Trinity Term
[2024] UKPC 21
Privy Council Appeal No 0007 of 2023

JUDGMENT

Director of Public Prosecutions (Appellant) *v* Chris Durham also called Bouye (deceased) and 2 others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lady Carr

JUDGMENT GIVEN ON
18 July 2024

Heard on 25 April 2024

Appellant
Ian L. Benjamin SC
Keston McQuilkin
Pierre Rudder
(Instructed by Charles Russell Speechlys LLP (London, England))

Respondents
Richard Clayton KC
Gerald Ramdeen
Wayne Struge
(Instructed by Dayadai Harripaul (Port-of-Spain, Trinidad and Tobago))

Respondents
(1) Chris Durham also called Bouye (deceased)
(2) Ian Sandy also called Bibi
(3) Deon Calliste also called Bom

LADY CARR:

1. INTRODUCTION

1. This appeal concerns the circumstances in which it is appropriate for the civil courts to intervene by way of judicial review in prosecutorial decisions to bring or, more specifically, to continue criminal proceedings.

2. The Appellant is the Director of Public Prosecutions for the Republic of Trinidad and Tobago ("the DPP"), a public office holder with power (under section 90 of the Constitution of Trinidad and Tobago ("the Constitution")) to institute, undertake, continue and discontinue criminal proceedings in respect of any offence against the law of Trinidad and Tobago. In exercise of that power, the DPP brought criminal charges against the Respondents for the alleged murders of three men who were shot and killed in Diego Martin on 21 April 2009. A conviction for murder in Trinidad and Tobago carries a mandatory death penalty (by section 4 of the Offences against the Person Act 1925).

3. The prosecution case relied centrally on the evidence of a Mr O'Neil Benjamin ("Mr Benjamin"), who was said to have been an eyewitness to the shootings. Mr Benjamin gave detailed evidence in preliminary proceedings in 2009 incriminating each of the Respondents (whom he said that he knew and had seen with firearms at the time of and near the shootings), following which the Respondents were committed for trial. However, shortly before the trial was due to commence in 2019, Mr Benjamin stated in a pre-trial witness briefing that his earlier evidence had not been true, but that he intended to repeat it at trial. Although requested to do so, he declined to sign a statement to this effect.

4. The DPP continued the prosecution. The Respondents brought immediate judicial review proceedings challenging what was said to be a decision not to discontinue the criminal proceedings. In May 2019 the High Court (Quinlan-Williams J) granted leave to bring judicial review proceedings on an urgent without notice basis and, following a full hearing, in June 2019 declared the DPP's failure to discontinue the prosecution to be "unreasonable, improper and unfair". Certiorari was ordered to remove the DPP's decision to the High Court, and the indictment was quashed and declared to be of no effect. In June 2022, by a majority (Archie CJ and Rajkumar JA) ("the Majority"), the Court of Appeal affirmed this result on the basis that the failure to discontinue was "unreasonable, unfair and an abuse of process". The minority (Bereaux JA) ("the Minority") stated that the decisions of both the High Court and the Majority were "palpably wrong".

5. The question for the Board is whether the decision of the Majority was correct. The DPP seeks a "principled answer to guide future courts".

6. It is common ground that, although a decision to prosecute (or to continue to prosecute) is in principle susceptible to judicial review, such relief will in practice be granted only extremely rarely. It is a "highly exceptional remedy" (see *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780 ("*Sharma*") at para 14(5)).

7. The DPP submits that the decision of the Majority (and that of the High Court) improperly enlarged the scope of judicial review: the remedy had been used incorrectly as a device to resolve points of law otherwise to be addressed in the ordinary course of criminal proceedings. Amongst other things, it is said that the Majority failed to take into account the safeguards available within the criminal proceedings and proceeded wrongly throughout on the assumption that Mr Benjamin's evidence was false. For the Respondents, it is said that the decision of the Majority (and that of the High Court) was "obviously right". The Majority were fully entitled to conclude that the circumstances were exceptional such that civil intervention by way of judicial review was justified.

2. THE CRIMINAL PROCEEDINGS

Events in 2009

8. On 21 April 2009 Mentei Murai, Mubarak Calder and Kevon St Louis were shot and killed on Factory Road, Diego Martin. They were all young men, their ages ranging between 15 and 25.

9. The Respondents were charged with murder. A preliminary hearing took place in the Magistrates' Court. The prosecution relied on the evidence of 25 witnesses. Of these, 24 were formal witnesses, such as witnesses identifying the deceased and the crime scene, or arresting officers. None provided any evidence linking the Respondents to the crime. The only eyewitness was Mr Benjamin, who provided sworn witness statements, gave recorded interviews and evidence in chief. His testimony was that he had heard the gunshots, and seen the Respondents, each of whom he knew, with firearms in the vicinity of the shootings at the time of the shootings.

10. Mr Benjamin was cross-examined at length over a number of days across June, July and September 2009. The transcripts of his evidence run to over two hundred pages. Mr Benjamin stated that he had seen the Respondents at the time of and close to the shootings. He identified the three men in the dock as those whom he had seen. He confirmed repeatedly that he saw three men on the dirt track and that these men were the Respondents, whom he had already known at the time.

11. The reliability of Mr Benjamin's evidence was challenged robustly and at length. It was put to Mr Benjamin that the Respondents were facing away from him, that his view was obstructed and that he had insufficient time to recognise the accused. He denied that there was any impediment to or error in his identification. He stated that it was not possible for him to be mistaken. His credibility was also the subject of direct attack. Thus, it was put to him that his account was "a fiction", that his delay in producing a witness statement was to give him "time to create [his] story, and it is for that reason, [he] had nothing to say in detail at the scene". He categorically denied this. It was also put to him that he was motivated by a gang-based animosity against the Respondents and was using the "judicial process to execute a misplaced vendetta." Again, he denied this. He said that he had no "grouse" with the First Respondent, and said that he was conveying truthfully what had happened. Quinlan-Williams J described Mr Benjamin's evidence, on its face, as "cogent".

12. On 6 November 2009 the Respondents were committed to stand trial at the Assizes.

Events in 2019

13. The matter was called on before Rampersad J on 1 March 2019 and fixed for trial to commence on 17 May 2019. A jury (and alternates) were empanelled.

14. On 23 April 2019, Mr Benjamin attended a pre-trial witness briefing with Prosecuting Attorneys Mr Jaglal and Ms Shah ("the Prosecuting Attorneys"). The briefing lasted approximately one and a half hours. Notes of Briefing were prepared and signed by both Prosecuting Attorneys ("the Notes"). According to the Notes, for the majority of the meeting Mr Benjamin confirmed his earlier evidence. He went on to give a history of the gangs in Diego Martin and in Port of Spain. In terms of contact with the Respondents since giving evidence at the Magistrates' Court, Mr Benjamin stated that the Respondents had sent "thanks" to him, appreciating his evidence, as "they enjoy a level of security in prison" as opposed to being in the outside world. He also said that "they" had offered him around $20,000 not to give evidence, but he was not interested in the offer. He said that he was aware that his evidence "makes or breaks the case", and was of the view that the jury would not come back with a guilty verdict. He went on to say that he had no fear of the Respondents being released. He said that he had been charged with arson with one of the deceased, Mr Calder, in January 2009. The matter had been dismissed but Mr Benjamin was one of those responsible for setting the house in question on fire as it was a "den for criminal activity". As the meeting was coming to an end, Mr Benjamin said that he realised that the meeting was concluding and so wished to tell the Prosecuting Attorneys something.

15. The Notes recorded that the following exchanges then ensued:

"[Mr Benjamin] proceeded to say that, all of this (pointing to the papers in front of him - depositions) was all part of his plan for the good of the community. He continued by saying **that there were no men in the track, he did not see these three accused persons but he named them and he did what he had to do at the time to bring a level of peace in the community of Diego Martin.** He further said that following his actions (ie giving statements and causing the three accused persons to be locked up in remand) there was calm restored in the community. He also said that several persons including the family members of the accused continue to thank him to this present day for what he had done. As regards this shooting/killing incident, he said he did what needed to be done for the good of the community which had been experiencing a lot of violence and shootings from warring factions of individuals at the time.

Mr Jaglal asked [Mr Benjamin]: So why it is that you are saying this now? In light of the fact that you gave several statements to the police, your interviews with police was also videotaped and you gave evidence in the Magistrates' Court?

Witness responded that the purpose for which he did it has been achieved.

Ms Shah asked [Mr Benjamin]: What is it that you expect for us to do with what you are saying now?

[Mr Benjamin] responded: You all go ahead and do your work. To work together for the community. Do your job. Ask the questions because your job is to ask the questions and to get convictions…

[Prosecuting Attorneys corrected him "in no uncertain terms".]…

Mr Jaglal asks [Mr Benjamin]: So when called upon in the court to give evidence what is it that you intend to do?

[Mr Benjamin]: ask your questions, I am coming to give evidence and I will answer as I did before. I am just saying

> this to you as we talking and is just between us." (emphasis in original)

16. Mr Jaglal informed Mr Benjamin that, in the light of what Mr Benjamin had said, the Prosecuting Attorneys would need to speak with the DPP and obtain instructions before speaking to him again.

17. After the briefing, Mr Jaglal contacted PC Huggins to obtain a statement from Mr Benjamin. PC Huggins spoke with Mr Benjamin by telephone on 24 April 2019 and visited him at home on 8 May 2019. At that visit PC Huggins referred to Mr Benjamin's conversation with the Prosecuting Attorneys on 23 April 2019, to which Mr Benjamin replied:

> "Boss I told JAGLAL something in private I am surprised that he tell anybody. I never say I wasn't going to court. I done say what I have to say."

18. On Friday 17 May 2019, the criminal proceedings resumed before Rampersad J. At this stage, the Prosecuting Attorneys raised "serious concerns they had about the legality, fairness and lawfulness of the continuation of the trial against the accused persons" with Rampersad J. Later in the day Mr Jaglal telephoned junior Defence Attorney, Ms Shaikh, informing her, without giving particulars, of serious concerns relating to Mr Benjamin. Ms Shaikh made oral and written applications for disclosure of material relating to Mr Benjamin's evidence.

19. On 20, 21 and 22 May 2019 Ms Shaikh was informed that the DPP was aware of the request for disclosure, which disclosure would be forthcoming. On Wednesday 22 May 2019 Rampersad J directed that there be disclosure. The matter was adjourned to the next day to enable that to take place. Later on 22 May 2019 pre-action correspondence was sent on behalf of the Respondents to the DPP requesting discontinuance of the prosecution.

20. The Notes were provided to the Defence Attorneys at around 9am on Thursday 23 May 2019. A hearing before Rampersad J then took place at around 10.50am. The following matters were canvassed:

> (i) Delay in producing the Notes, for which the prosecution was criticised. Amongst other things, Rampersad J commented that the Notes should have been produced by or at an earlier case management conference (on 29 April 2019);

(ii) The Prosecution Attorneys were now potential witnesses, and alternative prosecuting attorneys needed to be appointed;

(iii) The trial procedures under the Evidence Act Chapter 7.02 ("the Evidence Act") included provision for inconsistent statements, and dealing with adverse witnesses;

(iv) The trial was to proceed;

(v) The (acting) DPP intended to respond to the pre-action correspondence.

21. Significantly, the Defence Attorneys informed Rampersad J at this hearing that they proposed to seek a stay on the basis of abuse of process and/or seek judicial review, or both. The defence intention was for any application to be heard before Rampersad J. An affidavit and the necessary documents were said to have been in the process of being drafted. There were detailed discussions with Rampersad J about the timing and listing of an application to stay for abuse of process before him.

22. Rampersad J adjourned the trial to Monday, 3 June 2019.

3. THE CIVIL PROCEEDINGS

23. The Respondents did not in fact issue an application for a stay of the criminal proceedings that day, or at all. Rather, in the early afternoon of Thursday 23 May 2019, they commenced civil proceedings seeking leave to apply for judicial review, seeking an urgent without notice hearing that day.

24. The relief sought included a declaration that the DPP's failure to discontinue was "unreasonable, illegal, procedurally improper and unfair" (and in breach of the Respondents' constitutional rights). The application stated that the Respondents had "no other alternative remedy other than applying to the High Court for Judicial Review of the challenged decision". It was certified that the application was urgent because the Respondents were not entitled to bail; it was said that their prosecution and continued deprivation of liberty were illegal, unlawful and in breach of their constitutional rights.

25. The application for an urgent hearing was successful, with a hearing before Quinlan-Williams J taking place that same afternoon (at 4.30pm). The DPP was given no notice, even informal, of that hearing. Following oral submissions from one of the Defence Attorneys, Quinlan-Williams J granted leave with directions for service of a

Fixed Date Claim on or before Friday 24 May 2019 and a substantive fixed hearing on Monday 27 May 2019.

26. The Respondents filed their Fixed Date Claim for judicial review and served it on the DPP at 3.50pm on Friday 24 May 2019. On Monday 27 May 2019, Quinlan-Williams J heard further submissions on behalf of the Respondents and adjourned the hearing to Friday 31 May 2019 in order to allow the DPP to file any affidavit and make submissions in response. On 31 May 2019 the DPP filed a speaking note, but no evidence. An oral hearing before Quinlan-Williams J attended by both sides took place that day.

27. Quinlan-Williams J handed down her decision in the morning of Monday 3 June 2019, declaring (amongst other things) that the DPP's failure to discontinue was "unreasonable, improper and unfair" and quashing the indictment ("the JR Decision").

4. RETURN TO THE CRIMINAL PROCEEDINGS

28. As set out above, the criminal proceedings were due to resume before Rampersad J that same day, Monday 3 June 2019. When they did so, a newly appointed replacement prosecutor was in place. Rampersad J was informed of the JR decision. The DPP submitted that the trial could nevertheless proceed, since the JR decision was the decision of a court of only concurrent jurisdiction. Rampersad J, however, was persuaded that the trial could not proceed and ordered that the decision of Quinlan-Williams J be executed. Rampersad J directed that the jury (and alternates) were to be notified, the Respondents not having been placed in their charge.

29. The Respondents, who had by now spent some ten years in custody, were released. The First Respondent, Chris Durham, died in an accident in October 2020.

5. THE JUDGMENTS BELOW

The JR Decision

30. Quinlan-Williams J found that the only issue was whether the case was one that was so exceptional that it met the threshold required for the court to exercise its supervisory jurisdiction by judicial review of the DPP's decision. She held that it was. In summary, Mr Benjamin, the only witness connecting the Respondents to the charge of murder for which they had been indicted, had lied to the police and then the court at the preliminary enquiry. His perjured account was used to indict the Respondents, and he intended to maintain his deception at trial. There was no remedy available to a judge

presiding over the criminal trial to bring fairness to the trial process. She expressed her disappointment at the lack of any explanation from the DPP. In her view, the peculiar circumstances required such an explanation.

The Decision of the Majority

31. The DPP appealed to the Court of Appeal on 11 July 2019. The appeal came before Archie CJ, Rajkumar and Bereaux JJA on 25 October 2021. Judgments were handed down on 6 June 2022.

32. Archie CJ identified two questions: i) whether the Respondents could get a fair trial and ii) whether it was fair to try them in the first place. He accepted that the first question was a matter usually reserved for the trial judge. However, "the engagement of the Court's discretion must always be preceded by the exercise of the DPP's discretion with regard to the second".

33. He stated that the sole material witness had, by his own admission, perjured himself, and would continue to do so at trial. Even if Mr Benjmain were to retract his admission, there was no conceivable direction from a trial judge that could mitigate the risk of an unjust verdict. The difficulty with the DPP's position was exposed when it was acknowledged that the DPP could not decide whether Mr Benjamin had lied at the preliminary inquiry or was lying now. It was a wholly inappropriate engagement of the court's process for the DPP to put that matter to the test in court to be determined by the finders of fact. Nothing could be more damaging to public trust and confidence in the administration of justice if it were known that the DPP was prepared to put someone on trial for murder when the only material witness had admitted lying on the facts of the case. Any challenge to Mr Benjamin's testimony would probably involve putting the Prosecuting Attorneys in the witness box to undermine the DPP's case, conceivably involving inviting a jury to find Mr Benjamin's account of the meeting on 23 April 2019 more credible than the DPP's own counsel. No-one paying any serious attention to the Prosecutor's Code could countenance a continued prosecution in such circumstances.

34. Archie CJ answered both the questions that he had posed in the negative. Even if an application to stay or quash the indictment could have been dealt with by the trial judge, having regard to the considerable time that had elapsed, the matter did not need to be sent back to the High Court.

35. Rajkumar JA concluded that this was one of those exceedingly rare situations where judicial review of a discretion to maintain a prosecution had to be permitted on the ground of irrationality and abuse of process. There was no discretion to abuse the process of court. There was no technical argument to refute the fact that to permit

prosecutions to continue based on prior self-confessed false evidence being maintained at trial would bring the system of criminal justice into disrepute.

36. Rajkumar JA reasoned that it was unnecessary for Quinlan-Williams J to have made a finding that Mr Benjamin had committed perjury. In reality, she was simply forming the view that a prima facie case appeared to have been established that his evidence was "suspect and unreliable". The facts were reviewable at the earliest opportunity and judicial review was justified. He reviewed various possible scenarios under the Evidence Act. To leave the issue of which version of Mr Benjamin's accounts was accurate and in what way he had lied to the jury would be a "stark abuse of process". Further, there would be a breach by the prosecutor of section 27 of the Legal Profession Act Chapter 90:03 ("the LPA").

The Decision of the Minority

37. In Bereaux JA's judgment, there was nothing exceptional about the case to warrant any intervention to remove the matter into the civil court, far less an order to quash the indictment. In any event, exceptionality was not the only issue. It was first necessary to consider whether the grounds of challenge (unreasonableness, illegality, procedural impropriety and a breach of constitutional rights) fell within the category of case that makes the purported exercise of power reviewable.

38. Bereaux JA stated that the concerns of both the prosecution and the defence could all have been addressed adequately at the criminal trial which was only two weeks away, exercising the due process provisions under sections 4(a) and (b) of the Constitution. In his judgment Quinlan-Williams J was "plainly wrong" to consider that *Matalulu v DPP* [2003] 4 LRC 712 ("*Matalulu*") supported her decision. The Majority had made the same error. The DPP's decision to continue prosecution was consistent with his constitutional duty and discretion under section 90 of the Constitution ("section 90"). There was nothing exceptional on the facts: Mr Benjamin's alleged statement to the Prosecuting Attorneys was but a variation of the usual case of a witness recanting earlier sworn evidence in the Magistrates' Court. The criminal trial process had sufficient safeguards. The reasoning of the Majority involved speculation. Protecting the criminal process was precisely what the DPP was doing. The decisions of Quinlan-Williams J and the Majority had unacceptably enlarged the scope of judicially reviewing a prosecutorial decision by diluting the carefully crafted decisions which successive Boards of the Privy Council had made. Further, leave to bring judicial review proceedings should not have been granted.

6. THE DIFFERENT ROLES IN THE CRIMINAL TRIAL PROCESS

39. The criminal trial process involves a number of different participants, playing different roles and with different duties and responsibilities. It is adversarial in character, a format directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendants to advance their defence. The overriding requirement is to ensure that the defendant is tried fairly.

The DPP and Prosecutor

40. By section 90(2) and (3) of the Constitution the DPP is appointed as a public office holder with power "in any case in which he considers it proper to do so –

> (a) to institute and undertake criminal proceedings against any person before any Court in respect of any offence against the law of Trinidad and Tobago;
>
> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority…"

41. It is not the prosecutor's function to decide whether a person is guilty of a criminal offence, but rather to make an assessment as to whether it is appropriate to present charges for the criminal court to consider. The prosecutor acts independently of those responsible for investigation. Nor is it the prosecutor's duty to secure a conviction, but rather the duty is to act as a minister of justice (see for example *Randall v The Queen* [2002] UKPC 19; [2002] 1 WLR 2237 ("*Randall*"), para 10(i)). The role thus excludes any notion of winning or losing.

42. The DPP is responsible for the provision of a Code for Prosecutors in Trinidad and Tobago (March 2012 version) ("the Code"). The Code is not an instruction manual, nor does it purport to lay down any rule of law. But it is the expectation that all prosecutions in Trinidad and Tobago will be conducted in accordance with the guidelines outlined in the Code.

43. The Code includes the following guidelines:

(i) The interest of the prosecutor is to assist the court to achieve justice. As the representative of the public interest the prosecutor must guard against the conviction of the innocent. The prosecutor should invite the court to stop the proceedings if the point is reached at which he or she concludes that there is no longer a reasonable prospect of conviction (3.3);

(ii) The prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process (4.1);

(iii) Prosecutors should identify, and where possible, seek to rectify evidential weaknesses. They should swiftly stop cases which do not meet the evidential stage of Full Code Test (6.5). The proper test is whether there is a realistic prospect of a conviction (6.6);

(iv) Prosecutors must not allow a prosecution to continue where to do so would be seen by the courts as oppressive or unfair so as to amount to an abuse of the process of the court. (6.7);

(v) The final responsibility for the decision whether or not a case should be proceeded with rests with the DPP (6.9);

(vi) A case which does not pass the evidential stage of the Full Code Test (ie that there is a realistic prospect of a conviction) must not proceed, no matter how serious or sensitive it may be (7.5);

(vii) Prosecutors should not ignore evidence because they are not sure that it can be used or that it is reliable. Instead, they should look closely at it when deciding if there is a reasonable prospect of conviction (7.13);

(viii) A prosecutor should only put a witness in the witness box when satisfied that the evidence provided will be relevant and credible. Prosecutors should ensure that witnesses are aware of what is required and also provide as much assistance as they legitimately can to secure the best evidence from witnesses (14.4).

44. The Criminal Procedure Rules 2017 also oblige the prosecutor to deal with the case "*justly*" (see rule 3.1). And, amongst other things, prosecutors are bound by disclosure obligations (extending, amongst other things, to material that might undermine the credibility of a prosecution witness). Prosecutors are also subject to section 27 of the LPA which provides:

> "An Attorney-at-Law shall not knowingly use perjured testimony or false evidence or participate in the creation of or use of evidence which he knows to be false."

The Defence

45. The central task of the defence is to test the evidence presented on behalf of the prosecution. By challenging the strength, reliability and admissibility of evidence, defence counsel ensure that the process remains truly adversarial, essential for a fair trial; they are the critical counterforce in the courtroom, ensuring that the evidence withstands the highest scrutiny for the protection of their client's rights. Defence attorneys are also bound by the LPA and the Criminal Procedure Rules 2017.

The Jury

46. The jury is the ultimate arbiter of fact, representing a democratic check on judicial and prosecutorial power. In a jury trial, the only fact-finder on the question of innocence or guilt is the jury. The assessment of witness credibility is for them and them alone – the classic function of a jury in which the judge does not interfere. As stated in *Franco v The Queen* [2001] UKPC 38 at [18], "the starting point must always be that in a trial on indictment the jury is the body to which the all-important decisions on the guilt of the accused are entrusted*"*.

The Judge

47. It is the responsibility of the judge to oversee the trial, ensuring that the proceedings are conducted in a proper manner which is fair to both prosecution and defence. The judge must neither be nor appear to be partisan. He or she may rule on the admissibility of evidence and will give directions of law to the jury, including as to the weight to be placed on matters such as previous bad character and inconsistent statements. However, judges are not the fact-finders for the purpose of conviction. Those are matters within the exclusive province of the jury, as set out above.

48. In discharging the duty to ensure fairness, the judge will have available the various tools existing under the court's inherent jurisdiction, relevant legislation and procedural rules. Thus, by way of example, there is power to stay proceedings if to allow the prosecution to continue would amount to an abuse of the process of the court (albeit that this is a power to be exercised only in exceptional circumstances (see *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, 643G). There is also a power to dismiss the proceedings on the basis that there is no case to answer (see *R v Galbraith* [1981] 1 WLR 1039).

49. In this case, of particular relevance, is a suite of amendments to the Evidence Act introduced in 2009, namely sections 5, 6, and 15H. These provisions enable the judge to address evidential issues that can arise in relation to previous inconsistent statements and adverse witnesses so as to ensure a fair trial. They provide as follows:

> *"*5. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness in the opinion of the Judge proves adverse, contradict him by other evidence, or by leave of the Judge, prove that he had made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.
>
> 6. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it; but before such proof is given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made the statement.
>
> 15H. (1) Where in criminal proceedings a person gives oral evidence and -
>
> (a) he admits making a previous inconsistent statement; or
>
> (b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7,

> the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.
>
> (2) Where in criminal proceedings evidence of an inconsistent statement made by a person is given under section 15D(l)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.*"*

50. Thus, in summary, a party may contradict a hostile witness with proof of an earlier inconsistent statement (section 5); proof of an earlier inconsistent statement may be admitted if a witness denies making that statement (section 6); previous inconsistent statements that are admitted, or proved under sections 5 or 6, are admissible as evidence of any matter stated in those statements (section 15H(1)).

7. RELEVANT PRINCIPLES OF JUDICIAL REVIEW

51. Section 5(1) of the Judicial Review Act Chapter 7:08 ("the Judicial Review Act") provides:

> "An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court."

52. By section 6 of the Judicial Review Act, no application for judicial review can be made without leave. Section 9 of the Judicial Review Act provides:

> "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."

53. Judicial review is thus a remedy of last resort, and its pursuit is generally inappropriate where a suitable alternative remedy exists. In the present context, before granting leave, the court should consider which, if any, of the complaints could not adequately be resolved within the criminal process itself, either at the trial or, possibly, by application for a stay of the proceedings as an abuse of process. The ordinary rule is

that the court will refuse leave if, amongst other things, there is an alternative remedy that is "conveniently and effectively" available (see *Sharma* at paras 14(5), 24, 31 and 34; *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, para 30). The availability of an alternative remedy is a discretionary bar (see *Sharma* at para 14(4)).

54. Whilst judicial review of a prosecutorial decision is available in principle, it is a "highly exceptional remedy" (see *Sharma* at para 14(5)). As the court there stated:

> *"*The language of the cases shows a uniform approach: 'rare in the extreme' (*R v Inland Revenue Comrs, Ex p Mead* [1993] 1 All ER 772, 782); 'sparingly exercised' (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); 'very hesitant' (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); 'very rare indeed' (*R (Pepushi) v Crown Prosecution* Service [2004] Imm AR 549, para 49); 'very rarely' (*R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said '... 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.'"

55. On a challenge, the established principles of judicial review will apply, but always paying proper regard to 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.

56. In *Matalulu,* approved in *Mohit v Director of Public Prosecutions* [2006] UKPC 20; [2006] 1 WLR 3343 ("*Mohit*") para 18, the Supreme Court of Fiji identified (at 736b-f), that a purported exercise of power would be reviewable if, for example, it were made in bad faith, for example, dishonesty. However, contentions that the power had been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.

57. The court in *Matalulu* (at 736d-e) also stated:

> "A mistaken view of the law upon which a proposed prosecution is based will not constitute a ground for judicial

> review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced… "

58. However, *Matalulu* must be read in its context. There the DPP had decided to discontinue a prosecution on the basis of a construction of the Penal Code that was accepted generally as settled law and correct at the time that the decision was made. Only subsequently did the Supreme Court of Fiji consider the construction to be erroneous. In these circumstances, the Supreme Court found that there was no basis for interference with the DPP's (good faith) decision, albeit that it had been premised on an error of law.

59. However, a general proposition that a mistaken view of the law can never constitute a ground for judicial review of the exercise of prosecutorial discretion overstates the position. As Lord Bingham of Cornhill stated in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] AC 756, 841, para 32, the discretions conferred on the DPP are not unfettered. Amongst other things, in exercising prosecutorial powers, a prosecutor "must direct himself correctly in law. He must act lawfully". Thus, whilst judicial review of a prosecutorial decision remains a highly exceptional remedy, an error of law may provide a proper basis for challenge.

60. Whilst the standard of review must not be set so high as to deprive an aggrieved citizen of their only effective remedy, the reasons for the highly restrictive approach confirmed in *Sharma* are well understood. In summary:

(i) The prosecutorial powers are entrusted to the DPP and to no one else;

(ii) The polycentric character of official decision-making in prosecutorial decisions, referred to above. It is within neither the constitutional function nor the practical competence of the courts to assess the merits of such decision-making;

(iii) The powers are conferred on the DPP in very broad and unprescriptive terms;

(iv) The delays inevitably caused to the criminal trial if judicial review proceedings proceed, and the desirability of all challenges taking place in the criminal trial or on appeal;

(v) The great weight to be accorded to the judgment of experienced prosecutors on whether a jury is likely to convict;

(vi) The fact that an independent prosecutor will be bound by a code of conduct;

(vii) The need to avoid undermining prosecutorial effectiveness by subjecting the prosecutor's motive and decision-making to outside inquiry.

8. ANALYSIS ON THE FACTS

Available Alternative Remedy

61. The Board considers first the question of whether leave to seek judicial review should have been granted at all.

62. As set out above, leave to seek judicial review should not normally be granted if there is a suitable alternative remedy available. In this case, the court had to consider whether the Respondents' complaints could be resolved properly within the already existing criminal process.

63. The Respondents had an alternative remedy that was not only available to them, but far more appropriate, namely the criminal proceedings. Those proceedings were already constituted, with a judge and jury in place and the next hearing date fixed for 3 June 2019, only six working days away. There was nothing to prevent the Respondents from making an immediate application for a stay for abuse of process in the criminal proceedings (if they believed that there were legitimate grounds to do so). Indeed, the Defence Attorneys said in terms on 23 May 2019 before Rampersad J that this is what they intended to do. At the hearing before the Board, there was no suggestion of any substantive prejudice in terms of forum. Thus, the Respondents did not take issue with the DPP's submission that there was no complaint that could be raised in judicial review proceedings that could not also have been advanced in the criminal proceedings.

64. Moreover, in addition to the obvious merit in having a single set of proceedings, the judge presiding over the criminal proceedings was obviously better placed to address issues of potential abuse and fairness. The reasoning of the courts below and the Respondents' submissions before the Board serve to highlight this advantage. The decision of the Majority proceeded by reference to a series of hypothetical scenarios, including as to which witnesses might or might not give evidence and what they might or might not say. The Respondents repeated those speculations, and supplemented them

with reference to further potential evidential twists and turns. By contrast, Rampersad J would have been in a position to address concerns about abuse of process and fairness, not on the basis of conjecture, but on the facts and evidence as they unfolded.

65. The criminal proceedings afforded a full panoply of safeguards to ensure justice for the Respondents. These included:

(i) The duties of the prosecutor, defence, and judge, as outlined in section 6 above;

(ii) The ability to make an application for a stay of the proceedings on the ground of abuse of process;

(iii) The ability to call the Prosecuting Attorneys to give evidence. It may well be that proper discharge of the prosecutor's duty (as emphasised in *Randall* at para 10(1)) would require the prosecutor to call the Prosecuting Attorneys (assuming that it was intended to call Mr Benjamin as a witness). But in any event, the Prosecuting Attorneys could be called as witnesses by the defence;

(iv) The ability to attack Mr Benjamin's credibility by reference to what he was recorded in the Notes as having said to the Prosecuting Attorneys (whether or not he proved hostile (see sections 6 and 15H of the Evidence Act);

(v) The ability to make a submission of no case to answer;

(vi) The ability to make closing speeches to the jury addressing weaknesses in the prosecution case, including any inconsistencies in Mr Benjamin's evidence and attacks on his credibility;

(vii) The judge's directions to the jury;

(viii) An appeal if necessary.

66. These were all matters which should have been drawn to the attention of Quinlan-Williams J, as well as the readiness of the criminal proceedings. Judicial interference by a civil court with ongoing proceedings in a court of criminal (concurrent) jurisdiction is not a step to be taken lightly. It is not a step that should have been taken in circumstances where the criminal court was fully (and indeed better) equipped to deal with the issues arising. It resulted, amongst other things, in the

remarkable situation that the submission could be made to Rampersad J on 3 June 2019 on behalf of the DPP that Rampersad J could proceed with the criminal trial despite the order of Quinlan-Williams J quashing the indictment.

67. It is suggested for the DPP that there is a further constitutional objection. In written submissions following the conclusion of the hearing before the Board, the DPP contends that there was "constitutional impropriety" in a judicial review challenge in circumstances in which the trial had started, a jury having been sworn. Loosely put, the argument appears to be that, once the criminal trial has begun, judicial review of the DPP's decision to continue the prosecution is improper, with reliance on *Kostuch (Informant) v Alberta (Attorney General)* (1995) 128 DLR (4th) 440 ("*Kostuch*").

68. There can be a debate as to whether the criminal trial had started in circumstances where the Respondents had not yet been placed in charge of the jury: section 38 of the Criminal Procedure Act Chapter 12:02 suggests that it may have done; authorities such as *Morin v The Queen* (1890) 18 SCR 407, 415; *R v Tonner* [1985] 1 WLR 344, 357 suggest otherwise, namely that the trial does not start until the defendant has been placed in the jury's charge.

69. In either event, the submission of constitutional impropriety does not advance matters. *Kostuch* does no more than emphasise the well-established principle that exceptional circumstances are required before judicial review of a decision to prosecute is justified:

> "The judicial and executive must not mix. These are two separate and distinct functions…If a judge should attempt to review the actions or conduct of the Attorney General – barring flagrant impropriety – he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. That a judge must not do…"
>
> (At p 450, citing *R v Balderstone* (1983) 8 CCC(3d) 532, 539; 4 DLR (4th) 162, 169.)

70. In written reply, the Respondents advance new submissions emphasising that the right to seek judicial review in Trinidad and Tobago has a statutory basis. It is suggested that such a right is more constitutionally powerful than the common law right to seek judicial review in England and Wales. The further submission is that, because only a civil court can quash the DPP's decision to continue to prosecute, the criminal courts do not provide an adequate and effective alternative remedy.

71. However, the relevant principles were, as set out above, identified in *Sharma*. *Sharma* was itself a decision based on the right to judicial review in Trinidad and Tobago (the statutory basis of which was recognised expressly at para 14(3)). Further, there is no requirement for the alternative available remedy to be identical in order to be effective. The criminal proceedings provided multiple possible alternative routes to the termination of the criminal proceedings, which was the practical outcome sought by the Respondents in the civil proceedings. *Sharma* confirms that, in the context of prosecutorial discretion, the criminal process can, and usually will, provide an adequate, alternative remedy. This is entirely orthodox. It was, for example, the approach adopted in the earlier decision of the Court of Appeal of Trinidad and Tobago in *In the Application of Trevor Bailey* - Civil Appeal No 204 of 1997 *(*TT*)*. There Nelson JA (at 13) declined to interfere with the High Court Judge's exercise of discretion not to grant judicial review of a magistrate's decision to commit the appellant to stand trial on the basis that the appellant had an alternative remedy of making a submission of no case to answer at trial.

72. Finally, to hold that leave to bring judicial review proceedings should not have been granted is not to proceed as if no right to judicially review a prosecutorial decision exists at all. Such a right clearly exists in principle, as set out in section 7 above. The analysis merely emphasises the limits of the scope of the remedy, and the circumstances in which it should be invoked. The power to restrain for abuse of process is important; but it is also the policy of the courts to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges.

73. The existence of an alternative remedy that was both convenient and effective, as explained above, is sufficient to dispose of this appeal in the DPP's favour.

Irrationality and Abuse of Process

74. In any event, even if a judicial review challenge had been appropriate, the Board concludes that the Majority erred in finding that there was irrationality and an abuse of process such as to amount to exceptional circumstances justifying a quashing of the DPP's decision to continue the prosecution and the indictment.

75. As for irrationality, much emphasis was placed for the Respondents on the absence of any evidence from the DPP setting out the basis for the decision to continue the prosecution. It was pointed out that this was so, even after leave to apply for judicial review had been granted and an adjournment (from 27 to 31 May 2019) ordered so that, amongst other things, the DPP could file an affidavit. Reference was made to parallel judicial review proceedings relating to another decision to continue a prosecution (*DPP v Nurse (Kevon)*, 26 January 2022 (Civil Appeal No P 134/2021)), in which, by contrast, the DPP had provided a full affidavit explaining his decision.

76. The short answer to this is simply that the DPP was under no obligation to provide any reasons for his prosecutorial decision. The court will consider the merits on the basis of the evidence before it. That will include any reasons that the DPP may choose to give. But it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be (see for example *Mohit* at para 22).

77. Beyond that, as the authorities make clear, unreasonableness or unfairness, are not likely to be enough to amount to an exceptional circumstance.

78. A fundamental marker needs to be laid down at this stage, both in the context of irrationality and abuse of process: the DPP was faced with two conflicting versions of events from Mr Benjamin. The first was based on sworn depositions from and recorded interviews with Mr Benjamin, confirmed and repeated by Mr Benjamin over several days of examination in chief and cross-examination in the Magistrates' Court in 2009. Mr Benjamin clearly placed the Respondents at or close to the scene of the shootings and carrying firearms.

79. Against that were Mr Benjamin's apparent comments at the end of a pre-briefing session in 2019 stating that he had not in fact seen the Respondents at all; he had simply said what he needed to at the time "for the good of the community". It was submitted for the DPP that his comments during the pre-briefing session, if made and recorded accurately, raise a number of questions as to their reliability. It was suggested that there are internal inconsistencies, such as the suggestion that the Respondents thanked him for his evidence but also offered him bribes to desist. Further, Mr Benjamin subsequently refused to sign a statement confirming any retraction.

80. Confronted with these differing versions, the DPP decided to continue with the criminal proceedings where the evidence could be tested (and, for example, Mr Benjamin's apparent inconsistent out of court statement could be deployed in cross-examination if necessary).

81. Critically, it was not for the court on judicial review to assess, let alone determine, which of Mr Benjamin's versions of events was true; it was not for the court on judicial review to find that Mr Benjamin's sworn evidence was perjured. Here, Quinlan-Williams J fell into error: she found in terms that Mr Benjamin had committed perjury when he gave his sworn evidence in the Magistrates' Court. She therefore accepted not only that the Notes recorded accurately what Mr Benjamin said to the Prosecuting Attorneys but also that what he then said was true. Moreover, she went on to evaluate other credibility matters which, in her view, pointed against him being either a reliable or honest witness (such as his comments in which he painted himself as "some type of vigilante hero"). This was to usurp the jury's classic function of fact-finding.

Her conclusion that Mr Benjamin's original evidence had been untrue underpinned her conclusion that the DPP's decision had not been "fairly" or "justly made".

82. Archie CJ took a similar position to that of Quinlan-Williams J. He also appears to have accepted as true what Mr Benjamin was recorded as saying in the pre-briefing session. Thus he stated that this was a case where "we have a sole material witness who has, by his own admission, perjured himself...the only material witness for the prosecution has admitted lying in relation to the facts of the case*…"* Rajkumar JA stated (at para 45) that it had not been necessary for Quinlan-Williams J to make any finding of perjury, but elsewhere appears to have treated Mr Benjamin's original evidence as unequivocally false (and his comments as recorded by the Prosecuting Attorneys as true), for example:

> "29. This self-contradictory and self-confessed false testimony which would be the sole basis of the trial of the accused required no further analysis or assessment by a jury to determine if it could provide the basis for a fair trial. A discretion to continue a prosecution based on such evidence which fails to recognise that such a prosecution is an abuse of the process of the court falls within the exceptional category of prosecutorial discretions that would be reviewable on an application for judicial review."

83. As for abuse of process, the Board questions whether the conundrum arising out of Mr Benjamin's alleged comments to the Prosecuting Attorneys falls neatly within considerations of abuse of process. Rather, it is a situation where a central witness's credibility is called into serious doubt. This, of itself, is not an unusual, let alone an exceptional, circumstance. Witnesses can recant for a number of different reasons – for example, out of fear, distress or coercion (as happened in *Tsang Ping-nam v The Queen* [1981] 1 WLR 1462), or because the first version of events was untrue. As Bereaux JA commented, Mr Benjamin's alleged statements to the Prosecuting Attorneys were "but a variation of the usual case of a witness recanting earlier sworn evidence in the Magistrates' Court*"*. The criminal process has safeguards to address such situations, as set out above.

84. If, nevertheless, the matter is properly to be viewed through the lens of abuse of process, there are two categories of abuse of process in criminal proceedings, as identified in *R v Maxwell* [2010] UKSC 48; [2011] 1 WLR 1837 (cited with approval in *Warren v Attorney General for Jersey* [2011] UKPC 10; [2012] 1 AC 22 ("*Warren"*), para 21). Lord Dyson noted at para 13:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112F)."

85. Category 2 abuse involves a two-stage approach. First, it must be determined whether, and in what respects, the prosecutorial authorities have been guilty of misconduct. Secondly, it must be determined whether such misconduct justifies staying the proceedings as an abuse (see *R v Norman (Robert)* [2016] EWCA Crim 1564; [2017] 4 WLR 16, para 23).

86. The two categories are distinct and should be considered separately (see *Warren* at para 35). As it was put in *R v BKR* [2023] EWCA Crim 903; [2024] 1 WLR 1327, para 34:

> "The second limb…does not arise unless the defendant, charged with a criminal offence, will receive a fair trial. It seems clear that something out of the ordinary must have occurred before a criminal court may refuse to try a defendant charged with a criminal offence when that trial will be fair."

87. On the facts here:

(i) Category 1 abuse was not made out: a fair trial was possible, as set out above;

(ii) As for category 2 abuse, there was no prosecutorial misconduct such that a trial would offend the court's sense of justice and propriety or undermine public confidence in the criminal justice system. There was no suggestion of bad faith

on the part of the DPP, for example, or some other form of prosecutorial misconduct. Section 27 of the LPA was not engaged in circumstances where perjury, false evidence and the relevant knowledge of either perjury or falsity on the part of the DPP had not been established. The Prosecuting Attorneys acted commendably when faced with Mr Benjamin's comments on 23 April 2019: they made and signed a full written note; they made the necessary disclosures to the court and the defence; and they withdrew from their roles as attorneys in the light of their potential involvement as witnesses. The DPP disclosed the Notes themselves, albeit after some delay, but not more than a month after the meeting on 23 April 2019.

(iii) In summary, there were no circumstances meeting the high threshold of exceptionality such as to justify the quashing of the indictment.

9. CONCLUSION

88. This appeal arises out of an unfortunate sequence of events, commencing with the seeking and granting of leave to apply for judicial review on a without notice basis. The Board agrees with the decision of the Minority that leave to apply for judicial review should not have been sought or granted at all, let alone in the absence of the DPP. The criminal trial was due to re-start within days and provided an adequate and effective alternative remedy for the Respondents.

89. It is important for the courts to guard against the danger of unjustified collateral attacks on prosecutorial decisions. As the authorities confirm, occasions when it is appropriate to judicially review a prosecutorial decision whether to (continue to) prosecute are extremely rare. In the present case, there was unwarranted interference by a civil court of concurrent jurisdiction with ongoing proceedings in a criminal court.

90. For these reasons, the appeal will be allowed. It will be for the DPP to decide what, if any, next steps are appropriate.