Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CONSTITUTIONAL COURT

SUIT NOS. M103 and M113 of 1998

BEFORE: THE HONOURABLE MR. JUSTICE PANTON
THE HONOURABLE MR. JUSTICE SMITH
THE HONOURABLE MR. JUSTICE MARSH

MELANIE TAPPER
WINSTON McKENZIE — APPLICANTS

V.

DIRECTOR OF PUBLIC PROSECUTIONS
AND ATTORNEY GENERAL — RESPONDENTS

Mr. Ian Ramsay Q.C. and Miss Carolyn Reid
for Applicant Tapper
Mr. Walter Scott and Mrs. Sharon Usim
for Applicant McKenzie
Mr. Gayle Nelson for Mr. Rose
Mr. Hugh Wildman and Miss Lisa Palmer for
Director of Public Prosecutions
Mr. Lennox Campbell for Attorney General

23rd, 24th, 25th, 26th, 27th, November, 1998
17th, 18th December, 1998 and
8th February, 1999

PANTON, J.

On February 8, 1999 we declared as follows -

(1) the exercise of the powers of the Director of Public Prosecutions under the Constitution is subject to review by the Court by virtue of section 1(9) of the Constitution; and

(2) the entry of the nolle prosequi and the presentation of a voluntary bill of indictment in respect of the said charges by the Director of Public Prosecutions amounted to -

(i) an abuse of the process of the Court;

(ii) a deprivation of the protection of the law; and

(iii) a contravention of the constitution.

We also stayed proceedings on the voluntary bill of indictment, and remitted the cirminal proceedings to the Resident Magistrate's Court at Half Way Tree for trial as had been originally agreed between the prosecution and the applicants.

We gave then a summary of our reasons. Herein follow our detailed reasons. My learned brother, Smith, J., has stated fully the facts of the case. I am in full agreement with his reasoning and conclusions except so far as the unlawful arrest of the applicants is concerned, and so far as I may express myself differently in the few lines that I hereby contribute.

THE ABUSE OF PROCESS

Section 1(9) of the Constitution states:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution or any other law."

The Director of Public Prosecutions is empowered to function as such by section 94 of the Constitution. He is not subject to the direction or control of any other person or authority, in the exercise of his powers (section 94(6). However, he is not a law unto himself. "It [referring to section 94(6)] is not intended to apply to judicial control of the proceedings." (Brooks v. Director of Public Prosecutions and Attorney General) (1994) 2 All. E.R. p. 231 at 238H. He cannot simply do whatever he wishes without regard for the rights of the citizen or of the laws of the country. His action is subject to judicial review. In any such review, the Court is obliged to consider his reasons if he has disclosed them.

This case is unique as the circumstances leading up to the final act by the Director of Public Prosecutions are unprecedented. It seems clear that the Director (Mr. Glen Andrade, Q.C.) was misled by his Deputy Mr. Wildman into making strange extra-judicial moves to have Her Honour Miss Millicent Rickman removed from trying the case against the applicants. According to Mr. Wildman, in answer to this Court, the Director of Public Prosecutions had undisclosed reasons for wanting the matter to be heard by another Resident Magistrate. This, he said, was prior to the use of the word "persecutors" and "worms" as alleged of the Resident Magistrate. These reasons were never communicated to Miss Rickman, nor have they been communicated to this Court.

It was never intended by the Constitution that the Director of Public Prosecutions was to be able to choose which Resident Magistrate should try a case. If it is intended to challenge the right of a Resident Magistrate to preside at a particular trial, it should be done boldy and clearly. Surreptitious behaviour is not expected of the Director in a matter of such importance. The method of challenge has long been established as -

(1) applying to the Resident Magistrate in Chambers, setting out the reasons;

(2) applying to the Resident Magistrate in open Court, if the application in Chambers has failed; and

(3) applying to the Supreme Court if the Resident Magistrate has rebuffed the earlier efforts.

Having not followed the established procedure and having failed in his extra-judicial efforts to secure the removal of the Resident Magistrate, the Director of Public Prosecutions went to the extreme. He entered a nolle prosequi and presented a voluntary bill of indictment for the applicants to be tried in the Circuit Court. He, in my view, was high-handed and unfair in this move. He had led the applicants to the edge so far as a trial in the Resident Magistrate's Court was concerned. He had presented them with a copy of the indictment on which they were to be tried in the lower Court. Their preparation was based on this. To have suddenly done what the Director did, appeared malicious. He disregarded the fact that he was now exposing the applicants to greater penalties if convicted. It is my view that the Constitution never contemplated such behaviour by the Director, and it does not countenance it. Indeed, section 277 of the Judicature (Resident Magistrates) Act provides the method that would have been applicable if the Director genuinely wished the case to be tried in the Circuit Court.

The section reads:

> "Anything in this act to the contrary notwithstanding it shall be lawful for the Director of Public Prosecutions in any case brought before a Court, at any time before the accused person has stated his defence, by writing under his hand to require the Magistrate to adjourn the case, or deal with it as one for the Circuit Court; and on receipt of such requisition the said Magistrate shall deal with the case accordingly."

In my view, the proceedings having reached the point they had before the Resident Magistrate, with both sides having unequivocally committed themselves to a trial in that forum, the Director should have written to the Resident Magistrate requesting the conduct of a prelimnary examination, in keeping with section 277. In proceeding as he did, given the history of the matter, the Director of Public Prosecutions clearly abused the process of the Court.

THE UNLAWFUL ARREST

As regards the arrest of the applicants in the courtroom at Half-Way-Tree, Mr. Wildman, in answer to this Court, conceded that "there may have been a

technical breach committed in how the matter was brought before the High Court." When he gave the verbal instructions for the arrest of the applicants there was no document in existence to authorise the arrest - neither in the Resident Magistrate's Court nor in the Circuit Court. There was also no process in the hands of the police or even en route to them to sanction the arrest. The applicants had been on bail which had not been revoked by any Court. Furthermore, they had not committed any new offence. Mr. Wildman was here standing in the shoes of the Director of Public Prosecutions, a public officer whose office is one under the Constitution. In acting as he did, that is, without observing the legal requirements, it is my view that he abused the constitutional position of the Director. His abuse of it resulted in the unlawful deprivation of the liberty of the applicants in contravention of section 15 of the Constitution. There does not appear to be any real dispute on the point. After all, "where the liberty of the subject is at stake, technicalities are important": Brooks v. **Director of Public Prosecutions and Attorney General (supra)**. The applicants are, in my view, entitled to redress, in the form of damages to be assessed at the completion of the criminal trial. Multiplicity of actions are to be avoided so the fact that redress may be available to them in a separate action should not prevent the present recognition and determination of the breach of the Constitution.

Counsel's conduct

During the course of the proceedings before us, the new Director of Public Prosecutions Mr. Kent Pantry, Q.C. sought audience on two occasions. On the first, he came to indicate his willingness to facilitate a settlement of the matter by the return of the criminal trial to the Resident Magistrate's Court. We took the view that the proceedings before us were civil in nature and so could be resolved if it was the wish of the parties. This was not to be, however, as Mr. Wildman withdrew the cooperation that he had earlier indicated.

Mr. Pantry's second appearance was more dramatic and certainly most decisive. This was on the 17th December, 1998. He came to announce the revocation of Mr. Wildman's assignment for disobeying specific instructions that he, the Director of Public Prosecutions, had given.

I wish merely to say that given Mr. Wildman's behaviour in the Resident Magistrate's Court and his intimate connection with the events narrated in the various affidavits, it seemed most unwise for him to have been appearing as counsel in the proceedings before this Court.

F.A. SMITH, J.

This is a consolidated hearing of the two Originating Motions in the above suits dated the 21st September, 1998 and the 5th October, 1988 respectively.

The circumstances which led to the filing of these Motions are of the utmost importance. These must therefore be stated in some detail. They appear largely from the affidavits of the applicants supported by the affidavit of Mr. Crafton Miller the attorney-at-law. They are as follows:

On the 16th day of October, 1996, Mr. Winston McKenzie was arrested and charged with 324 counts of fraud. On the said day he was taken before the Resident Magistrate's Court at Half Way Tree where he was granted bail.

These charges came up for mention in the Half Way Tree Resident Magistrate's Court on at least two occasions. They were set down for trial on 14th April, 1997.

On that date the matter was adjourned and a new trial date, May 27, 1997 set.

On May 27 the prosecution sought and obtained an adjournment on the ground that another person was to be arrested and charged jointly with McKenzie. Thereafter the case was mentioned on May 29 and June 16, 1997.

Mrs. Melanie Tapper was arrested and charged on the 7th day of July 1997. She was taken to the said Resident Magistrate's Court on the same day and granted bail.

Both applicants were charged jointly with conspiracy to defraud Mr. Bentley Rose of $7,000,000.00.

Both appeared in court on the 14th July 1997. Thereafter the matter was called up for mention on about five (5) occasions, during which time disclosure and other pre-trial matters were dealt with.

On the 7th November, 1997 the matter was set for trial to commence on January 26, 1998 and to continue on the 27th and 28th January, 1998.

On the 26th January the matter was listed in court 1 before Her Honour Miss Millicent Rickman one of the Resident Magistrates assigned to the Resident Magistrate 's Court, Half Way Tree. The prosecution was represented by Mr. Hugh Wildman a Deputy Director of Public Prosecutions and Mr. Gayle Nelson who had the D.P.P.'s fiat to be associated with the prosecution.

The prosecution again applied for an adjournment stating that yet another person was arrested in respect of the same charges. This other person was Mrs. Melanie McKenzie the wife of Winston McKenzie.

The defence objected to the application for adjournment. The application was granted and the trial was set for four days commencing on April 20, 1998.

On the 16th April, 1998 the defence was sent a copy of the draft Indictment.

On the 20th April, 1998 at 10:20 a.m. when the matter was called the prosecuting attorneys were not in court. Attorneys –at-law for the defence were present.

The Resident Magistrate, Her Honour Miss Rickman stated that earlier that morning it was brought to her attention by the Clerk that the matter was listed in Court 4 before another Resident Magistrate. On her instructions the matter was relisted before her.

Mr. Nelson appeared a few minutes later and apologised for his late arrival. Shortly after, Mr. Wildman appeared. He told the court that the prosecution was ready. However he went on to say that there had been "some developments" and that he was instructed by the Director of Public Prosecutions to seek a short adjournment. The Magistrate expressed her concern with the manner in which the case was being dealt with. She said it seemed that someone did not want her to try the case. Eventually the matter was adjourned to the following day.

On the 21st April, 1998 both Mr. Wildman and Mr. Nelson were absent. There was no word of apology or explanation.

In an affidavit Miss Gregg, the Clerk of Courts, stated that the Magistrate enquired "where are the persecutors." She then told the Magistrate that the Deputy Clerk had informed her that Mr. Wildman had telephoned to say that the Director of Public Prosecutions had ordered that the matter be transferred to Court 4. The Magistrate was, understandably, perturbed and observed that the Director of Public Prosecutions could not "order her around." She nonetheless adjourned the matter for trial on July 6, 7 and 8.

On July 6, the matter was again listed before Her Honour Miss Rickman. Mr. Wildman, on behalf of the Director of Public Prosecutions entered a nolle prosequi. A note appended to the nolle prosequi indicates that it was entered solely so that the proceedings against the accused persons may be commenced de novo in the Home Circuit on a Voluntary Bill of Indictment.

Consequently the accused persons, that is, the applicants, were taken into custody. They were transported the same day to the Hone Circuit Court. There a Voluntary Bill of Indictment which was preferred against them was placed before Pitter, J. who admitted them to bail.

The charges contained in the Supreme Court Indictment are identical to the charges contained in the erstwhile proposed indictment for the Resident Magistrate's Court.

We have before us affidavits sworn by Mr. Glen Andrade Q.C., (the first Respondent), Mr. Bentley Rose, Mr. Hansurd Lawson, Constable Joy Reid, Constable Daniel Richards and Miss Laurel Gregg (the Clerk of Courts). These affidavits were filed by and/or on behalf of the Respodnets.

Mr. Bentley Rose is a businessman and the managing director of Benros Company Limited of which Mr. Winston McKenzie was a Director. The allegations are that the applicants and Mrs. Elaine McKenzie defrauded Benros Company Limited.

The import of Mr. Rose's evidence, it is argued, is the effect which the statements alleged to have been made by the Magistrate might have on his perception of a fair trial. He stated that on or about the 26th January, 1998 he received a "very disturbing report." He also stated that on or about the 20th April, 1998, he was in the Clerk of the Court's office when he heard a young lady telling the clerk that Her Honour Miss Rickman had said "..... the case of Winston McKenzie and Melanie Tapper belongs to her." Mr. Rose said he told Mr. Wildman and Mr. Nelson what he had heard.

He claimed that "I was very upset as it was clear to me from Miss Rickman's remark reported to me from the previous court date as well as what I had heard on this day, that I could not expect that there would be a fair hearing and justice done in the matter."

As we shall see later this perception seems to be one of the factors which influenced the Director of Public Prosecutions in entering the nolle prosequi.

According to Miss Laurel Gregg, the Clerk of the Courts, it was on the 21st of April, 1998 that the learned Resident Magistrate had enquired "where are the persecutors" and then proceeded to read from a statement which made mention of the worms "coming out of the woodwork." Mr. Hansurd Lawson, Constable Joy Reece and Constable Daniel Richards corroborate Miss Gregg's evidence.

Mr. Glen Andrade, Q.C., the then Director of Public Prosecutions in his affidavit stated that he was advised of the comments allegedly made by the learned Resident Magistrate Miss Rickman in open court. He was of the view that the alleged comments were "clearly prejudicial to a fair trial in that reference was made to the prosecutors

as 'persecutors' and 'woodworms.' He was very concerned as to the implications for a fair trial. Consequently he discussed the matter with The Honourable Chief Justice with a view to having the matter transferred to another court. Such efforts were to no avail, he said. He therefore took the decision to remove the case to the jurisdiction of the Supreme Court by entering a nolle prosequi and prefering a Voluntary Bill of Indictment.

He did this, he said, "to ensure that the trial would proceed without violence to the maxim justice must not only be done but manifestly and undoubtedly appear to be done." Presumably he had in mind the perception of Mr. Bentley Rose the virtual complainant. He went on to state that because a date for trial was set and the case was ready and the witnesses were in attendance and the volume of evidence involved, he thought it more desirable in the interest of justice that a Voluntary Bill of Indictment be preferred instead of proceeding by way of a preliminary enquiry.

I must now turn to consider the issues canvassed before us.

These applications are made pursuant to Section 25(1) of The Constitution of Jamaica. The applicants are alleging that certain provisions of Sections 14-20 of Chapter 3 have been and are being contravened in relation to them.

For convenience and economy of time I will first set out the Declarations sought which are common to the applicants and then those that are peculiar to each.

Common Declarations Sought

1. That the entry of a Nolle Prosequi by the Director of Public Prosecutions in respect of charges pending against the applicant in the Resident Magistrate's Court for the purpose of reinstituting the identical charges in the Supreme Court amounted in the circumstances of the instant case to an abuse of the process of the court and to a deprivation of protection of law and to a contravention of SS.13, 15 and 20 of the Constitution in relation to the Applicant.

2. That the Applicant's right to personal liberty and to protection of law under S.15(a) - (k) and S.20 of the Constitution has been and is being contravened by the aforesaid unconstitutional action of the Director of Public Prosecutions by the manipulation and/or misuse of the process of the Court.

3. That S.277 of the Judicature (Resident Magistrate's) Act specifically provides for the modus of transfer of a criminal case at the instance of The Director of Public Prosecutions from the Magistrate's Court to that of the Supreme Court.

4. That SS.272 and 277 of the aforesaid Judicature (Resident Magistrate's) Act and S.20 of the constitution conjointly protect the right of the Applicant to a fair hearing by way of a Preliminary Examination where the Director of Public Prosecutions directs the Magistrate in writing to treat the case as one for the Circuit Court.

5. That the entry of the Nolle Prosequi and the preferment of a Voluntary Bill by the Director of Public Prosecutions constitute a manifest manipulation of the process of the Court and an attempt to circumvent S.277 of the Judicature (Resident Magistrates) Act in order to bring the Applicant to trial in the Supreme Court without a judicial determination that a prima facie case has been made out.

6. That the performance of the functions of the Director of Public Prosecutions is subject to review and correction by the court pursuant to S. 1(1) of the Constitution.

<u>Declaration Peculiar to the Motion of Miss Melanie Tapper</u>

That the Applicant was entitled to a fair hearing on the aforesaid charges within the parameters of S.272 and S.277 of the Judicature (Resident Magistrate's) Act before the Resident Magistrate as an independent and impartial court established by law.

Those Peculiar to the Motion of Mr. Winston McKenzie

1. That the issue of a Nolle Prosequi by the Driector of Public Prosecutions does not amount to a withdrawal and/or dismissal of a charge or charges against the person charged under S.20(1) of the Constitution.

2. That the Director of Public Prosecutions has power under S.94 of The Constitution only to discontinue a criminal case however instituted, but no power to reinstate the identical case and to obtain trial thereon save upon strong and powerful grounds of justification demonstrated to the Court.

3. That the Constitution does not give the Director of Public Prosecutions as an officer of the Executive Branch of Government the power to select the severity of the range of punishment to be imposed on an individual who may be found to be guilty of the offences set out herein.

4. That the Director of Public Prosecutions by issuing a Nolle Prosequi in respect of charges pending against the Applicant in the Resident Magistrate's Court for the purpose of reinstating the identical charges in the Supreme Court amounted in the circumstances to the Director of Public Prosecutions selecting the severity of the range of punishment to be imposed on the Applicant if he is found guilty of the said charges and amounts to the Director of Public Prosecutions performing and/or directing judicial functions contrary to the principle of the separation of powers.

The Orders sought by the applicants are as indicated below:

1. (a) That the Voluntary Bill of Indictment herein be struck out and/or dismissed and/or set aside as null and void by reason of the contravention of Section 15 of the Constitution (The combined effect of orders sought by both).

   (b) That the Voluntary Bill of Indictment dated the 6th day of June, 1998 as against the Applicant be set aside as null and void by reason of the contravention of the principle of the separation of powers (sought only by Winston McKenzie).

2. That the Applicants be unconditionally discharged.

3. Alternatively that the aforesaid charges against the Applicants be remitted to the Resident Magistrate's Court for trial and/or otherwise to be dealt with according to law.

(Mr. Ramsay asked the court to concentrate on this order)

4. That the applicants be awarded compensation to be assessed as the court may direct, from The State as redress for the deprivation of their personal liberty under S.15 of the constitution, and for deprivation of the protection of Law under S.20 of the said Constitution.

5. That costs of the applications may be paid by the first and second respondents or such other Order as the Honourable Court may think fit.

6. For such further and other relief as the court may seem fit.

The Issues

The issues for the determination of this court may be summarised as follows:

(1) Whether in light of Section 1 (9) of the Constitution of Jamaica, the Director of Public Prosecutions' right to discontinue criminal proceedings before a court or to enter a nolle prosequi pursuant to Section 94(3) (c) of the Constitution and S.4 of the Criminal Justice (Administration) Act, is subject to judicial control and/or review;

(2) If the Director of Public Prosecutions is subject to such judicial control and/or review whether his ent of the nolle prosequi may be set aside by this court, on the ground that it mounts to or is first step in an abuse of the process of the court;

(3) Whether the reinstitution by way of a Voluntary Bill of Indictment in the Supreme Court of the same charges which were the subject matter of the nolle prosequi entered in the Resident Magistrate's Court to achieve the objective of removing the case from the aprticular Resident Magistrate constitutes an abuse of the process of the court, a deprivation of the protection of law afforded by S.277 of the Judicature (R.M.) Act, and a contravention of the Constitution and a breach of the applicants' legitimate expectations; and

(4) Whether the applicants were unlawfully arrested and deprived of their liberty within the meaning of S.15 of the Constitution and thus entitled to redress under S.25 of the Constitution.

I will now proceed to deal with these issues. I propose to deal with 1 and 2 together. Whether the Director of Public Prosecution is subject to judicial review and/or control in the exercise

of his powers under S.94(3)(c) of the Constitution and S.4 of the Criminal Justice Act and whether the entry of nolle prosequi may be set aside by the court on the ground that it amounts to or is the first step in an abuse of the process of the court.

Section 94(3)(c) of the Constitution states:

> The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -
>
> (a) .....
>
> (b) .....
>
> (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.

S.94(6) provides:

> In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

S.1(9) provides:

> No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the constitution or any other law.

Section 4 of The Criminal Justice Act empowers the Director of Public Prosecutions or his Deputy to enter a nolle prosequi in any criminal proceedings before any court.

Mr. Ramsay Q.C., for the applicant Mrs. Tapper submitted that the combined effect of S.1(9) of the constitution and S.94(6) is that whilst the discretion of the Director of Public Prosecutions to institute proceedings or discontinue them is unfettered once he has instituted proceedings before the court, it is the court that has control of the proceedings. Hence the court can say there is an abuse of process and set aside the nolle prosequi. For this contention he relies on Brooks v. Director of Public Prosecutions of Jamaica (1994) 2 All E.R. 231 at 239 (a-f) and at p.240 (e) and (f).

Mr. Scott for the applicant McKenzie, submitted that the entry of a nolle prosequi is one of the many rules of procedure involved in the criminal trial. He contended that the entry of nolle prosequi is the process which initiated the abuse of process and that this court - the constitutional court - has the power as part of its supervisory mechanism to ensure that the process of the court is not abused. Great reliance was placed on Director of Public Prosecutions v. B. (1998) HCA 45 (23rd July, 1998) a decision of the High Court of Australia and Gabby Rona v. District Court of South Australia (19-1-95) a decision of the Supreme Court of South Australia.

Mr. Wildman conceded that like other functionaries under The Constitution the exercise of power by the Director of Public Prosecutions can be reviewed by the court. He refers to the case of Council of Civil Service Unions and Others v. Minister of Civil Services (1984) 3 All E.R. 935 (CCSU) where the House of Lords held that powers exercised under the prerogative are subject to judicial review. However he contended that the Director of Public Prosecutions can only be challenged if it can be shown that he had breached the ultra vires principle - see Tapping v. Lucas 20 W.I.R. 229 at 235H. That it must be shown that his conduct was illegal or irrational or procedurally improper. Mr. Wildman referred the court to the Nigerian Court of Appeal's decision in Attorney General, Ogun State et al v. Egenti (1987) LRC (Const.) 607. The Court of Appeal's decision here was primarily concerned with the doctrine of stare decisis.

Mr. Nelson adopts Mr. Wildman's submission in this regard and contends that there has been no abuse of process.

On this issue Mr. Campbell contented himself by submitting that the entering of a nolle prosequi could not be an abuse of process since trial had not yet begun.

In Connelly v. Director of Public Prosecutions (1964) A.C. 1254 the House of Lords held that the court has a general inherent power to protect its process against abuse. This includes safeguarding the accused person from oppression and prejudice - See Mills v. Cooper (1967) 2 All E.R. 100.

In Brooks v. Director of Public Prosecutions (1994) 2 All E.R. 231 and 238 (h) the Privy Council held that the primary purpose of

S.94(6) of The Constitution was to protect the Director of Public Prosecutions from political interference and it had no application to judicial control of proceedings.

It would seem therefore that there is no real dispute as to whether or not the court may review the Director of Public Prosecution's exercise of the power to enter a nolle prosequi.

Indeed the dicta of Smith L.J. in R. v. Comptroller of Patents (1899) 1 Q.B. 909 at 914 that: ..."The Attorney General alone has power to enter a nolle prosequi and that power is not subject to any control" do not reflect the present status of the law.

The power of the Attorney General of England was exercised directly under the prerogative and as such was thought to be immune from challenge in the courts. And, at the time when the learned trial judge spoke, judicial review of the exercise of prerogative power was "limited to enquiring into whether a particular power existed, and, if it did, into its extent." But as was said by Lord Scarman in the CCSU case (supra) at 945 "this limitation has now gone, owerwhelmed by the developing modern law of judicial review."

In any event, as stated before, in Jamaica the power of the Director of Public Prosecutions to discontinue criminal proceedings or to enter nolle prosequi is derived from the authority of the Constitution and the Criminal Justice Act. There can be no doubt that the exercise of such power is subject to an obligation to act fairly and may be called into question by the courts.

I must nonetheless go on to consider the remedy available. In what way, if any, can the court control the exercise of such power?

It is now settled law that a limited discretionary power exists to prevent a prosecution from proceeding on the basis that it is an abuse of process of the court. Of course this power should only be exercised in exceptional circumstances - See Viscount's Dilhourne's warning in Director of Public Prosecutions v. Humphrys (1976) 63 Cr. App. R. 95 at 107.

Where a nolle prosequi is entered, this remedy would only be available if and when fresh proceedings for the same charges are instituted.

The effect of a nolle prosequi is to bring to an end criminal proceedings before the court - the accused "shall be discharged in respect of the charge for which the nolle is entered" - S.4 Criminal Justice (Admin.) Act.

Most of the abuse of process cases are concerned with the power of the court to stay criminal proceedings for abuse of process. When the Director of Public Prosecutions enters a nolle prosequi the remedy of a stay of the proceedings before the court would be to no avail. There might well be circumstances where the only remedy that would be adequate is for the court to refuse to accept the nolle prosequi and to direct that the proceedings be continued and failing that to dismiss the accused.

The question must then be - can the courts prevent the Director of Public Prosecutions from bringing an end to criminal proceedings by the entry of a nolle prosequi on the ground that such action is an abuse of the court's process? Put another way - can a court refuse to act on a nolle prosequi entered by the Director of Public Prosecutions?

The High Court of Australia had to grapple with such a question in **Director of Public Prosecutions v. B (1998) HCA 45 (23rd July, 1998).** On 28th November, 1994 the respondent was charged with six counts of sexual offences against a young girl. He pleaded not guilty. The trial was ultimately set to commence on the 11th July, 1995. On that day the complainant whose evidence was essential to the prosecution's case was absent. The Crown asked for an adjournment. The judge refused the application. Counsel for the prosecution told the judge she was instructed to enter a nolle prosequi. The judge refused "in the circumstances" to accept it.

On the suggestion of the judge, counsel for the respondent applied for trial by judge alone; the application was granted. On arraignment the respondent pleaded not guilty to all counts. The prosecution tendered no evidence. The judge found him not guilty on all counts and discharged him. At the request of the Director of Public Prosecutions for South Australia the judge stated a case for the Full Court. questions of law were reserved by the judge for the consideration of the Full Court.

(1) Do I have the power to refuse to accept a nolle prosequi entered by the Director of Public Prosecutions? and

(2) If the answer to the first question is yes, are there any limitations to the exercise of that power?

The Full Court held that both questions should be answered affirmatively.

The Director of Public Prosecutions appealed to the High Court of Australia. By a majority the High Court held that the trial judge did not have jurisdiction to reserve the two questions and the answers given by the Full Court were set aside. Kirby J. dissented.

The dissenting judgment of Kirby, J. is most helpful.

In answering the first question he first set out the arguments against the power.

> "I accept that there are a number of arguments which support a conclusion that no such power exists, including where the nolle prosequi is proffered by the Director of Public Prosecutions pursuant to statute.
>
> 1. To the extent that some features of the Attorney General's nolle prosequi have been carried over to the statutory power afforded to the appellant most earlier, legal authority suggests that no power or discretion to refuse the entry of a nolle prosequi exists in a court.....
> .....
>
> Just as the crown had an unfettered right to commence criminal proceedings, it traditionally had an unfettered right to conclude them.....
>
> 2. A reason of principle for adhering to this approach may be sought in the removal of the courts from involvement in prosecutorial decisions. Although not universal this is considered desirable in our legal tradition for the independence and manifest impartiality of the courts.....
>
> 3. The procedural difficulties of declining to accept the entry of a nolle prosequi were also emphasised. If the Crown refuses to proceed with a trial the court could scarcely take over the role of the prosecutor.
>
> It would ill-become a court insist that a a person be prosecuted and to require that evidence be tendered against the person if the prosecutor declined to do so. Either the matter would proceed to an inadequate or half hearted prosecution or no evidence would be called or the judge would be placed in the intolerable position of calling evidence in a way inappropriate to a criminal trial as conventially conducted in this country. Moreover once the prosecutor had announced an intention not to proceed on the indictment before the court the remedy of a stay of proceedings, at least if directed to proceedings on the indictment, would be futile. There would be no point of providing a stay given the announced intention not to proceed upon the indictment anyway.
>
> 4. Further practical difficulties arise from a purported refusal to accept a nolle prosequi. In the present case, the respondent's trial,

> if it had begun at all, was in its earliest phase. Cases can arise where a nolle prosequi is proffered at an advanced stage in a trial. Indeed, these are the cases in which the worst suggested abuses of process could potentially arise. A case where a jury's request for redirection may have signalled a likely verdict unfavourable to the prosecution; one where the case has gone badly for the prosecution; one where the prosecutor has taken the risk of proceeding without a witness whose evidence, in retrospect, appears vital. But allowing trial judges to refuse to accept a nolle prosequi places a heavy burden upon them. Because a prosecutor cannot be required to give reasons for the decision to proffer a nolle prosequi, a court may often be unaware of the complex considerations which have resulted in this course, even in the midst of a trial. If the court refuses to accept a proffered nolle prosequi, the possibility of a guilty verdict in a trial by jury cannot be excluded.
>
> 5. To hold that the court has no power to prevent the entry a nolle prosequi, including by a statutory office holder such as the appellant, does not leave the courts entirely without remedy where further prosecution would constitute an abuse of process or an unacceptable departure from fairness to the accused. It would still be open to the accused, in the event of a fresh prosecution, to argue that the circumstances in which the nolle prosequi was entered involved an abuse of process or a departure from fair trial requirements. In this way, the intervention of the courts would be reserved to cases where intervention was strictly necessary. There would then be proceedings in a court which could properly be the subject of a stay order directed at the process initiated by the new indictment. Short of refusing to accept the entry of a nolle prosequi, a judge could properly make plain an opinion that, in the absence of significantly new evidence, the commencement of fresh proceedings would constitute an abuse of process. The purported assertion of a power to refuse the entry of a nolle prosequi would therefore ordinarily, be unnecessary. As in this case, refusing the entry of a nolle prosequi might punish the Crown for inadequate preparation in ensuring the attendance of its witnesses (and send a signal for other like cases). But it might do so at a price of denying the community's interest in having serious criminal charges heard on their merits and, if proved, those found guilty punished according to law.

Arguments for the power: These arguments are obviously significant. Weight might be given to them. However, a number of competing arguments support the proposition that, in rare and exceptional circumstances, an Australian court is empowered to refuse to accept the entry of a nolle prosequi. At least it is so empowered where tendered by a statutory office holder such as the appellant, and where the court is convinced that, if entered, the nolle prosequi

will be, or will be the first step in, an abuse of process of the court or an unacceptable infringement of an accused's right to fair trial:

1. The power of Australian courts to prevent and remedy abuse of their process or serious infringements of an accused person's right to fair trial is now much more clearly perceived and strongly asserted than was formerly the case. In Rona v. District Court (SA), King CJ put the present problem into the context of legal history:

   "It may be that the development in Australia of a deeper understanding of the inherent power of the criminal courts to prevent abuse of their processes leads to the conclusion that the courts have power to act in a way which achieves what is now achieved by practice in England, by refusing to act on a nolle prosequi where to do so would permit an abuse of process. In R. v. Saunders, the court refused to act on a nolle prosequi entered during trial and directed an acquittal. In R. v. Jell; Exparte Attorney General, the Full Supreme Court held that a trial judge has a discretion to refuse to accept a nolle prosequi if to do so would be an abuse of process.

   If the reasoning and decision in Jell are sound, and they certainly accord with my sense of justice, there is no reason why the same should not apply where the trial has not begun but the date for trial has been fixed in accordance with the regular procedures of the court. When the accused appears for trial on that date, the interests of justice may demand that, if the prosecution does not wish to proceed and there is no valid reason why the accused should remain exposed to prosecution in respect of the alleged conduct, there be a verdict of not guilty by direction."

2. Exercising such power does not, as such, constitute a novel review of the prosecutor's discretion to enter a nolle prosequi. Instead, it may be characterised as action on the part of a court to defend its own processes. It ensures that minimum requirements of a fair trial of persons accused of criminal offences are observed in the courts of this country. The inescapable duty of courts to secure fair treatment of those who are brought before them was recognised in England in Connelly v. Director of Public Prosecutions, in New Zealand in Moevao v. Department of Labour and by this Court in a series of cases following Jago v. District Court (NSW). Courts cannot surrender these functions to an officer of the executive government, such as a Director of Public Prosecutions. Once a person is before a court, in the sense that that court's jurisdiction has been engaged in relation to him or her, the court's protective powers are attracted. This is especially so in the case of superior courts which have large inherent powers to protect their own processes which in recent years, they have been more ready than previously to exercise.

3. It would be offensive to principle, at least in respect of the exercise of powers such as those conferred on the appellant by the DPP Act, to suggest that his decision to enter a nolle prosequi was beyond judicial scrutiny if, for example, it could be shown that it was exercised for a malicious purpose, corruptly or otherwise contrary to law. Not only has Parliament expressly reserved the use of the appellant's power to "appropriate cases" but it has afforded that power, in the ordinary way, to be used to achieve the proper objects of the DPP Act. A court might be slow to question the use of the power. It would be slower still to embark upon conduct which risked calling into question its own neutrality. But the submission that a court is completely powerless to defend its processes and to uphold the right of persons before it to fair trial in extreme and obvious cases is quite unconvincing. It is unnecessary, and probably impossible, comprehensively to catalogue what such extreme cases will be. But a clear instance would be where criminal proceedings, in which the accused was ready for trial, were repeatedly unready because of inadequate or incompetent preparation by the prosecution. In such cases, if the prosecution were denied a further adjournment after argument of the merits, the appellant could, if his argument were accepted, procure the same result by unilateral entry of a nolle prosequi. An extreme example arose in Richards v. Jamaica. There, the accused was charged with murder and pleaded guilty to manslaughter. The plea was accepted by the prosecution. Subsequently, however, a nolle prosequi was entered. He was then again charged with murder, and this time convicted and sentenced to death. The United Nations Human Rights Committee found that:

"The nolle prosequi was used not to discontinue proceedings against the accused but to enable a fresh prosecution against the accused to be initiated immediately, on exactly the same charge in respect of which he had already entered a plea of guilty to manslaughter, a plea which had been accepted. Thus, its purpose and effect were to circumvent the consequences of that plea, which was entered in accordance with the law and practice of Jamaica. In the Committee's opinion, the resort to a nolle prosequi in such circumstances, and the initiation of a further charge against the accused, was incompatible with the requirements of a fair trial within the meaning of the International Covenant on Civil and Political Rights."

Were the prosectuion allowed an unfettered right to enter a nolle prosequi in either of the above circumstances, the result would be offensive to justice and to the function of a court as such. The processes of the court would be seriously threatened. The accused would be deprived of the right to a fair trial, including one conducted in a timely fashion. The appellant would, in effect, put himself above the judicial direction exercised by the court for

the fair conduct of proceedings before the court. The public's confidence in the courts would thereby be undermined. The power of the courts to ensure even-handedness as between the individual and the prosecution would be eroded. The courts are not obliged to allow this to happen.

> 4. Although the assertion of a power such as I have mentioned, in relation to the conduct of the appellant and his delegates, undoutedly involves a departure from the old legal authority which denied to a court any authority to refuse to accept the entry of a nolle prosequi by the Attorney General, that refusal must itself be seen in the context of the assumptions then prevailing in the law concerning judicial examination of the exercise of prerogative powers. It must be re-examined in contemporary circumstances in the light of the beneficial developments of recent decades in the judicial review of the decisions of statutory office holders. The endeavour to import historial prohibitions and immunities once applied in relation to the decisions of the Crown made by the Attorney General, to the exercise of statutory powers by a statutory office holder such as the appellant is unconvincing. It should be rejected, It it is beyond question that Australian courts have full power to prevent abuse of their process, they have a duty, where necessary, themselves to protect the integrity of that process. It is not sufficient simply to trust, without question, the propriety of every decision of a statutory office holder to enter a nolle prosequi. Nor is it necessarily sufficient, the matter being before a court, to leave defence of the court's process or of the accused's fair trial right to a future court, should a fresh prosecution be brought. In a given case, that might deprive an accused person of an entitlement or a verdict of acquittal. It could burden him or her unjustifiably with the odium of an unresolved criminal accusation. It could involve injustice and serious oppression. Most importantly, it could defeat the expectations of the accused, the community and the court itself that once the proceedings are before an independent court of justice no party to those proceedings can, in defiance of the court's rulings on the justice of the case, unilaterally terminate the matter. Least of all may the appellant do so given that Parliament has confined his power to enter a nolle prosequi to "appropriate cases" and those, by implication, for the purposes of advancing the objects of the DPP Act.

> 5. Where a court concludes that conduct of any party is, or if permitted would be, an abuse of its process or, in a criminal trial, diminishes the accused's right to a fair trial which is the hallmark of the criminal law of this country, it is for the court to fashion the remedy (if any) that is appropriate. In some cases it may be sufficient to order the expedition of any subsequent proceedings or to lay down conditions for their conduct.

> In some cases it will be appropriate to leave the provision of relief to be decided if a prosecution is revived. But in rare and exceptional cases the court will have the power and authority to fashion an order staying further proceedings on the indictment. In other cases, particularly where the nolle prosequi is proferred at an advanced stage in the trial, the court may require the matter to proceed to verdict, at least where that is the wish of the accused and the defence of the court's process as well as fairness to the accused suggests that it is proper. Once it is accepted that a court may, in rare and exceptional circumstances, refuse to enter a nolle prosequi, although proffered for the prosecutor, it must be expected that the prosecutor would accept the judicial ruling and conform to its consequences so far as these affected the ensuing conduct of the trial.
>
> 6. Like the Full Court, I refrain from commenting on the appropriateness of the refusal to accept the entry of the nolle prosequi in the present case. It is enough to say, with every respect to all involved, that neither in its substance nor in its procedure is the case a model for what should happen where a court entertains a concern that entry of a nolle prosequi would constitute an abuse of process or a derogation from the accused's fair trial right. However, because the primary judge did have a power to refuse to enter a nolle prosequi proffered on behalf of the appellant, the Full Court's affirmative answer to the first question was correct. Subject to what follows, the appeal from the Full Court's order that the first question be so answered should therefore be dismissed."

I find the analyses reasoning and conclusion of Kirby J. most helpful. Although the D.P.P. Act of South Australia which empowers the D.P.P. "to enter a nolle prosequi or otherwise terminate a prosecution in appropriate cases" is not quite the same as the constitutional and statutory powers of the D.P.P. in this jurisdiction, I am of the view that the principle embraced by Kirby, J. are applicable to the situation here. Accordingly I am inclined to think that the court may in rare and exceptional circumstances refuse to accept a nolle prosequi entered by the D.P.P.

I would venture to think that in the case of proceedings commenced by the police (as in the instant case) or by the D.P.P. himself the court may refuse to act on a nolle prosequi where such refusal is necessary to defend its process and to uphold the right of the accused person to a fair trial. As was stated by Kirby, J. (supra) the D.P.P. cannot "put himself above the judicial direction exercised by the court for the fair conduct of the proceedings before the court.

The public's confidence in the courts would thereby be undermined. The power of the courts to ensure even-handedness as between the individual and the prosecution would be eroded."

I may add that in the case of a private prosecution, if the intervention of the D.P.P. is malicious, corrupt or otherwise unlawful the court is entitled to reject it. Provided the D.P.P. is not acting completely unreasonable or in bad faith his conduct in taking over a prosecution and then discontinuing it will not be open to judicial review. Such intervention would essentially be a matter for the D.P.P.'s discretion - see Attorney General v. Raymond (1982) Q.B. 839.

For the reasons stated above I agree with my brothers that the right of the D.P.P, to enter a nolle prosequi is subject to judicial control and, more specifically, that the court may in rare and exceptional circumstances refuse to accept a nolle prosequi entered by the D.P.P.

The third question addresses the core issue of the applicants' complaint.

The issue here is whether the conduct of the D.P.P. in particular the entry of the nolle prosequi and the presentation of a voluntary bill in respect of the said charges amounts to:

(i) an abuse of the process of the court;

(ii) a deprivation of the protection of the law;

(iii) a contravention of the constitution; and

(iv) a breach of the applicant's legitimate expectation.

Mr. Ramsay for the applicant Miss Tapper submitted that the first step in the abuse of process was the clandestine, irregular and manifestly improper attempt to remove Her Honour Miss Rickman from the case and to replace her with a Resident Magistrate of choice. When this failed, he said, the D.P.P. entered a nolle prosequi to achieve the objective of removing the case from the Resident Magistrate on the purported basis of injudicious remarks which were made subsequent to his failed efforts.

By the preferment of The Voluntary Bill in the Home Circuit, the D.P.P. he submitted, changed not only the Resident Magistrate but the entire

had
jurisdiction which he himself/elected as the arena of trial; thus depriving the applicant of the legal right under S.277 of the Judicature (R.M.) Act. This section reads:

> Anything in this Act to the contrary notwithstanding it shall be lawful for the Director of Public Prosecutions in any case brought before a Court, at any time before the accused person has stated his defence, by writing under his hand, to require the Magistrate to adjourn the case, or deal with it as one for the Circuit Court; and on receipt of such requisition the said Magistrate shall deal with the case accordingly.

He contends that such conduct constituted an abuse of process which escalated into the irregular and unlawful arrest and deprivation of liberty of the applicant. He argued that the D.P.P. and his Deputy manipulated and misused the process of the court so as to deprive the applicant of the protection provided by S.277 of the Judicature (R.M.) Act.

The unfairness, he submitted, occurs in the procedure and deprives the applicants not only of the procedure but of their legitimate expectation.

He relied on R. v. Derby Crown Court exparte Brooks (1985) 80 Cr. App. R.164; Bennett v. Horseferry Road Magistrate's Court and Another (1993) 3 All E.R. 138; Brooks v. Director of Public Prosecutions of Jamaica (1994) 2 All E.R. 231.

Mr. SCott for the applicant Mr. McKenzie, submitted that the affidavit evidence points clearly to a case of "manipulation of process," or "misuse of process," or "violation of the fundamental principles of justice underlying the community's sense of fair play and decency." That the true principles upon which the basis for avoidance of executive action for an abuse of process rests are set out in R. v. Derby Crown Court (supra), Brooks v. D.P.P. (supra) Director of Public Prosecutions (south Australia) v. B. (supra) and Gabby Rona v. District Court of South Australia (supra). That the objective of the discretionary power is to ensure that there should be a fair trial according to law and this involves fairness to both sides. He contended that the attempt by the D.P.P. to depart from his unequivocal election to proceed to trial in the R.M. Court by preferring the voluntary bill in the Supreme Court was in the circumstances unfair to the applicants and amounts to an abuse of the

process of the court.

By taking the case to the Supreme Court, he submitted, the D.P.P. was selecting the range of punishment and thereby interfering with the functions of the judiciary. For this he relied on **Ali v. R.** and **Rassod v. R.** (1992) 2 All E.R.. Dealing with the prejudice to the accused, Mr. Scott contended that:

(i) There is the possibility of a more severe sentence being imposed.

(ii) The applicant has been deprived of his right under S.277.

(iii) The applicant has been denied of his legitimate expectation.

(iv) The attendant problem of delay.

Mr. Wildman for the D.P.P. submitted that on the facts before the court there is nothing to suggest that the D.P.P. has acted illegally, irrationally or that he is guilty of any procedural impropriety. There is therefore no basis for a claim of abuse of process. That the D.P.P., a creature of the Constitution with wide and unfettered powers under the Constitution and Sections 2 and 4 of The Criminal Justice (Administration) Act can initiate, discontinue and reinstate criminal proceedings and once he acts within the confines of the law that is to say once his actions do not offend the ultra vires doctrine and once it can be shown that he exercises these powers consistent with the public's interest, his actions cannot be successfully challenged even if another tribunal may have felt that they would have acted differently. For the applicants to succeed, he continued, they must demonstrate to the court that no D.P.P. having regard to the totality of the evidence before him would have acted the way he did.

The D.P.P., he argued, has clearly demonstrated that he was acting in the interest of justice in having the matter put before an impartial tribunal. He contended that if the D.P.P. had embarked on a trial before Her Honour Miss Rickman whatever the outcome of the trial it would have done violence to the maxim "justice should not only be done but must manifestly and undoubtedly appear to be done."

In the circumstances of the statements made by the R.M. the D.P.P., he opined, would have abdicated his duty to the public had he not exercised the powers granted by The Constitution and the Criminal Justice Act and removed the matter from the Magistrate.

He relied on the following cases among others: Lester Campbell v. Hector Guelph et al (1963) 1 Gl. L.R. 179 - a case concerning injudicious remarks made by a Resident Magistrate and their effect on the plaintiff; CCSU v. Min. of Civil Service (supra); Associatd Provincial Picture Houses Ltd. v. Wednesbury Corp. (1947) 2 All E.R. 680; King v. D.P.P. (Barbados) (1990) L.R.C. (Const.) H42 also reported at (1991) 40 W.I.R. 15; Gladys Tappin v. Francis Lucas (1973) 20 W.I.R. 228 at 235 H and I; Grant and Others v. D.P.P. (1980) 30 W.I.R. 246; R. v. Scott (1991) L.R.C. (Crim.) 130.

Mr. Wildman also submitted that the decision of the D.P.P. to go by way of a voluntary bill instead of invoking the provision of S.277 of the Judicature (R.M.) Act did not contravene the constitutional rights of the applicants. He contended that S.277 presupposes that the trial has in fact commenced before the Magistrate.

The fact that the charges in the Supreme Court are identical to charges in the Magistrate's Court does not constitute a breach of established procedure, he submitted. Reliance was placed on R. v. Lloydell Richards (1993) A.C. 217 and R. v. Louis Chen 9 J.L.R. 290.

As regards legitimate ecpectations, he submitted that this concept is inextricably bound up with the concept of natural justice. Legitimate expectation, he argued, can only arise in circumstances whee the functionary in question has a duty to act in keeping with natural justice.

Mr. Nelson adopted the submissions of Mr. Wildman in particular those relating to the law. His submissions in the main concerned a close consideration of the Declarations and Orders sought in Suit No. M.113/98 and the relevant affidavit evidence.

He contended that the remarks of the Resident Magistrate were so offensive that the D.P.P. was left with no choice but to remove the matter from her as he did. It cannot therefore be said that he manipulated or misused the process of the court, he argued.

He submitted that the applicants have failed to demonstrate that they are not likely to receive a fair hearing by an independent and impartial tribunal. He referred to many of the cases already mentioned and urged the court to find that there has been no abuse of process.

The essential aspects of the submissions of Mr. Lennox Campbell for the Attorney General were as follows:

(1) In order for a claim of Abuse of Process to succeed in a criminal prosecution the accused must demonstrate:

(a) that the conduct of the prosecuting agency has been such as to prevent a fair trial of the accused, or

(b) that the prosecuting agency has wrongfully disregarded standard practices that enured to the benefit of the accused, thereby making it unfair to try the deceased.

(2) (a) The unfairness must be of such a nature that the Court cannot right the unfairness. For this he relies on D.P.P. v. Feurtado (supra) and Grant v. D.P.P. (supra).

(b) The misuse or manipulation of procedure must constitute violations or executive unlawfulness to amount to abuse of process of the court - R. v. Derby Crown Court exparte Brooks.

Abuse of Process

Abuse of process has been developed by the courts from common law principles. It has been defined by the Privy Council in **Hui Chi Ming v. R.** (1992) A.C. 34 as:

> "Something so wrong that the court should not allow a prosecutor to proceed with what in all other respects is a regular proceeding."

There is no doubt that the D.P.P. is empowered by law to discontinue criminal proceedings and later reinstitute the very same proceedings see Lloydell Richards v. R. (supra) and R. v. Louis Chen (supra). There is also no doubt that the D.P.P. has the legal right to exercise a power to prefer an indictment without a preliminary enquiry in cases in which in his discretion he thinks it appropriate so to do - see D.P.P. v. Grant (supra).

What the applicants are challenging is the manner in which these discretionary powers were exercised.

As already stated their complaint is that the conduct of the D.P.P. amounted to a manipulation or misuse of procedure.

The common law recognises misuse of procedures as a ground for setting aside proceedings. In R. v. Derby Crown Court ex parte

Brooks 80 Cr. App. R.164 at 168-9 it was held that it may be an abuse of process if the prosecution has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take an unfair advantage of a technicality. This was approved by the Privy Council in D.P.P. v. Brooks.

In Gabby Rona v. District Court of South Australia Olsson, J. in dealing with abuse of process said:

> ".....in general, the power to stay criminal proceedings arises as a weapon to meet two broad categories of situations. The first is where it may fairly be said that the prosecution, or the mode of prosecution, of proceedings is contemplated in such a manner as to make them an instrument of oppression which will result in an unfair trial.
>
> The second is essentially based on policy aspects, which do not necessarily focus upon an end result being an unfair trial, in the traditional sense of that expression."

He went on to state that:

> "The concept of the duty of a court to protect itself against an abuse of its process gives rise to what is described as 'two fundamental policy considerations'"

The first was said to be "that the public's interest in the administration of justice required that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike."

The second being "that unless the court protects its ability to function in that way its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."

In Bennett v. Horseferry Road Magistrates Court at p.149 (h) Lord Griffiths had this to say:

> "As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused."

He then approvingly referred to R. v. Derby Crown Court ex exparte Brooks and continued at p.150 (b):

> "There have however also been cases in which although the fairness of the trial itself was not in question the courts

> have regarded it as so unfair to try the accused for the offence that it amounted to abuse of process. In **Chu Piu-Wing v. A.G. (1984) HKLR 422** the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence."

The learned Law Lord endorsed the view that:

> "There is clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

He then continued P.151 (e-h):

> "Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial .....
>
> If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.
>
> My Lords I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter part of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should in my view express its disapproval by refusing to act upon it."

It is now clear that in considering whether there has been an abuse of process the court is concerned not only with the interest of the accused in a fair trial but also the public interest in a fair and just trial process and the proper administration of justice.

Cases such as **Tappin v. Lucas (supra)** and the decision of the Nigerian Supreme Court in **The State v. Ilori et al (1983) 2 S.C. 155** (referred to in **Attorney General and Ogun State et al v. Egenti (supra)** must be seen in the light of the developing modern law of judicial review.

Application of law to facts

Essentially the D.P.P. is saying that the removal of the case from the magistrate by the entry of a nolle prosequi followed immediately by the preferring of a voluntary bill of indictment in the Supreme Court with exactly the same charges in respect of which the nolle prosequi was entered is not an abuse of process because the D.P.P. had a good reason founded in public interest for such course.

The 'good reason' of course is the injudicious remarks made by the magistrate which, according to Mr. Andrade in his affidavit threatened to do violence to the maxim 'justice should not only be done but should manifestly appear to be done.' Mr. Wildman contends that these remarks would have led the virtual complainant to feel that there would not be a fair trial.

One of the cases on which Mr. Wildman placed much reliance is the Canadian case of **R. v. Scott (1991) L.R.C. (Crim.) 130.** At the trial of Scott who was charged with possession of cocaine, his counsel in cross-examination asked a police witness a question to which Crown Counsel objected on the ground that it was irrelevant and would inevitably lead to the identification of a police informer.

The judge allowed the question whereupon Crown Counsel exercised her statutory power to discontinue the proceedings. Shortly thereafter the Crown reinstituted the proceeidngs and the case was put before a different judge.

Defence Counsel moved to stay the proceedings on the ground of abuse of process arguing that the statutory power to discontinue proceedings was being used to circumvent an evidential ruling unfavourable to the Crown. The stay was refused. Later defence Counsel undertook the same line of cross-examination as in the original trial and the Crown again objected.

The judge upheld the objection. Scott was convicted and appealed. The Court of Appeal dismissed the appeal. He appealed to the Supreme Court. The Supreme Court by a majority of 5 to 4 dismissed the appeal holding that "neither the stay nor the reinstitution of proceedings was an abuse of process or an infringement of any rights in the Canadian Charter of Rights and Freedoms. The Crown had acted in good faith solely to protect the identity of the informer and was not bound to offer no further evidence and appeal the

the inevitable acquittal. The Crown had renewed the proceedings at the first reasonable opportunity and the appellant was not prejudiced by delay....."

In a powerful judgment the dissentients held that "Abuse of Process may be established where - (a) the proceedings are oppressive and vexatious, and (b) the fundamental principle of justice underlying the community's sense of fair play and decency are violated. This case raised three concerns in the context of abuse of process which the Court of Appeal and majority judgment failed to fully address: (a) the evil of judge-shopping; (b) the impartiality of the administration of justice, and (c) the need to uphold the dignity of the judiciary and the judicial process. A system which allowed the Crown an advantage in choosing judges was or appeared to be partial and permitted a judge's ruling to be circumvented other than by appeal, it was open to the charge that it offended the fundamental principles of justice upon which society rested. Such concerns outweighed the public interest in prosecuting crimes and protecting the identity of informers."

In my view the dissenting judgment is in line with the modern development of the law in regard to judicial review of the decisions of constitutional and statutory office holders, and is of great assistance to this court.

It is for this court to examine the evidence and circumstances in the instant case with a view to determining whether or not there has been an abuse of process resulting in a breach of the applicant's constitutional rights.

The evidence of Miss Gregg, the Clerk of the Courts, as contained in her affidavit filed on behalf of the respondents indicates that there was an attempt to remove the case from Her Honour Miss Rickman before the words complained of were used.

According to Miss Gregg on April 20, 1998 Mr. Wildman told the Magistrate that "they could not proceed that day because there had been some developments pertaining to the case and the D.P.P. was in consultation with the Chief Justice about it." The Magistrate and defence counsel wanted to know what "these developments" were. Mr. Wildman did not inform them. The Magistrate withdrew to her chambers. Defence Counsel, Crown Counsel and the

Clerk went with her. These "developments" were not divulged. The matter was adjourned to the following day i.e. April 21.

On the 21st, the affiant said that a telephone call was received from Mr. Wildman directing that the matter be listed in court 4 i.e. before another Magistrate.

On Miss Gregg's and Mr. Lawson's evidence it was after that that the remarks were made by the Magistrate.

Mr. Bentley Rose spoke of hearing "a very disturbing report" on the 26th January, 1998. Then on the 20th April, 1998 he overheard a young lady telling the Clerk that Miss Rickman had said that the case belonged to her.

Mr. Crafton Miller a senior attorney-at-law who was then representing Miss Tapper stated in his affidavit that the conduct of Mr. Wildman constituted an attack on the integrity of the Magistrate and defence counsel. He said the Magistrate declared that the D.P.P. could not direct her to transfer the case to another court and that the proper course was to apply for an Order of Prohibition.

It seems to me that the Magistrate wanted to hear and to be given a chance to answer, if necessary, what Mr. Wildman called "developments pertaining to the case."

Thus it is clear that the Magistrate's utterances in court on the 21st April came after the decision was taken by the then D.P.P. to remove the case from her.

Apparently the D.P.P. tried to enlist the support of the Honourable Chief Justice to remove the Magistrate from the case. The Chief Justice declined to interfere.

Some ten (10) weeks later when the matter came before the Magistrate again for trial, to the surprise of the Magistrate and the defence, Mr. Wildman entered the D.P.P.'s nolle stating in open court that this was done solely so that proceedings against the appellants may be commenced de novo in the Supreme Court. The nolle prosequi was, in a way, flaunted in the face of the court. No doubt the Magistrate was, in the circumstances, embarrassed. Her integrity might have been undermined. The conduct of the D.P.P. could have led to the erosion of public confidence in the administration of justice in the Resident Magistrate's Court. Such conduct

might impair the dignity of the judiciary.

This might well defeat the expectations of the applicants to be tried by an independent court of justice. The evidence certainly supports the allegation of the applicants that their contitutional rights to be afforded a fair hearing within a reasonable time by an independent and impartial court have been or are being contravened.

In this regard I agree with both counsel for the applicants who argued forcefully that the prosecution has manipulated and/or misused the process of the court thus depriving the applicants of their legal rights.

They contended that the first step in the abuse of process was the manifestly improper attempt to remove the magistrate from the case by instucting the assistant clerk of the court to list the case before another Magistrate of the prosecutor's choice. Section 277 of The Judicature (R.M.) Act does not empower the D.P.P. so to do. This section empowers the D.P.P. at anytime before the person accused has stated his defence, by writing under his hand, to require the Magistrate to adjourn the case or deal with it as one for the Circuit Court.

Mr. Ramsay and Mr. Scott also criticised the approach by the D.P.P. to the Chief Justice to persuade him to change the Resident Magistrate in the absence of the applicants' attorneys, as irregular and amounting to "judge shopping."

It is not in dispute that the entry of the nolle prosequi and the preferring of the voluntary bill in the Supreme Court were resorted to only because the steps referred to above had failed. This clearly is a manipulation or misuse of the process of the Court.

By ignoring the provisions of Section 277 of the Judicature (Resident Magistrate) Act, the D.P.P. in the circumstances of this case deprived the applicants of the benefits of committal proceedings which were described in Barton v. R. (1980) 147 C.L.R. 75 as "an important element for the proteciton of an accused" See Brooks v. D.P.P. (supra) at 240 (e) and (f).

Mr. Wildman's submission that the removal of the case from the particular magistrate in the manner in which it was done was in the interest of the public is not tenable.

If the D.P.P. is aware of a real danger of bias he should raise the issue with the Magistrate and if necessary apply to the Supreme Court for an Order of Prohibition. It is certainly not for the D.P.P. himself to determine that the Magistrate is biased. It is for the court to hear the evidence of bias and the magistrate's comments and then determine if there is a real danger that there might not be a fair trial.

It is certainly not in the public interest for the D.P.P. to "step over" the magistrate as the headline in the Daily Gleaner Newspaper declared. Certainly raising the issue first with the Magistrate in chambers and then, if necessary, applying to the Supreme Court for Prohibition would be a balanced approach.

I accept the submissions of Counsel for the applicants and hold that the conduct of the D.P.P. complained of amounts to an abuse of process, and a deprivation of the protection of law afforded by Section 277 of Judicature (R.M.) Act.

Has this abuse of process led to a breach of the applicants constitutional rights?

Section 20(1) of the Constitution provides:

> 1. Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Mr. Ramsay submitted that abuse of process is recognised as a constitutional issue. For this he referred the court to **Brooks v. D.P.P. at page 240.**

As I have endeavoured to show, abuse of process involves conduct on the part of the prosecution that is oppressive to the applicants and incompatible with the requirements of a fair trial within the meaning of S.20(1) of the Constitution. In my view such conduct is also capable of constituting an interference with the independence of the courts.

Legitimate Expectation

The applicants claim that the prosecution by their course of dealing led them reasonably to expect that their trial would be in the Resident Magistrate's Court.

In Attorney General (Trinidad and Tobago) v. K.C. Confectionery Limited (1985) 34 W.I.R. 387 at 409 (b) Persaud, J. said:

> "I have taken the trouble to deal at some length with "legitimate expectation" and the meaning given to it in the available cases if only to demonstrate that the concept is inextricably bound up with the rules of natural justice, particularly the right of the citizen to be heard and the obligation of a Government or other authority to act fairly. As has already been pointed out, the concept has been held to extend beyond enforceable legal rights."

The principles governing legitimate expectation were set out by Stuart-Smith L.J. in R. v. Jockey Club Exparte RAM Racehorses Ltd. (1993) 2 All E.R. 225 at 236-237 as:

(i) a clear and unambiguous representation see per Bingham L.J. in Exparte MFK Underwriting Agencies Ltd. (1990) 1 All E.R. 91 at 110;

(ii) that it was reasonable for the applicant to rely upon it without more;

(iii) that the applicant did so rely upon it;

(iv) that the applicant did so to his/her detriment;

(v) that there was no overriding interest arising from the respondent's duties and responsibilities.

The burden of the applicant's contention is that in the circumstances where copies of indictment were served on them and dates set for trial in the Resident Magistrate's Court, they had every reason to have a legitimate expectation for trial in the Magistrate's Court. I am not persuaded that they have established this claim. However this conduct is relevant to the issue of abuse of process.

Deprivation of Liberty and the right to Constitutional Redress

I have the misfortune to differ from my brothers on this issue. I will first consider the arrest and then the right to constitutional redress.

The Arrest

The only complaint by the applicants in this regard is that their arrest without warrants was unlawful and in breach of Section 15 of the constitution.

What are the circumstances of the arrest?

The evidence of Miss Tapper is that they were "rearrested

upon Mr. Wildman's statement that (they) had to be taken back into custody." She said they were immediately restrained and taken to the 'cell holding area' by the court police. No warrant was read to her. She stated that Inspector Bailey 'gave an express disclaimer' to her and told her he was not making an arrest and had not arrested her 'pursuant to the entry of the nolle prosequi." She went on to say that the Inspector told her he was only assisting her by giving her a lift to the Supreme Court. There the prosecution did not oppose bail.

So on her evidence she was deprived of her liberty by the 'court police' not Inspector Bailey, the investigating officer.

The evidence of the applicant McKenzie is as follows: After the nolle prosequi was entered, they were discharged. The court was adjourned for a short while. Mr. Wildman directed the police to take them into custody in order to take them before the Circuit Court. The police, without warrants, took them into custody and placed them into a cell in the 'holding area' of the court. They were shortly after taken to the Supreme Court where Pitter, J. granted them bail.

Was the deprivation of the liberty of each applicant in contravention of Section 15 of the Constitution?

Section 15(1)(f) of the Constitution provides:

> "No person shall be deprived of his personal liberty save as may in any of the following cases be authorsied by law -
>
> upon reasonable suspicion of his having committed or of being about to commit a criminal offence; (emphasis mine).

Lawful arrests are those:

(i) under warrant

(ii) without warrant at common law, and

(iii) without warrant under statute.

It is not in dispute that the applicants were arrested without warrants.

At common law a constable has power to arrest without warrant on reasonable suspicion of felony but has no such power to arrest for misdemeanour unless a breach of the peace has been committed in his presence - see Stevenson v. Aubrook (1941) 2 All E.R. 476 which was approvingly referred to by the Jamaican Court of Appeal in R. v. Owen Sampson 6 J.L.R. 292 at 295.

All the counts of the voluntary bill of indictment charge

misdemeanours. The police would therefore have no authority at common law to arrest the applicants upon reasonable suspicion without warrants, for any of the offences contained in the indictment preferred in the Supreme Court.

Section 15 of the Constabulary Force Act provides that any constable may without warrant apprehend any person found committing any offence punishable upon indictment or summary trial. The police did not 'find' the applicants committing the offences and therefore this section is not applicable.

However Section 33 of the Constabulary Force Act provides:

> "Every action brought against any constable for any act done by him in the execution of his office, shall be an action on the case for a tort, and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non suited or a verdict shall be given fr the defendant."
> (emphasis mine)

It is clear that by virtue of the provision an action against a constable in respect of an unlawful arrest effected in the execution of his duty must be an action on the case for tort. It is also clear that in such a case the plaintiff must allege and prove that the constable acted maliciously or without reasonable and probable cause. The intention here is to protect the police from frivolous and vexatious suits.

It is my opinion that a plaintiff cannot circumvent this provision by seeking constitutional redress in respect of an unlawful arrest.

The important questuon thought, is whether an arrest made without warrant for any offence in circumstances where the police have reasonable and probable cause so to do is unlawful. Section 33 states that if a plaintiff fails to prove that the police acted wither maliciously or without reasonable and probable cause he shall be non suited or judgment given for the defendant.

It seems to me that implicit in this is that if the police, for example, had reasonable or probable cause to arrest without warrant such arrest would not be unlawful.

Thus if the police have "reasonable and honest" belief that the circumstances justified the arrest that would be a good defence.

The test, as stated by Diplock L.J. in Dallison v. Caffery (1965) 1 Q.B. 348, 371 is "whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by the defendant, would believe that there was reasonable and probable cause" for the arrest.

In the instant case the applicants were charged with certain indictable offences. The proceedings in respect of those charges were discontinued with a view to transferring the matter to the Supreme Court. A voluntary bill of indictment was preferred to this end, containing the same said charges. The police were told in open court by Mr. Wildman, the Deputy Director of Public Prosecutions, that the applicants should be taken to the Supreme Court.

Can it reasonably be said that in these circumstances the police had no reasonable or probable cause to arrest the applicants without warrants?

The marginal note to Section 15(1) of the Constitution refers to "protectionf rom arbitrary arrest or detention," and of course subsection (1) (f) speaks only to 'reasonable suspicion' of having committed a criminal offence.

Now the investigation was complete. The matter had long gone past the stage of 'reasonable suspicion.' Indeed the indictment was preferred. It is my view that on the facts of this case, the claims of the applicants that their constitutional rights under Section 15 have been breached must be viewed in the light of S.33 of the Constabulary Force Act.

To my mind the applicants have failed to show that their fundamental rights, not to be deprived of their liberty except in accordance with S.15 of the Constitution, have been violated.

Constitutional Redress

In any event, it is my view, that even if the applicants were unlawfully arrested, this court should not entertain their application for constitutional redress in respect of such arrests.

Section 25 of the Constitution reads:

> (1) Subject to the provisions of subsection (4) of this section, if any person alleges, that any of the provisions of Sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without

prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled. Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. (emphasis mine)

(3) .....

(4) .....

In **Davis v. Renford and Others** (1980) 37 W.I.R. 308 the Jamaican Court of Appeal in applying the proviso to S.25(2) held that adequate means of redress for an arrest without the arrested person being informed of the reason were available at common law.

In that case Kerr, J.A. at page 314 in stating what should be the proper approach quoted Lord Diplock in **Kemrajh Harrikisson v. Attorney General** (1979) 31 W.I.R. 348 at 349:

> "The notion that whenever there is a failure by an organ of government or public authority or public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 (Section 25 of the Jamaican Constitution) of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

It is my view that the law of tort provides the applicants with adequate redress inthe circumstances of this case and accordingly this court should not exercise its powers under Section 25 of the Constitution.

CONCLUSION

1. I would grant the following declarations:

   (i) The right of the Director of Public Prosecution to discontinue criminal proceedings pursuant to S.94(3) of the Constitution of his right to enter a nolle prosequi pursuant to S.4 of the Criminal Justice Administration Act are subject to judicial review.

   (ii) The entry of the nolle prosequi by the Director of Public Prosecutions and the presentation of a voluntary bill in respect of the said charges amounted to:

      (a) an abuse of the process of the court.

      (b) a deprivation of the protection of law provided by S.277 of The Judicature (Resident Magistrates') Act.

      (c) a contravention of the applicant's rights under Section 20(1) of the Constitution.

2. Accordingly I would order that:

   (i) The nolle prosequi be set aside.

   (ii) The proceedings on the Indictment preferred in the Supreme Court be stayed; and

   (iii) The matter be remitted to the Resident Magistrate's Court at Half Way Tree.

3. I would dismiss the applicants' claim under S. 25 of the Constitution for compensation in respect of the alleged unlawful arrest.

MARSH, J.

I have read the judgments of my brothers Panton and Smith JJ. I am in agreement with the Order proposed by my brother Panton, J. in its entirety and for the reasons stated in his judgment.