 and 65. Section 61 provides in effect for the disqualification of various persons for the

offences of treating etc. This is in addition to the fine of five thousand dollars or to imprisonment for six months for which the person found guilty of treating is liable. It is not entirely clear why the requirement of filing a petition pursuant to section 65 within the time limits specified in section 68 of the DA Elections Act are mandatory by virtue of section 40(1)(a) of the Constitution of Dominica in respect of a prosecution for the offence of treating. Did the drafters intend that no prosecution should be brought after the period of 21 days following the election if a person had committed the offence of treating? The intention of the drafters of the mandatory rule that election petitions must be brought within 21 days is to ensure finality of the *election results*.

[54] In Browne v Francis-Gibson et al [1995] ECSCJ No. 24, Chief Justice Sir Vincent Floissac opined that:

> The Judicial Committee of the Privy Council has repeatedly affirmed that the jurisdiction conferred on local courts of a British colony or former British colony to determine questions as to the validity of elections and appointments to the local legislature is a peculiar and special jurisdiction in at least five respects. Firstly, constitutionally, the jurisdiction is essentially a parliamentary jurisdiction conveniently assigned to the judiciary by the Constitution or by legislation. It is not a jurisdiction to determine mere ordinary civil rights. Secondly, the parliamentary questions which the local courts are constitutionally or statutorily authorised to determine are expected to be determined expeditiously so that the composition of the legislature may be established as speedily as possible. Thirdly, the legislature must have envisaged that the parliamentary questions would be determined either on their merits or purely on procedural grounds and without hearing evidence. Fourthly, because of the urgency of the parliamentary questions, the legislature is presumed to have intended that the decisions of the local original and appellate courts would be unappealable to Her Majesty in Council. Finally, the presumption against appeals to Her Majesty in Council is usually confirmed by imperial or local legislation declaring the decisions of the local courts to be final and unappealable. In any event, the presumption is rebuttable only by specific imperial or local legislation unequivocally authorising such appeals.

[55] The highlighted section above shows that questions relating to the composition of Parliament following a general election must be determined as speedily as possible. Since a conviction for treating is a disqualification for a sitting member of

the House of Assembly being able to retain his or her seat as member of the House of Assembly, it must be the case that it can be brought at any point in time. This is subject to any law, apart from the DA Elections Act, that might limit any such prosecution. What if the evidence of treating is not discovered until 3 months after the election? What if the evidence is compelling? Does this mean that a conviction is therefore time barred since the 21 days have elapsed? In my view, the drafters of the DA Elections Act and the Constitution of the Commonwealth of Dominica did not intend this result.

[56] Stevenson J stated, first, "the effect of the charges as brought by the Interveners is that they are in fact questioning and challenging the validity of the elections of the Claimants" (at [52]); and second, "[o]ne of the grounds that an election may be set aside if found to have been committed, is the offence of Treating" (at [61]). The fact that a conviction of a member of the House of Assembly for treating results in that member being disqualified from retaining his or her seat in the House of Assembly and therefrom for a further 7 years does not mean that a charge for treating is "questioning" or "challenging" the validity of the elections. No doubt it has an impact on the candidate who was successful in the last election and who is now a member of the House of Assembly. A charge for treating laid against a sitting member of the House of Assembly is not at all a challenge to, or a questioning of, the election of that member to the House of Assembly to engage the application of section 65 of the DA Elections Act. That person remains a validly elected member of the House of Assembly until he or she is convicted of treating by a magistrate thereby becoming disqualified from retaining his or her seat as a member of the House of Assembly. Such a charge for treating is not required to be brought under section 65 which provides that a complaint to be made for an undue return or undue election of a member of the House of Assembly to be made by way of an election petition. A charge for treating is not a complaint in respect of an undue return or election of a member of the House of Assembly. Nowhere in the DA Election Act does it state that a conviction for, or committing, the offence of treating is a ground on which the election of a member of the House of Assembly can be challenged or questioned.

[57] In addition, the jurisdiction of the High Court under section 40(1)(a) of the Constitution in respect of any question regarding the election of a candidate to the House of Assembly is not engaged when a member of the House of Assembly is charged with the offence of treating. Any such charge and subsequent conviction for treating does not relate to the election of a candidate to the National Assembly although it impacts directly on whether a properly elected member can retain his or her seat as a member of the National Assembly.

[58] The Applicant is not correct in submitting that Stevenson J determined that under a proper interpretation of the DA Elections Act and the Magistrates Code of Procedures Act of Dominica, the magistrate has no jurisdiction to hear elections offences. That is stating the position too widely for Stevenson J's reasoning was limited to offences such as treating *under* section 56 of the DA Elections Act for which the penalties are provided in section 59 and for which convictions are grounds for disqualification of members of the House of Assembly of Dominica under section 61 of the DA Elections Act. However, in the case at bar, the offence for which the Applicant was charged was a common law offence operating wholly outside the scope of the Elections Act.

[59] The Respondents submit that the decision in Skerrit is distinguishable from the case at bar because in Skerrit the matters about which the applicants complained related to the offence of "treating" that was defined in section 56 and punishable under section 58 of the DA Elections Act. The Respondents further submit that the trial judge opined that because a conviction for treating would result in the applicants, who were members of Parliament, being disqualified to sit in Parliament, a prosecution for the relevant offence must be brought by way of an election petition and therefore subject to the 21 day limitation period set out in section 68 of the DA Elections Act. The Respondents contend that although the Applicant framed his argument in similar terms to the decision of the court in Skerrit notwithstanding the key difference in the case at bar, the Informations deposed to and the Warrants issued do not allege any offence contrary to the Elections Act but allege an offence at common law. The Respondents, therefore,

conclude that the decision in Skerrit does not take the Applicant's case any further. I agree with the submissions of the Respondents for the reasons stated above.

[60] The Applicant submits that the courts in the Eastern Caribbean have consistently held that elections fall within an exclusive statutory jurisdiction conferred by Parliament through legislation. The Applicant continues that these decisions have also consistently pronounced that if an act, power, or procedure is not expressly provided for in the legislation governing elections, then it must be regarded as Parliament's intention for such an act, power or procedure not to exist or apply. That is stating the rule inaccurately. The correct position is that it is the intention of Parliament that "such an act, power or procedure" not to apply or exist under the relevant elections legislation unless specifically provided for by Parliament.

[61] The Applicant contends that while most of these decisions may relate to the conduct of an election petition or the applicability of the Civil Procedure Rules 2000 (the "CPR"), the underlying principle is what is important, namely, once a jurisdiction is found to be an exclusive statutory jurisdiction, there is no authority to import, imply or rely on any duty, power, authority or the common law outside of the statutory provisions, citing in support the following decisions: Petrie et al v Attorney General et al (1968) 14 W.I.R. 292; Attorney General for Jamaica et al v Thompson (1981) 18 J.L.R. 246; N.P. Ponnuswami v Returning Officer, Namakkal Constituency and Ors. [1952] Supreme Court Reports 218; and Lindsay Fitz-Patrick Grant v Rupert Herbert, Leroy Benjamin and Wentford Rogers (SKBHCVAP2012/0001).

[62] In Petrie, the appellant brought an application seeking declarations that the Acts of Parliament and the regulations made thereunder, by virtue of which the elections to the National Assembly were to be held, be declared unconstitutional, null and void with the consequence that the result of the elections should also be declared null and void. The appellant also sought an injunction restraining the Chief Elections Officer from holding any election to the National Assembly on the basis of registers of electors compiled pursuant to the legislation enacted by

Parliament by virtue of which the elections to the National Assembly were conducted, administered and held.

[63] The Attorney General objected to the application on two grounds. First, the court has no jurisdiction to entertain the application since the question which it raised belonged to a class of questions which were placed by the Constitution of Guyana exclusively within the jurisdiction of the High Court exercising a special jurisdiction and, as such, were justiciable only after the election had been held. Second, having regard to Article 67 of the Constitution of Guyana and the Proclamation issued by the Governor General requiring the holding of the election on 16 December 1968, the court had no jurisdiction to grant an injunction by way of equitable relief to restrain the Chief Elections Officer from holding the elections.

[64] The Court of Appeal of Guyana examined Article 71 of the Constitution of Guyana which is in similar terms to section 36 of the Constitution of Saint Christopher and Nevis and stated (at p. 299):

> On an anlysis (sic) of the article in relation to the matters which concern us here, it is clear that Parliament is here conferring an exclusive jurisdiction on the High Court to determine certain questions. These questions centre (sic) around the qualification of any person to be elected as a member of the National Assembly, whether generally or in any particular place, an election has been lawfully conducted or the result of an election affected, whether the seats in the Assembly have been lawfully allocated or a seat has become vacant or any member of the Assembly is required to cease to exercise any of his functions as a member, regarding the filling of a vacancy or whether any person has been validly elected as Speaker.

[65] Regulations 3 and 4(1) of the House of Assembly (Validity of Election) Regulations 1964 provides that an elector or candidate may present an election petition for the determination of any question under Article 71. Article 71(1) of the Constitution of Guyana provided that:

> 71 (1) Subject to the provisions of this article, the High Court shall have exclusive jurisdiction to determine any question–
>
> (a) regarding the qualification of any person to be elected as a member of the National Assembly,

(b) whether-

(i) either generally or in any particular place, an election has been lawfully conducted or the result thereof has been, or may have been, affected by any unlawful act or omission,

(ii) the seats in the Assembly have been lawfully allocated,

(iii) a seat in the Assembly has become vacant, or

(iv) any member of the Assembly is required under the provisions of article 61 (3) of this Constitution, to cease to exercise any of his functions as a member thereof,

(c) regarding the filling of a vacant seat in the Assembly, or

(d) whether any person has been validly elected as Speaker of the Assembly from among persons who are not members thereof or, having been so elected, has vacated the office of Speaker.

[66] The Court of Appeal stated that:

> The question remains whether an interlocutory injunction can be obtained in these proceedings or, indeed, in any proceedings, and I accept the submission by the Attorney-General, that on a fair construction of art 71 (1) (b), the language used does not permit of an interlocutory injunction being granted to prevent the election being held on the appointed day. I accept his analysis of the relevant paragraph that the question which is entrusted to the court is, whether an election has been lawfully conducted. It is to be noted that the past tense is used and not the future tense, and it seems to me that if the framers of the Constitution intended that relief could be sought by way of an interlocutory injunction the paragraph would have read "whether an election has been lawfully conducted or will be lawfully conducted."
>
> I agree with the submission that the questions which the court has to consider under the paragraph are, whether there is some general illegality either affecting the whole election or the election held in some particular place, or, in the absence of a general illegality, whether there has been some specific illegality being either an act or an omission which affects the result of the election. It seems to me that the word "election" is used in the paragraph in its wider sense to include the whole process of an election. See 12 Halsbury's Laws (2nd Edn), pp 237–238, wherein it is stated that although the first formal step in every election is the issue of the writ, the election is considered, for some purposes, to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminet".

[67] The decision of the Court of Appeal in Petrie establishes nothing more than where a person makes an allegation in respect of which the High Court has exclusive jurisdiction under the Constitution then the election petition can only be brought if the subject matter falls within the meaning of the words used in the Constitution. The Court of Appeal held that the words of Article 71(1)(b) of the Constitution gave the High Court jurisdiction in relation to determinations of whether "an election has been lawfully conducted" which does not include the question of whether an election will be lawfully conducted.

[68] A similar reasoning informed the decision of the Supreme Court of India in Ponnuswami where it was held that the court had no jurisdiction to entertain a challenge before an election by a candidate whose nomination was rejected by the returning officer. The Supreme Court reasoned that Article 329(b) of the Constitution of India provided that no election to either House of Parliament or to the House or either House of the Legislature of a state shall be called in question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. The appellant sought an order of *certiorari* to quash the decision of the returning officer to reject his nomination paper and *mandamus* to direct the returning officer to include his name on the list of valid nominations to be published. The election contemplated by article 329(b) of the Constitution of India had not yet taken place. The Supreme Court stated (at [6]) that:

> 6. Now, the main controversy in this appeal centres around the meaning of the words "no election shall be called in question except by an election petition" in Article 329(b), and the point to be decided is whether questioning the action of the Returning Officer in rejecting a nomination paper can be said to be comprehended within the words "no election shall be called in question".

[69] The Supreme Court of India explained (at [9]) that:

> The question now arises, whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly

> excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court.

[70] The decisions of Petrie and Ponnuswami confirm that, where the Constitution specifically gives jurisdiction in election matters to the High Court and legislation prescribes the manner in which such election matters are to come before the High Court, they cannot be brought in any other manner other than that specified by the Constitution or election legislation. It must also be noted that in both Petrie and Ponnuswami the applications by the appellants sought to call into question the election itself and this was a matter specifically stated in the constitutional provisions as reserved to the High Court on an election petition. It is important to note that the Supreme Court of India summarized its conclusions (at [16]) as follows:

> (1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
>
> (2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election" and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of

> an election petition and not be made the subject of a dispute before any court while the election is in progress.

[71] The election petition is concerned specifically with matters that affect the "election" result itself.

[72] The Privy Council in Berge v Laudry (1876) 2 AC 102 had to consider whether an appeal to the Judicial Committee of the Privy Council under the Quebec Controverted Elections Act of 1875 and similar Act of 1872 which preceded it providing among other things that the judgment of the Superior Court "shall not be susceptible of appeal". Lord Cains, for a unanimous Privy Council, stated (at p. 106) that:

> These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

[73] In respect of whether the Judicial Committee of the Privy Council had jurisdiction in election matters, the Privy Council stated (at 108-109) that:

> Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior

> Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place.

[74] The principle that no appeal lies to the Judicial Committee of the Privy Council in election petition matters has been repeated many times: Senanayake v. Navaratne [1954] A.C. 640 (Ceylon); Strickland (Lord) v Grima [1930] A.C. 285 (Malta); Patterson v Solomon [1960] AC 579 (Trinidad and Tobago); Arzu v Arthurs [1965] 1 WLR 675 (British Honduras); Russell v Attorney General of Saint Vincent and the Grenadines [1997] 1 WLR 1134; and Devan Nair v Yong Kuan Teik [1967] 2 AC 31 (Malaysia).

[75] These cases establish that the election jurisdiction is "extremely special" or "peculiar", no doubt because the framers of elections legislation intended that specific matters covered by elections legislation must be dealt with in accordance with the legislative framework that Parliament specifically created to govern elections. The Supreme Court of India in Ponnuswami explains the decision of the Privy Council in Laudry as follows:

> 18. The points which emerge from this decision may be stated as follows : (1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed it (2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

[76] Does this exclusive jurisdiction of the High Court pursuant to section 36 of the Constitution permit a prosecution for a common law offence in respect of conduct occurring during an election? The Applicant contends that this necessitates a determination of the meaning or definition of the word "election" mean. The Supreme Court of India in Ponnuswami attempted such a definition (at [7]) as follows:

> As we have seen, the most important question for determination is the meaning to be given to the word "election" in Article 329(b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected.
>
> It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature.

[77] After citing from Halsbury's Laws of England, the Supreme Court noted "the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process". Therefore the decision in Ponnuswami suggests that the word "election" means the entire process by which a candidate is returned to the Legislature. Article 329(b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part". There is no exact provision in the Elections Act but the effect of section 94 of the Elections Act is to prescribe the manner in which specified persons may challenge "an undue return or undue election of a member of the National Assembly". This alone is the subject matter covered by an election petition in Saint Christopher and Nevis.

[78] The decisions of Ponnuswami, Laudry, and Petrie emphasize that the jurisdiction of the election court will be jealously safeguarded and that only if the subject matter properly construed falls within the specific words of the election legislation or the Constitution would it be covered within that "special jurisdiction". In Petrie, the Court of Appeal of Guyana adopted a literal interpretation of the Constitution to find that the question whether "an election has been lawfully conducted" does not include the question of whether an election will be lawfully conducted. This emphasizes that exclusive nature of the jurisdiction, which means that it only covers matters that the Parliament thought, in their wisdom, properly belongs to that special jurisdiction and no other. Likewise, in Ponnuswami, the

Supreme Court of India held that words "no election shall be called in question except by an election petition" meant that it had no jurisdiction to entertain a challenge before an election by a candidate whose nomination was rejected by the returning officer. These cases, rather than assist the Applicant, point to the view that clear words would be needed in the Elections Act or the Constitution for subject matter that falls outside it to be brought within the special jurisdiction of the election court and legislation.

[79] The decision of the Court of Appeal in Herbert is instructive in this regard. The question for the Court of Appeal was whether the costs regime in Parts 64 and 65 of the CPR apply to the quantification of costs awarded on an election petition in this jurisdiction. Webster JA (Ag) stated "[t]here is no legislation in St. Kitts and Nevis incorporating either the CPR generally or the costs regime in Parts 64 and 65 and therefore it does not apply to election petition cases" (at [23]). A similar point was made earlier by Chief Justice Sir Hugh Rawlins in Joseph v Reynolds and Montoute v Hippolyte (SLUHCVAP 2012/0014 dated 31 July 2012) where he stated that "[t]he true principle is not that the civil procedure rules are not applicable in these proceedings. Rather, it is that they are not applicable in the absence of express legislation that provides for their application" (at [25] (Emphasis added)). The effect of these two decisions and others of similar ilk is that in the same way a "judge trying an election petition has no power to allow alterations, changes or amendments", the judge also has no power to allow matters not specifically provided for by the National Assembly in the Elections Act to be incorporated therein under the guise of statutory interpretation or otherwise.

[80] The same reasoning that underpins the decision of the courts in Ponnuswami, Laudry, and Petrie to reject attempts at expanding the jurisdiction of the election court for matters not included by the clear words of the election legislation also informs the decisions of the Court of Appeal in Joseph and Herbert, namely, that procedural law which is not expressly incorporated into election legislation by Parliament cannot be used in proceedings relating to election petitions. By parity of reasoning, it must also be the case that substantive law, namely, the common

law offence of misconduct in public office, operates outside the scope of the Elections Act and therefore the requirement for elections petitions to be brought within 21 days of the election under section 94 of the Elections Act does not apply to any prosecution for that offence at common law. It can only fall within the time period if the National Assembly expressly so provides.

[81] The Respondents submit that it is not open to the court to conclude that the common law offence is abolished unless the National Assembly has expressly done so. The Respondents further submit that a statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment requires. The Respondents contend that had the National Assembly intended by the insertion of a statutory provision to abrogate the common law principle, the National Assembly would have used words clearly expressing such an intention. The Respondents further submit that misconduct in public office is an offence at common law and is applicable by virtue of section 2 of the Common Law (Declaration of Application) Act CAP 3.05 of the Laws of Saint Christopher and Nevis.

[82] In Attorney General's Reference (No.3 of 2003) [2004] EWCA Crim 868; [2005] Q.B. 73, Pill LJ clarified the law relating to misconduct in public office as follows:

> The circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse. A summary of its elements must be considered on the basis of the contents of the preceding paragraphs. The elements of the offence of misconduct in a public office are: (1) a public officer acting as such (para 54); (2) wilfully neglects to perform his duty and/or wilfully misconducts himself (paras 28, 30, 45 and 55); (3) to such a degree as to amount to an abuse of the public's trust in the office holder (paras 46 and 56-59); (4) without reasonable excuse or justification (para 60). As with other criminal charges, it will be for the judge to decide whether there is evidence capable of establishing guilt of the offence and, if so, for the jury to decide whether the offence is proved.

[83] At the hearing Mr. Hamilton Q.C. explained that a new section was introduced in the form of section 63 of the Representation of the People Act 1983 (the "1983 Act") in the United Kingdom. That section was repealed and replaced in the Representation of the Peoples Act 1985 as follows:

> 63 Breach of official duty.
>
> (1) If a person to whom this section applies is, without reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (2) No person to whom this section applies shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty.
>
> (3)The persons to whom this section applies are—
>
> (a)the Clerk of the Crown (or, in Northern Ireland, the Clerk of the Crown for Northern Ireland),
>
> (b)any sheriff clerk, registration officer, returning officer or presiding officer,
>
> (c)any other person whose duty it is to be responsible after a local government election for the used ballot papers and other documents (including returns and declarations as to expenses),
>
> (d)any postmaster, and
>
> (e)any deputy of a person mentioned in any of paragraphs (a) to (d) above or any person appointed to assist or in the course of his employment assisting a person so mentioned in connection with his official duties;
>
> and "official duty" shall for the purposes of this section be construed accordingly, but shall not include duties imposed otherwise than by the law relating to parliamentary or local government elections or the registration of parliamentary or local government electors.".

[84] The section, it was submitted, showed an express intention of the United Kingdom Parliament to negate the effect of the common law both for criminal prosecution for misconduct in public office and damages in relation to the tort of misfeasance in public office. Section 63(2) provides that:

> (2) No person to whom this section applies shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty.

[85] There is therefore no question that by statute the United Kingdom Parliament has abrogated the common law offence and tort in relation to those persons specified in that section in respect of their official duties as defined. In addition, I agree with learned Queen's Counsel that only clear words such as that as expressed in section 63(2) of the 1983 Act would be needed to remove the power at common

law to prosecute persons for misconduct in public office in respect of matters relating to elections. In England and Wales, the DPP has a duty under section 181 of the 1983 Act to consider making inquiries and instituting prosecutions where information is provided to him or her that an electoral offence has been committed. The time limit under that section for commencing proceedings is one year from the commission of the offence. This may be extended to 24 months on application to the magistrate within the one-year period. There is no provision in the Elections Act that stipulates a time period within which a prosecution must be brought for the various offences outlined therein. If the National Assembly intended that any or all such offences must be prosecuted within the time period for filing election petitions, it would have stated this expressly in the Elections Act. It therefore does not follow that any or all offence(s) under the Elections Act must be prosecuted by way of an election petition, *a fortiori*, an offence under the common law that falls outside the Elections Act.

[86] This must be contrasted with sections 121 and 128B of the 1983 Act, which provides that, subject to some exceptions, petitions must be initiated within 21 calendar days of the date of return or election. This time period can be extended to 28 days for petitions relating to corrupt or illegal practices involving the payment of money or other reward, or in connection with election expenses (sections 122(3)(b) and 129(2) 1983 Act. These provisions mirror those in section 95 of the Elections Act. It must be noted that in the 1983 Act the time period for initiating a petition has nothing to do with the offences outlined therein for which there are specific time periods within which any prosecution must be brought.

[87] If the Applicant's argument is correct, it means that any common law offence that may be applicable to an act committed by a person in the course of an election is an election offence and therefore must be brought by way of election petition. In R v Hussein [2005] EWCA Crim 1866, a former councilor was sentenced to 3 years and 7 months imprisonment for pleading guilty to completing 233 electors' postal votes in 2002, which he had obtained from them by deception. No question arose

in that case as to the applicability of the common law offence of conspiracy to defraud to what was essentially an offence that related to a local election.

[88] In the premises, the Applicant has not shown that there is an arguable ground for judicial review having a realistic prospect of success for the following reasons: (1) clear words need to be found in the Elections Act to abrogate the common law offence of misconduct in public office and no such words can be found in the Elections Act; (2) the authorities cited by the Applicant show that election legislation must be construed narrowly and do not cover matters not expressly provided for in the legislation itself – so by failing expressly to provide for the offence of misconduct in public office, it cannot be incorporated into the Elections Act under the guise of statutory interpretation or otherwise; (3) the continued existence of common law offences applicable to conduct relating to elections is not inconsistent with the regime provided for under the Elections Act; (4) the offences for which the election petition applies relate to matters that have an impact on the election result itself or relate specifically to the candidate himself or herself (see section 96 and 97 of the Elections Act), not all offences under the Elections Act, let alone common law offences outside the Elections Act that have no impact whatsoever on the result of the election or relate at all to any candidate; and (5) even assuming that such an offence was part of the Elections Act, it is doubtful whether it can be brought by way of election petition under section 94 of the Elections Act which provides that a complaint to be made for an undue return or undue election of a member of the National Assembly to be made by way of an election petition.

[89] The application for leave to apply for judicial review is dismissed because it does not have an arguable ground having a realistic prospect of success. Consequently, the interim injunctions previously granted must be discharged with the consequence that the conditions of bail are immediately reinstated. The Applicant may apply to the magistrate in the usual way to vary or remove the conditions of bail.

Costs

[90] The general rule in applications for administrative orders is that is that no order for costs may be made against an applicant unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application: CPR 56.13.6. I am of the view that the applicant acted unreasonably because there are many reasons I have found why the main ground underpinning the application for leave to apply for judicial review was bound to fail and in all circumstances hopeless. This is not an application that should have been brought at all since the learning is clear on all points raised. Consequently, I must depart from the general rule and order that the Applicant pay the costs of the Respondents in these proceedings.

Disposition

[91] For the reasons explained above, I make the following orders:

(1) The Application for leave to apply for judicial review is dismissed as an abuse of the process of the court.
(2) The interim injunction granted at paragraph 3 of the order of the court on 19 November 2018 is hereby discharged.
(3) The interim order granted at paragraph 4 of the order of the court on 19 November 2018 is hereby discharged.
(4) Costs to the Defendants to be assessed if not agreed within 21 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar