[2016] JMSC Civ. 96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 05839

BETWEEN	**WARREN WILLIAMS**	**1ST APPLICANT**
AND	**THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**2ND APPLICANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

IN CHAMBERS

Mr. Richard Small, Mrs. Shawn Wilkinson, Ms. Courtney Foster and Ms. Lisa Dunbar for the Applicants

Mr. Jeremy Taylor Senior Deputy Director of Public Prosecutions and Ms. Latoya Bernard for the Respondent

Heard: 19th April and 9th June 2016.

Judicial review - Private prosecution - Director of Public Prosecutions decision to terminate prosecution by offering no evidence and not by *nolle prosequi* - Whether method of discontinuance in breach of constitution - Whether decision to terminate amenable to judicial review

LAING, J

The Background

[1] The 1st Applicant Warren Williams is the Chief Investigator at the Independent Commission of Investigations (INDECOM). The 2nd Applicant is Mr Terrence Williams who is currently the Commissioner of INDECOM.

[2] On or about the 12th October 2015 the 1st Applicant caused Jason Anderson ("the Accused") to be charged with the offences of assault at common law and discharging a firearm in a public place contrary to section 23 of the Firearms Act ("the Case").

[3] Mr. Richard Small was retained by INDECOM to conduct the prosecution of the Case together with Ms. Lisa Dunbar an Attorney-at- law employed to INDECOM. On 4th November 2015, the 1st Applicant, Mr. Richard Small and Ms. Lisa Dunbar met with the learned Director of Public Prosecutions ("the DPP") pursuant to her request by letter dated 30th October 2015. At that meeting the DPP indicated that she would intervene in the Case to "*exercise her authority pursuant to the Constitution of Jamaica*".

[4] Mr. Small by email dated 5th November 2015 indicated to the DPP that he would call all the eye-witnesses on the Crown's case and the DPP acknowledged receipt of the e-mail that same day.

[5] The DPP prepared a letter dated 6th November 2015 ("the Letter") indicating that she had reviewed the Case and that it was her considered view that the evidentiary material was insufficient to support a viable prosecution with any prospect of a conviction. Also on the 6th November 2015 the DPP took over the prosecution of the Case and terminated the prosecution of it by offering no evidence before the learned Resident Magistrate for the Parish of St. Catherine. The DPP had sent an e-mail dated the 6th November 2015 and time stamped 7:51 a.m. to the 2nd Applicant, Mr. Small and Ms. Dunbar announcing her decision to terminate the Case (the 6th November e-mail"). The DPP also provided Mr. Small, Counsel for the Applicants, with a copy of the Letter later that day in Court, shortly before no evidence was offered.

The Application for leave

[6] The Applicants' position is that it could be interpreted from the 6th November e-mail that the termination would have been by *nolle prosequi* and as a

consequence that e-mail did not notify the persons to whom it was addressed of what the DPP in fact did.

[7] The Applicants asserted that because the Letter which contained the reasons for the decision to terminate the Case was only provided to Mr. Small in Court shortly before no evidence was offered, this meant that the circumstances provided no real opportunity to object to the termination. This was because Counsel needed time to consider the contents of the Letter, to take instructions and to advise accordingly. It was therefore an "*intolerable position in which to place Counsel."*

[8] By Notice of Application filed on the 4th December 2015 as amended on 11th February 2016, the Applicants claimed a number of reliefs which do not easily lend themselves to a summary and I find it most convenient to set them out hereunder:

> *"6.* ***The reliefs sought are:***
>
> *I. A Declaration that the Respondent's policy to discontinue prosecutions instituted by other persons or authorities if the respondent is not satisfied that there is a realistic prospect of conviction, is either unlawful or unfair or irrational having regard, in particular, to the policy's restriction of the right of other persons or authorities to institute and conduct prosecutions.*
>
> *II. A Declaration that the Respondent's policy to terminate prosecutions brought by other persons or authorities, without provisions for those persons or authorities, or other interested parties to seek that the Respondent reverse or modifies the decision by internal review is unfair.*
>
> *III. A Declaration that the Respondent acted irrationally and improperly in terminating the prosecutions.*

IV. *A Declaration that in terminating a prosecution brought by another person or authority ("the informant") the Respondent must give the informant and interested parties notice of the intended decision and the reasons for the decision, in sufficient time and detail, for the informant and any interested party to assess and, if they think appropriate, make submissions to the Respondent to stay, reverse or modify the decision.*

V. *A Declaration that in terminating a prosecution brought by another person or authority ("the informant") the Respondent must act in a manner that does not derogate or diminish the informant or any interested party's recourse to apply for judicial review.*

VI. *A Declaration that in terminating a prosecution brought by another person or authority the Respondent must comply with the published policies of the Office of the Director of Public Prosecutions regarding the termination of prosecutions, namely "The Decision to Prosecute: the Jamaican Protocol" (hereinafter "the policy"), and in particular:*

a. *terminate such prosecutions by entering a nolle prosequi.*

b. *act in a manner that does not derogate or diminish the informant, or any interest party's recourse of having her decision stayed or quashed by Judicial Review.*

c. *giving a sufficiently reasoned decision that explains how the policy was applied.*

d. *giving the investigator an opportunity to attempt to obtain further evidence.*

VII. A Declaration that in terminating, in considering the issue of delay, the Respondent should take into account whether there is any injustice caused by the delay: and whether there are other appropriate remedies.

VIII. A Declaration that in the instance case, the Respondent erred in the application of the law in relation to the use of force in self defence.

IX. A Declaration that in the instant case, the Respondent erred in the purported application of the policy in failing to give due weight to the entirety of the evidence, namely:-

a. failing to give due consideration to the evidence that could inform the conclusion that the accused did not honestly believe that he had been under attack or had reason to suspect that the complainants had committed an offence;

b. failing to give due consideration to the substantial evidence that the accused discharged his firearm in circumstances where he was not in imminent danger;

c. failing to give due consideration to the evidence that the accused's use of force was excessive.

when, on proper application of the policy, the Respondent must consider the evidence in its totality. The Respondent should recognize the limitations of this assessment in being a consideration purely of statements, and appreciate that the court can accept one witness' evidence over the other and even part of one witness' evidence.

X. Any other order, relief and/or direction that this Honourable Court may determine to be appropriate and/or just."

[9] The grounds on which the Applicants are seeking the orders are numerous but clearly expressed and it is likewise most convenient to simply reproduce them as follows:

"1) In terminating the matter in the manner that the Respondent did:

a. the Respondent acted contrary to her own policy.

b. caused the informant and interested parties' recourse to apply for judicial review and if successful, the decision be stayed was derogated or diminished.

c. caused the informant and interested parties' recourse to have the decision judicially reviewed and if successful, the decision quashed was derogated or diminished.

d. caused the informant and interested parties' recourse to have the decision judicially reviewed and if successful, the matter remitted for trial was derogated or diminished.

2) The Respondent erred in approach to the law by failing to give due consideration to the objective element in determining the degree of justifiable force in self-defence.

3) The respondent erred in her assessment of the instant case in that she failed to give due weight to the entirety of the evidence namely:

a. failed to give due consideration to the evidence that could inform the conclusion that the accused did not honestly believe that he had been under attack or had reason to suspect that the complainants had committed an offence.

b. failed to give due consideration to the substantial evidence that the accused discharged his firearm in circumstances where he was not in imminent danger.

c. failed to give due consideration to the evidence that the accused's use of force was excessive.

4) The Respondent in finding that too much time had passed before charges were laid erred in approach to law and acted contrary to her policy by failing to:

a. consider whether there was any evidence that the delay would cause any serious injustice to the accused;

b. recognize that seeking an early trial was an appropriate remedy.

5) In concluding that there was no explanation for the delay in charging the accused, the Respondent reached a conclusion that no reasonable prosecutor would have.

6) The Respondent erred in approach in failing to invite the investigator/prosecutor to provide further evidence as regards alleged disputed areas of the evidence.

7) In concluding that there were public interest reasons not to continue the prosecution the Respondent:-

a. acted contrary to the policy by failing to take relevant factors into account.

b. reached a conclusion that no reasonable prosecutor would have.

8) There is no alternative form of redress available to the Applicants.

9) To the knowledge of the Applicants, the only considerations made by the Respondent germane to the issues contained in this Application are an electronic mail from the Respondent to the 2nd Applicant which is exhibited in the 2nd Applicant's Affidavit and the Respondent's written reasons which are exhibited in the 1st Applicant's Affidavit.

10) The time limit for making this Application has not been exceeded.

11) The 1st Applicant has been adversely affected by the decision of the Respondent.

12) It is just and equitable for the Court to grant the orders as prayed."

[10] The Application and the areas of complaint as expressed in the supporting grounds can be conveniently distilled and organized into three main issues for purposes of analysis:

1. Unlawful policy or practice

2. Error in law or application of law

3. Irrational decision to terminate the prosecution.

Issue I - Unlawful Policy or practice

A. ***No notice***

[11] The Applicants aver that the prosecution was terminated with no notice to victims and the reasons for the decision were only given to the informant's counsel a few minutes before the Case was terminated.

[12] There is no challenge to the right or authority of the learned DPP to have terminated the prosecution by offering no evidence. What is being asserted is that when opting for that manner of termination of the prosecution, the DPP

should give notice and therefore an opportunity for representation to be made for her to change her course or for additional evidence to be obtained if possible in order to cure any deficiency which she has identified.

[13] The Applicants highlighted the fact that by the DPP offering no evidence, a verdict of not guilty was entered, consequently, any further attempt to prosecute the accused in respect of the matter would have been quite correctly met with a plea of *autrefois acquit*. This deprived the Applicants or the virtual complainants of the opportunity of setting aside the DPP's decision. It was submitted that as a result the constitutional arrangement where the Court can review the DPP's decision to terminate a prosecution, quash the decision, and remit the matter for trial, has been rendered illusory and/or nugatory. The Applicants rely on section 1(9) of the constitution which provides as follows:

> *"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 function 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 this constitution or any other law".*

[14] The Applicants noted that the only viable course open to the Applicants is to apply for declaratory relief by way of an application for judicial review. In the circumstances it was submitted that there is a need for the Supreme Court to review the appropriateness of the course adopted by the DPP. It was submitted further, that if leave to apply for judicial review is granted the Court would also have the opportunity to make pronouncements as to under what circumstances there should be a termination by offering no evidence and what might be an appropriate procedural course where the DPP is terminating a prosecution by this method.

B. ***Breach of Legitimate expectation***

[15] Counsel for the Applicants submitted that termination by offering no evidence without notice as was done in the Case, was also a breach of the DPP's own policy. Counsel expressed it as follows:

> *"..by virtue of the DPP's policy and past practice in respect of prosecutions brought by private parties, INDECOM and the virtual complainants had a legitimate expectation that where such proceedings are to be discontinued by the DPP, such proceedings would be terminated by way of a nolle prosequi."*

[16] It was argued that support for this position is found in **The Decision to Prosecute: A Jamaican Protocol** ("the Protocol") which states that:

> *"In exercising his/her power to discontinue proceedings, the DPP enters what is called a nolle prosequi. This power arises under Section 94 (3) (c) of the Constitution and Section 4 of the Criminal Justice (Administration) Act.*
>
> *Section 4 of the Criminal Justice (Administration) Act prescribes that at any stage before the court renders judgment the DPP may discontinue criminal proceedings in any Court by entering a nolle prosequi. He/she may do so by stating in open Court where the proceedings are pending or by informing the Clerk of the Courts in writing that the Crown does not intend to continue such proceedings. Thereupon the proceedings shall be at an end and on receipt of such notice the accused person shall at once be discharges in respect of the charge for which the nolle prosequi is entered."*

Issue II - Error in Law or application of law

C. ***Failure to apply the correct test for self defence***

[17] Counsel for the Applicants submitted that the learned DPP failed to apply the correct test for self-defence and ignored the object element of the defence. Counsel placed heavy reliance on the Letter, in which it was stated that "*Therefore the test to be relied upon insofar as the Accused man's belief is concerned is a subjective one*."

[18] It was submitted that the correct test can be found in the Privy Council case of **Solomon Beckford v R [1988] AC 130** in which their Lordship commented on the test for self-defence as follows:

> *"their Lordships therefore conclude that the summing up in this case contained a material misdirection and answer question 1(a) by saying that the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another."*

D. ***Failure to properly apply the facts to the law***

[19] Counsel for the Applicants devoted a significant portion of his written submission to dissecting the contents of the Letter in his attempt at demonstrating that the learned DPP failed to properly apply the facts to the law. Counsel argued that there was no material on which a reasonable prosecutor could have relied to find that the potential witnesses for the crown would have given a version which was favourable to the defence or fatal to a prosecution. In order to do justice to Counsel's submissions I will reproduce in some detail Counsel's analysis of the evidence which he argued, demonstrates the error in the approach of the learned DPP.

[20] It was submitted that the DPP in her reasons contained in the Letter at paragraphs 73 – 77 suggests that the evidence of the eyewitnesses, Glenice Leachman, Natica Dell and Andre Douglas support the defence of self-defence raised by Jason Anderson. Counsel was of the view that the statement of Leachman dated the 22nd December, 2013 does not raise any issue of self-defence. The Court was directed to the portion of the statement of Leachman where she says:

> *"the motor vehicle inside the prohibited area began speeding in the direction where the man was standing and I could hear shouting at them to stop. They did not and I saw the man who came out of the Rav 4 motor vehicle discharging a firearm from a hand gun and I heard about five (5) loud explosions. On seeing the motor vehicle getting away I shouted that they should be chased and that someone should call the security at the main entrance to lock the gate."*

[21] The Court was also directed to her further statement dated the 15th February, 2014 where she states:

> *"when I saw the man who came out of the grey Rav 4 motor vehicle discharging the firearm, I cannot say that he was firing at the vehicle that sped off. I can say for sure that his hands were in front of him with the gun in his hands. The vehicle that sped off was in front of him and heading up the road towards the main gate."*

[22] Counsel also referred to the statement of Douglas dated the 21st December, 2013 where he states:

> *"the man stood in the entrance and the car sped towards him from the premises causing him to rush out of its way. As the vehicle made its way from the premises onto the roadway I heard several loud explosions and I thought to myself that it must be clappers. Seconds after the vehicle sped away I observed the man who claimed to be a police personnel standing in the middle of the road with his hand pointed in the direction of the vehicle which sped away. I saw smoke in his general direction and as his hand lowered I noticed that he had a firearm in it."*

[23] It was submitted that although on this statement self defence may arise, it is clear that the discharge of the firearm must have been after the vehicle had passed and at which time there was no threat. The point was also made that this account of Douglas is in conflict with Leachman's account.

[24] As it relates to the statement of Dell, Counsel directed the Court to the following portion:

> *"he [Anderson] then reversed the Rav 4 and attempted to block the entrance that at this time the men were trying to leave through in their car. I saw when Dougie lifted the chain to stop the car from leaving and car swung at Dougie and sped off towards the main gate. While the car with the men were driving off I heard about three (3) explosions. I could not tell if the explosions were gunshots or firecrackers and I did not see anyone with any gun that night."*

[25] Counsel submitted that on this account there is no issue of Anderson being placed in any danger. Whereas it was conceded by Counsel that the issue was raised of Douglas being placed in danger, the discharge of whatever firearm was after the vehicle had passed Douglas and was on the way to the main gate.

[26] Counsel recognised that Leachman said in her statement, "*the vehicle that sped off was in front of him"* but argued that a competent tribunal of fact would have been hard pressed to find that in the circumstances, *"in front of him",* meant that the vehicle was going towards Anderson. Counsel contended that in any event even if the DPP's interpretation were to be accepted, an investigator could collect a further statement from Leachman to clarify this point or any other issues as it relates to the other two witnesses, Dell and Douglas.

[27] Counsel for the Applicants also took issue with the learned DPP's conclusion as to the direction in which the shots were fired. In particular Counsel attacked the DPP's reasons in the Letter where it is stated that:

> *"Further it is our position that the discharge of rounds into the air cannot be deemed as disproportionate to the actions of the complainants as alleged by the eyewitnesses and DSP Anderson. This would be the force that he would deem necessary in performing his duty to keep the peace."*

[28] It was argued that the DPP wrongly assumed that the evidence shows that the shots were fired into the air. This, Counsel said, was not borne out by the statement of Leachman that ***"****his hands were in front of him with the gun in his hands"* and the statement of Douglas that *"Seconds after the vehicle sped away I observed the man who claimed to be a police personnel standing in the middle of the road with his hand pointed in the direction of vehicle which sped away. I saw smoke in his general direction and as his hand lowered I noticed that he had a firearm in it."*

[29] In summary, the position of the Claimant was that it ought to have been left to the tribunal of fact to determine on the requisite standard of proof, which of the competing version of the facts they accepted and whether it was found that the force used was proportionate in the circumstances.

E. ***Delay and Abuse of Process***

[30] The learned DPP in the Letter expressed the concern that she had not been provided with a satisfactory response in relation to the length of time taken by the

Investigator to lay charges against the accused Anderson. The DPP referred to the issue of the delay in charging the accused as an issue which "*directly impacts on the prosecutor's duty to ensure fairness to an accused man and guard against an abuse of process"*.

[31] It was submitted on behalf of the Applicants that the DPP failed to take into account relevant considerations that arise when there is an issue as to whether there ought to be a stay on the ground of delay. Furthermore in concluding that there was no explanation for the delay in charging the accused, the DPP reached a conclusion that no reasonable prosecutor would have reached. Here again the Applicants complain of the failure of the DPP to consult which would have provided the opportunity to speak effectively to the delay.

[32] The explanation for the delay is largely contained in the affidavit of Mr. Terrence Williams filed in support of the application. In his evidence Mr. Williams attempts to demonstrate using empirical data, that on an objective assessment the alleged delay was not outside the average time for the prosecution of case in Jamaica.

Issue III – Irrational decision

[33] There is an overlap between this ground/issue and the previous 2 issues. It was submitted that the DPP's decision to terminate was irrational having regard, *inter alia,* to issue 1, that is, that the DPP by failing to give reasonable notice of her intention to terminate the case by offering no evidence failed to allow the informant an opportunity to clarify and/or remedy any apparent deficiencies in the evidence. The DPP thereby also failed to allow the informant the opportunity to explain the reason for the delay in charging Anderson.

[34] The overlap with issue 2 stems from the fact that the irrationality is also based on the assertion that the DPP misconstrued the observations of the eyewitnesses to opine that Anderson's life was in danger at the time that he discharged his firearm.

[35] In Counsel's written submissions the "irrationality" argument was also supported on the basis that:

> *"the DPP's decision to intervene at the stage that she did usurped the rights of the three (3) young men and the informant/prosecutor as little reliance was placed on other material which supported the prosecution of Anderson. In addition, the DPP erred in assessing whether the public interest was in favour of prosecuting or against prosecuting. In particular, the DPP failed to have regard to her own Protocol which states "A Prosecution is more likely to be in the public interest if:*
>
> > *"... The offence was committed by a public officer who was abusing his office."*

[36] The case of **R (B) v DPP** [2009] 106 (Admin), albeit on different facts, was cited as an example of a situation in which the courts held that the decision to discontinue the prosecution was irrational. In that case the complainant had a medical illness and the court held that it was impossible to see how the prosecution had decided it was more likely than not that the complainant's account was a hallucination based purely upon a medical report.

[37] It was consistently argued on behalf of the Applicants that any perceived ambiguities and inconsistencies could have been resolved if the learned DPP had afforded the Applicants the opportunity to collect additional statements. It was also submitted that even if the perceived inconsistencies could not have been remedied by additional investigation or statements, the Case could have proceeded since these discrepancies were not fatal to the prosecution's case. It was advanced that in the circumstances, no reasonable prosecutor would have concluded that on the strength of the statements of the witnesses Leachman, Douglas and Dell it was more likely than not that the accused Anderson would have been acquitted. What the DPP ought to have done was to allow the tribunal of fact to assess the contradictory evidence and to make appropriate findings.

[38] In looking at how discrepancies and inconsistencies should be treated the case of **Steven Grant v R** [2010] JMCA Crim 77 was commended to the Court in which the Jamaican Court of Appeal stated at paragraphs 68 – 69 as follows:

> *"[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements give rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies to discrepancies. The aim of proving that a witness has made contradictory statements is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited ...*
>
> *[69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony."*

[39] The Court was also referred to **R v Cairns** [2003] 1 WLR 796 in which the Court opined:

> *"But it is not uncommon for there to be witnesses whose evidence is regarded by the prosecution as largely, or in part, worthy of belief and reliable but not wholly reliable. There may be good reason for the prosecution arriving at such a judgment. It is a normal human experience that people sometimes tell the truth about certain matters but may not be reliable about others, as the verdicts of juries from time to time suggest. There is no reason why a jury should not regard part of a witness's evidence as true but take the position that they cannot rely upon the whole of that evidence. That not infrequently happens and seems to have happened in the present case."*
>
> *"So it is clear, in our view, that the prosecution may properly call a witness when they rely on one part of his evidence but not on another part. Whether they choose to call such a witness is a matter for their discretion, to be exercised on the principles which we have already set out. But that does not amount to an attack on their own witness's credit."*

[40] The principles which should be considered when calling contradictory witnesses are outlined in **R v Josh Michael Clarke** [2011] EWCA Crim 407 and it was submitted that taking these principles into account the DPP ought to have allowed the Case to proceed to trial. In **R v Josh Michael Clarke** the Court suggested the following approach:

> *"The common law and statutory rules of evidence define the parameters within which both prosecution and defence must present their cases. The prosecution's discretion, however, is further circumscribed by its obligation to promote a fair trial. Thus the prosecution ought normally to call or tender all available witnesses who can give direct and credible evidence of the primary facts in issue. On the other hand, the prosecution is under no duty to call witnesses whom it reasonably regards as unworthy of belief. See the judgment of the Court of Appeal in Kenneth Russell-Jones [1995] 1 Crim App R 538 at 544 to 545, where these principles are set out at greater length in the form of seven propositions with accompanying commentary."*
>
> *"From this review of authority, we derive the following principles which are relevant to present appeal:*
>
> *i) The prosecution may call a witness to give relevant evidence on some issues in the case, even if his or her evidence on other issues appears to be incorrect.*
>
> *ii) If the prosecution witnesses give inconsistent evidence on particular issues, the prosecution may suggest to the jury which evidence on those issues should be preferred.*
>
> *iii) However, the prosecution may not explicitly attack the credit of its own witness, or suggest that the witness is deliberately lying in parts of his or her evidence, unless the prosecution has obtained the court's permission to treat the witness as hostile."*

[41] On the strength of these authorities it was submitted on behalf of the Applicants that the Case should have been brought before the Court for the tribunal to determine the veracity of the contradicting witnesses' evidence.

F. *Public Interest*

[42] The position was also advanced, that the learned DPP failed to take into account other relevant public interest considerations including the negative perception that the Jamaican public has towards the administration of justice and towards members of the Jamaica Constabulary Force and the fact that the accused was in a position of authority or trust.

The Respondents Submissions

[43] Mr. Jeremy Taylor the Senior Deputy Director of Public Prosecutions submitted that the starting point in this application should be section 94 of **The Jamaica (Constitution) Order in Council 1962** ("the Constitution"). Of particular relevance is s. 94(3) which provides as follows:

> *(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do-*
>
> *(a) to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence against the law of Jamaica;*
>
> *(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority ; and*
>
> *(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*

[44] The position advanced on behalf of the Respondent is that there is no practice or system in place which requires the DPP to bring matters to an end by *nolle prosequi* as opposed to achieving that objective by offering no evidence. If there is no such requirement then there is similarly no requirement for the DPP to give notice to any witness, investigator or any person if the DPP opts to terminate a prosecution by offering no evidence.

[45] Mr. Taylor urged the Court to accept the evidence of the Respondent that the Policy is non-binding. Implicit in this is the unlikelihood that the Policy could ground any legitimate expectation that a termination of a prosecution would be by *nolle prosequi*. The effect of a breach of the policy, if it is non-binding, would also be of limited effect.

[46] Mr. Taylor also submitted that the learned DPP is entitled to apply the same test to private prosecutions as to those initiated by the DPP and for this proposition relies on Lord Neuberger of Abbotsbury PSC in **Regina (Gujra) v. Crown Prosecution Service** [2013] 1 AC 484 para. 68 – 70:-

> ***68**. There is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities as Lord Wilson JSC acknowledges at paras 28 and 29, and Lord Mance JSC says at para 115. However, that does not really impinge on the lawfulness of the Director applying a "better than evens" test to private prosecutions. Once one accepts that the Director is entitled to apply that test to his own prosecutions, it is hard, as a matter of logic, to see how applying the same test to private prosecutions inhibits the valuable protection afforded by the right to bring such prosecutions.*
>
> ***69**. I am also not impressed by the point that an individual who was in some way directly involved in, or who witnessed, the commission of the alleged crime, is in a better position than the Director to assess the prospects of obtaining a conviction. An objective, expert, and experienced assessment of the prospects appears to me to be generally more reliable than the assessment of a person who will normally be (probably wholly) inexperienced in the criminal justice system, and (often, as in this case) involved, frequently as a victim, and therefore far from dispassionate.*
>
> ***70**. Given that the Director has been given statutory power to take over and discontinue a private prosecution, it seems to me hard therefore to say that the 2009 policy undermines the principle that the right to conduct prosecution should in principle survive. The interests of private prosecutors and of potential defendants, as the two groups with the greatest interest in the policy, should be taken into account, as should the public interest, which includes the efficient use of court time and public money, and confidence in the criminal justice system. I find it hard to see what is wrong with a policy that a private prosecution should be allowed to proceed as such, only if (i) it has a greater than evens chance of success, (ii) it is not contrary to the public interest, and (iii) there is no special reason why it should be conducted by the Director.*

[47] The general thrust of Mr. Taylor's submissions was that the authorities demonstrate that the instances in which the courts will subject the decision of the DPP to judicial review are rare and this will only be done in exceptional circumstances. He further submitted that in this case there was no conduct of the DPP which satisfied the test for a judicial review and the application should be refused. He provided the Court with a number of authorities which the Court found to be of great assistance, many of which are referred to below in the Court's review of the applicable law.

Applicable law

[48] It was common ground between the parties that the applicable test on an application for leave to apply for judicial review is found in the Privy Council case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379; an appeal from the State of Trinidad and Tobago. Although decided in the context of the Judicial Review Act 2000, of Trinidad and Tobago, it is equally applicable to this jurisdiction. At para. 14 (4) the Privy Council stated the general rule as follows:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued."*

[49] Sykes, J in **R v Industrial Disputes Tribunal (Ex parte Wray and Nephew Limited** [2009] HCV 04798 accurately puts it as follows:

> *"58. The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in the light of the now stated approach…"*

[50] For the avoidance of doubt I also remind myself that an arguable case with a realistic prospect of success does not mean that the applicant has to establish a more than 50% chance of success.

[51] It cannot be disputed that since the coming into effect of the Independent Commission of Investigations Act and the appointment of the Commissioner, there has been some uncertainty as it relates to the role of INDECOM *vis a vis* that of the DPP. This and other related issues have occupied the Courts (see for example the case of **The Police Federation and others v The Commissioner of The Independent Commission of Investigations and The Attorney General** [2013] JMFC Full 3. There is also a perceived tension between the

Commissioner and the DPP as a result of various exchanges which have occupied the public space. This application demonstrates what is now not uncommon, that is, a difference in opinion between the Commissioner and the DPP as to the correct approach to be taken in respect of the prosecution or non-prosecution of a particular case.

[52] The announcement of the DPP's publication of the Protocol has also generated interest among the legal fraternity and the wider public. There is now available a tangible document which may be used for reference in assessing and understanding the DPP''s approach to prosecution as a matter of policy.

[53] The issue as to what might be an appropriate procedural course where the DPP is terminating a prosecution by offering no evidence is certainly an important one. However, whether it is of such importance that it tips the scales in favour of the granting of the application when the assessment of arguability falls for this Court's determination.

Judicial review of the DPP's decisions -The special constitutional position of the DPP

[54] In the **Sharma** case referred to earlier, the appellant at the relevant time was the Chief Justice of Trinidad and Tobago who was alleged to have attempted to influence a trial that was being conducted by the Chief Magistrate. The decision was taken by the DPP to prosecute him for attempting to pervert the course of justice and he applied for judicial review of that decision and other relief. The Privy Council held that although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with a prosecutor's independent judgment such relief would only rarely be granted.

[55] In **Millicent Forbes v The DPP** 2009 HCV 03617 (April 9, 2010) Brooks J (as he then was) succinctly expressed the position in relation to the decisions of the DPP as follows:

> *The law relating to the issue of judicial review of a decision of the Director of Public Prosecutions is somewhat paradoxical. On the one hand it is clear that the Director's decisions are subject to judicial review. However, on the other hand the Courts are generally unwilling to grant review of these decisions.*

[56] The attitude of the Courts to judicial review of the DPP's decisions is born out of the recognition of the special constitutional position of the DPP and the wide discretion accorded to the holder of that office in fulfilling his constitutional mandate. In **Gladys Tappin v Francis Lucas** (1973) 20 WIR 229, Bollers CJ at 236 said :-

> *"The Director of Public Prosecutions then, while subject to the rule of law like any other public authority or official, under the Constitution enjoys a very wide discretion in instituting, undertaking, carrying on, and discontinuing criminal proceedings. Parliament, in conferring those powers upon him, would expect him to exercise them fairly, reasonably, and in good faith. However, as long as he keeps within the statutory limits of those powers his decisions cannot be the subject of judicial review."*

[57] Pereira J.A in **Young v Frederick and other appeals** – (2012) 82 WIR 294 ascribed a high standard of review of the DPP's decision not to prosecute where one is simply relying on the traditional heads of review of irrelevant consideration and irrationality. In that case the learned judge stated:

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

[58] In the case of **Council of Civil Service Unions v Ministry of Civil Service [1985] AC 374** at page 410 Lord Diplock classified under three well established heads the grounds upon which administrative action is subject to control by judicial review, namely illegality, irrationality and procedural impropriety. Lord Diplock proceeded to explain as follows:

> *"By "illegality" as a ground of judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par*

> *excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By "Irrationality" I mean what can now succinctly be referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should b e well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of justice ."*

[59] In relation to a decision not to prosecute a person, it has been submitted by Counsel on both sides that the threshold for review may be lower than in relation to decisions to prosecute and there is indeed support for this position. In **Marshall v Director of Public Prosecutions** [2007] 4 LRC 557 at paragraph 18 the Privy Council noted that "*In relation to decisions not to prosecute, the considerations are slightly different and the threshold for review may be to some extent lower*". In analysing the decision of the DPP not to prosecute the Court in **R v Director of Public Prosecutions**, **Ex parte Manning and Another** [2000] 3 W.L.R. 463 at 474 F made the following observations:

> *In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and the likely*

> *defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.*

[60] The review of the DPP's decision will therefore be undertaken with these observations in mind. In **Manning** the court found that there was no absolute obligation imposed on the DPP to give reasons for a decision not to prosecute but that this may be expected in serious cases. In this case the issue has not arisen in view of the Letter and the reasons contained therein, which in fact have provided much of the foundation for this application.

[61] The conduct of the DPP which is complained of, in my opinion quite correctly, has not been framed as deficiencies in procedural fairness and in this regard it is perhaps helpful to note the observations made in **Re Adams's Application for Judicial Review** [2001] NI 1 per Carswell LCJ.

> *The role of the DPP was not an adjudicating role between two parties since his function was to decide in the public interest whether a prosecution should be brought. It followed that he was not subject to the rules known as procedural fairness because he was not adjudicating in the same way as an administrator and there was no trigger factor which operated in a limited class of cases to oblige him to give reasons. Nor was the DPP under any obligation to consult the victim or to furnish the victim with a copy of the investigation report. Furthermore, the public interest in keeping such investigation files confidential outweighed, in the instant case, the appellant's wish to inspect the report. Dicta of Rose LJ in R v. DPP, ex p Treadaway (1997) Times, 31 October, approved.*

[62] I will therefore proceed to consider the specific complaints of the Applicants in order to determine whether there is an arguable ground of judicial review having a reasonable prospect of success.

Unlawful Policy or Practice

[63] I accept the submission on behalf of the DPP that there is no restriction on the DPP terminating a prosecution by offering no evidence and I have not been

directed to any authority which suggests that the DPP must terminate a prosecution by entering a *nolle prosequi*. The Policy in and of itself cannot and does not impose an absolute obligation on the DPP to do so. Consequently, I am of the view that the DPP by offering no evidence (as opposed to entering a *nolle prosequi*) did not breach any constitutional arrangement for the review of the DPP's decision. Judicial review is the only means by which the citizen can seek redress against the DPP's decision not to prosecute. The fact that when a prosecution is terminated by offering no evidence the complainant or investigator may not be able to re-open the prosecution does not for that reason render that method unlawful or unconstitutional.

[64] In view of the wide discretionary power of the DPP in terminating prosecutions, the Policy and/or the Letter and/or any of the e-mail communication from the DPP, could not have properly formed the basis for a legitimate expectation on the part of the virtual complainants, the investigator or anyone else, that the termination of the Case would have been by *nolle prosequi*. Similarly, in much the same way as there is no obligation on the DPP to give reasons for her decision to terminate a particular prosecution, there is no obligation imposed on the DPP to give adequate or any notice of such a decision. The fact that reasonable notice was given in the case of **Nerine Small v DPP** [2013] JMSC Full 1 does not support a conclusion that this was the usual practice nor does it establish a binding precedent.

[65] The absence of such an obligation is also not affected by the fact that the investigation and prosecution was being driven by INDECOM. In my view the right of INDECOM to institute a private prosecution does not elevate either INDECOM or the 1st Applicant's status to that of a party with whom the DPP is required to consult or advise before terminating such a prosecution. It makes no difference whether the purpose of such consultation would be to permit INDECOM to do further investigation, furnish additional evidence or otherwise. In the interest of good relations and transparency such interaction and notice may no doubt prove to be beneficial, but is not an obligation imposed on the DPP

by any law or practice and the failure to issue such notice as is being complained of does not provide a ground upon which this Court can grant the application for leave.

Error in Law or Application of Law

[66] I have earlier in this judgment reproduced at length the submissions of Counsel for the Applicants and Counsel's dissection of the evidence which he did in an effort to demonstrate what he said were the DPP's errors in her approach to the evidence. Counsel said firstly that the DPP did not appreciate the objective component in self defence. In support of this assertion Counsel extracted a single line from the Letter which reads" *Therefore the test to be relied upon insofar as the Accused man's belief is concerned is a subjective one"*.

[67] As has been previously stated, the DPP is not required to give reasons for her decision. In this case the DPP has given reasons in the Letter. I am not of the view that this Court is to bring the same approach and level of analysis to bear on the Letter as an appellate court would do if reviewing a decision of a single Judge. The DPP in the Letter quoted extensively from the **Solomon Beckford** case including the portions dealing with the objective element of the test and I am of the view that the learned DPP did appreciate the correct test to be applied. I do not think that it would be inappropriate for me to take judicial notice of the fact that the DPP has during the course of her long and illustrious career prosecuted numerous matters in which the issue of self defence arose and she has correctly argued in relation to the law on that issue. One such case is **Steven Grant v R** (*Supra at para 38*) which is contained in the Defendant's bundle (although it was not included for the purpose of supporting this conclusion).

[68] It was also submitted that the learned DPP failed to properly apply the facts to the law. On Counsel's analysis of the witness statements, self defence does not arise or where it potentially arises for example in one of the witness statement of Douglas, the discharge of the firearm [by Anderson] was after the car which

posed the threat had passed Douglas. The DPP's comment on this issue at page 9 of the Letter is as follows:

> *In our view it is somewhat disingenuous for one to say that at the time DSP Anderson discharged his weapon the car had already passed him, as it is clear from the statement of the eyewitnesses that the car was speeding towards him and the discharge of his weapon was as a result of this or contemporaneous to this.*

[69] In an adversarial system of law opposing counsel will bring their skill to bear in seeking to have the tribunal of fact adopt the interpretation of the evidence which is most favourable to the party they represent. The analysis by Counsel for the Claimant of the potential evidence contained in the statements is potent but having reviewed the witness statements I am unable to agree with the submission of Counsel for the Applicants that there was no material on which a reasonable prosecutor could have relied to find that these witnesses would have given a version which was favourable to the Defence. By way of example Leachman said in her statement, "*the motor vehicle inside the prohibited area began speeding in the direction where the man was standing and I could hear shouting at them to stop".* A tribunal of fact could therefore have found that this meant that the vehicle was going towards Anderson, and by extension that it was at this point that shots were fired by him. This is consistent with Anderson's account that the car sped towards him and he jumped out the way, the car came at him again and he fired shots in the air (see question and Answer interview of DSP Jason Anderson 21st January 2014).

[70] It is impossible for this Court to say that the conclusion by the DPP that self defence was a live issue was plainly wrong. Similarly, I am unable to hold that the conclusion that the shots were fired in the air and consequently was a reasonable and proportional response to a perceived threat was not one which could have been arrived at based on the witness statements. In view of these findings what we are left with is a case in which the DPP decided, it would appear, "*fairly, reasonably, and in good faith*", to discontinue the prosecution.

[71] In **Marshall** *supra at para 18*, the Privy Council made the following observation;

> *Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict: R v DPP,ex p Manning [2001] QB 330 at 339 per Lord Bingham.*

Since the DPP stated that she was not satisfied that there was a reasonable prospect of conviction the Court was in a position to independently gauge the strength of the evidence for itself and has found that the opinion of the DPP was not baseless.

The Public Interest

[72] The Letter outlines a number of public interest concerns which the DPP took into consideration in making her decision. One public interest consideration stated in the Letter was that there was a long delay between the offence taking place and the date of the trial. I do not accept the submission of Counsel for the Applicants that the decision ought to be subject to judicial review because the DPP may not have also considered all the factors which Counsel asserted that she should have.

[73] The Letter evidences the enquiry which the DPP undertook in weighing the numerous issues and interests. It should be noted that this was not a case in which there was a plain *prima facie* case on the evidence with a reasonable prospect of securing a conviction. As a consequence the DPP would have had to be very careful in considering the impact, if any, of public interest concerns. By way of example, although page 18 of the Protocol states that a prosecution is more likely to be in the public interest if the offence was committed by a public officer who was abusing his office, as the Court in **Re King's Application** (1988) 40 WIR 15 at page 35 F opined:

> *"it cannot be accepted that a police officer should be charged and prosecuted for murder if a prima facie case is not made out" [which in my view applies equally to any offence]. It cannot be in the public interest that a police officer should be treated differently from a civilian in such maters"*

In light of the DPP's view of the evidence, the fact that the accused was a police officer ought not to have been accorded any significant weight, or certainly not such weight as to require a prosecution where the DPP was of the opinion that there was no reasonable prospect of securing a conviction.

Delay in bringing the accused before the Court

[74] The Delay in bringing the accused before the Court was also expressly noted as another issue which the DPP considered and commented that a satisfactory response had not been provided in respect of the length of time taken by the investigator to lay charges against the accused. The affidavit evidence of the Commissioner included empirical data in the form of statistics to suggest that the delay was not inordinate in context of prosecutions in Jamaica. That may well be so but the DPP was entitled to consider the length of the delay (in absolute terms) in her overall assessment of the Case, without reference to the length of the delay in relative terms as compared to other cases.

[75] The fact that the delay might have been reasonably explained had the DPP given the investigator the opportunity does not detract from the fact that there was a considerable delay before the accused was taken before the Court. It is also noteworthy that although the length of the delay is being downplayed by the Applicants, Counsel then representing the accused in a letter to the DPP dated 13th October 2015, complained about the delay. This is a clear demonstration of the competing interests which the DPP was required to address. It might have been advisable for the DPP to seek to obtain an explanation for the delay but her failure to do so does not exclude the delay as a factor worthy of her consideration on an objective assessment. In any event the delay was not the main reason for the DPP discontinuing the prosecution, it was her assessment that there was no reasonable prospect that a conviction could not have been secured.

[76] In my opinion the Applicants have not shown that the Director's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper

exercise of his power, in terms of **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation** [1948] 1 K.B. 223, or that no Director of Public Prosecutions, properly directing himself, could on the evidence reasonably or regularly or properly have formed a decision not to prosecute the accused.

[77] There is no allegation or evidence of fraud, dishonesty, mala fides or corruption. On the strength of the cases and dicta referred to above, I am of the view that this is a case in which the Courts will not interfere with the decision of the learned DPP. As a consequence, at this application for leave to apply for judicial review stage, I conclude that I am not satisfied that there is an arguable ground for judicial review having a realistic prospect of success. Accordingly, the application is refused.