In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 17 of 2021

BETWEEN:

THE QUEEN

-and-

AB[1]

&

CD

Before: **The Hon. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Ms. Elizabeth Christopher for the Prosecution
Mr. Jerome Lynch KC and Ms. Sara Tucker for the Defendants

Date of Hearing: 9th & 10th June 2022
Date of Ruling: 27th September 2022
Date of Reasons: 30th January 2023

RULING

Application for a Stay of Proceedings for Abuse of Process – Department of Public Prosecutions changing decision not to prosecute - Whether a stay is necessary to protect the integrity of the criminal justice system

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[1] In order to preserve the anonymity of the Defendants I have referred to them individually as Defendant AB and Defendant CD. Collectively I refer to them as the "Defendants".

1. By way of an Indictment dated 28th June 2021 the Defendants were charged with the sole count of Serious Sexual Assault, contrary to section 325(1)(d) of the Criminal Code Act 1907 (the "Criminal Code").

2. The Defendants made an application for a stay of proceedings for abuse of process on the grounds that a stay, against the factual and procedural backdrop of this case, is necessary to protect the integrity of the criminal justice system. On the 27th September 2022 I acceded to the Defendants' application for a stay and I accordingly released the Defendants from their bail obligations. The following paragraphs detail my reasons for doing so.

The Chronology

3. It would be of assistance to catalogue the largely undisputed chronology of this matter. It is as follows:

27th April 2019	The serious sexual assault is alleged to have occurred.
18th November 2019	The Complainant[2] makes a formal complaint of serious sexual assault to the police against the Defendants.
29th November 2019	Both Defendants are arrested for the offence of serious sexual assault and submitted to an audio/video police interview. Phones and laptops belonging separately to Defendant AB and Defendant CD are also seized.

[2] As with the Defendants, for reasons of anonymity I have declined to use the Complainant's name.

28th January 2020	A recorded police interview of Defendant AB is conducted by police officers of the Bermuda Police Service ("BPS").
31st January 2020	Defendant AB provides a handwritten witness statement.
4th February 2020	Defendant CD provides a handwritten witness statement.
21st May 2020	Then Deputy Director of Public Prosecutions Ms. Cindy Clarke ("DDPP Clarke") approves criminal charges to be laid against the Defendants.
19th June 2020	By way of a nine (9) page letter to the Commissioner of Police then Director of Public Prosecutions Mr. Larry Mussenden ("DPP Mussenden"), who was then DDPP Clarke's superior, decides that that there shall be no prosecution against the Defendants for Serious Sexual Assault or for the second offence of Perverting the Course of Justice (contrary to section 134 of the Criminal Code).[3] It is accepted by both parties that DPP Mussenden, as Director of Public Prosecutions ("DPP"), had the ultimate authority in deciding whether charges should be laid.
29th June 2020	The Complainant institutes Judicial Review ("JR") proceedings against DPP Mussenden's decision not to prosecute the Defendants (*Police Constable GA v. The*

[3] Found in Tab 1 of the Defendants' Bundle.

Director of Public Prosecutions, Police Sergeant BP, and Police Sergeant SR, Case No. 208 of 2020).

The Complainant sought the following: an Order for a Declaratory Ruling in respect of DPP Mussenden's decision not to prosecute; an Order of Certiorari to quash DPP Mussenden's decision; and, an Order of Mandamus that DPP Mussenden reconsidered his decision not to prosecute.

In support of his JR application the Complainant swears an affidavit on the same date.

16th July 2020 — DPP Mussenden swears an affidavit in response to the Complainant's affidavit explaining, *inter alia*: that the Defendants were initially charged and then those charged were withdrawn; that an Information in respect of any alleged offences committed by the Defendants was never laid before the Magistrates' Court; the process involved in the Department of Public Prosecutions Office in respect of approving charges against defendants; and, the reasons why he decided not to have the Defendants prosecuted.

26th/27th October 2020 — The Hon. Chief Justice Narinder Hargun hears the Complainant's JR application.

3rd December 2020 — DPP Mussenden is appointed Puisne Judge of the Supreme Court of Bermuda.

4th December 2020	DDPP Clarke is appointed Director of Public Prosecutions ("DPP Clarke").
5th December 2020	DPP Clarke is asked by the Commissioner of Police to revisit the evidence which underpinned the allegations of serious sexual assault against the Defendants.
5th January 2021	Hargun CJ rules to dismiss the relief sought by the Complainant in the JR.[4]
21st January 2021	DPP Clarke approves the prosecution of the Defendants stating that in her view there was a realistic prospect of conviction against each Defendant.
27th April 2021	An Information is laid in the Magistrates' Court of Bermuda against the Defendants for the sole offence of serious sexual assault.
21st May 2021	The Defendants appear in the Magistrates' Court to answer to the charge. The matter is adjourned to the Supreme Court of Bermuda's Arraignment session on the 1st July 2021.
18th June 2021[5]	The Prosecution lay an Indictment before the Supreme Court particularizing the offence of serious sexual assault against the Defendants.
1st July 2021	The Defendants appear in the Supreme Court to answer to the said Indictment.

4 The Chief Justice's written Judgment can be found on Tab 3 of the Defendants' Bundle.

5 The Registrar of the Supreme Court of Bermuda executed the Indictment on the 28th June 2021.

14th March 2022	DPP Clarke swears an affidavit stating why she, as Deputy DPP, recommended a prosecution of the Defendants on the 21st May 2020 ("DPP Clarke's First Affidavit").
12th April 2022	DPP Clarke swears a second affidavit expanding upon her decision to prosecute the Defendants (DPP Clarke's Second Affidavit).

The Allegations against the Defendants

4. The Summary of the Evidence found on page 20 of the Court Record alleges that on the 27th April 2019 the Complainant received a WhatsApp message from Defendant AB about going for a drive and playing some cards. The Complainant is a police officer and both Defendants are Sergeants in the BPS. Eventually, Defendant AB picked up the Complainant at his residence in a marked police car and then took him to Defendant CD's residence. After a few minutes the Defendants suggested that they all go into the bedroom to play "strip poker" wherein the loser would remove an article of clothing. The Complainant lost a few rounds and therefore removed articles of his clothing down to his undershirt and boxer-type underwear. He stated that he would not be removing any further clothing. Defendant AB also lost a few rounds and he removed his clothing to the point where he was naked. Defendant CD asked the Complainant what he [the Complainant] was going to do seeing that Defendant AB was naked.

5. It is further alleged that the Complainant then commenced playing with Defendant AB's penis and whilst doing so he felt someone grip and turn his neck. He then felt and saw Defendant CD's penis in his face near his mouth. The Complainant tried to push Defendant CD's penis out of his face but then Defendant AB tried to pull the Complainant's legs apart but was unsuccessful in inserting his penis into the Complainant's rear end. The Complainant told Defendant AB to stop and he tried to fight him off but Defendant CD

was holding him down. Defendant CD then released the Complainant and proceeded to have sexual intercourse with Defendant AB whilst the Complainant sat on the edge of the bed. At some point thereafter Defendant AB drove the Complainant home.

6. As stated earlier, the Complainant eventually made a formal complaint of sexual assault against the Defendants approximately seven (7) months later on the 18th November 2019.

Decision

7. It is the contention of the Defendants, through the submissions of their attorney Mr. Jerome Lynch KC, that DPP Clarke's decision to prosecute the Defendants after DPP Mussenden's decision not to prosecute and after Hargun CJ's judgment in the JR proceedings that DPP Mussenden's decision was not perverse, is an affront to the proper administration of justice. Therefore, Mr. Lynch further asserts, the prosecution against the Defendants should be stayed in order to protect the integrity of the criminal justice system.

8. Before addressing the gravamen of Mr. Lynch's arguments it would be useful to set out the case law which shapes stay applications, particularly in relation to the basis of the Defendants' application.

9. It is common ground between Mr. Lynch KC and Ms. Elizabeth Christopher (for the Prosecution) that the *"constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions"* (*Beckford [1996] 1 Cr App R 94*) and that the Court has *"an inescapable duty to secure fair treatment for those who come or are brought before them"* (*Connelly v. DPP [1964] A.C. 1254*). Therefore, the Court's overriding power to stay the prosecution of an accused person is fundamental to the administration of the criminal justice system and most importantly for the protection of the accused person's constitutional and legal rights. However, one must be acutely aware that while stay applications are not unfamiliar to the Courts granting them are exceptional and should only be resorted to sparingly or as "a remedy of last resort" (*R v. Maxwell [2011] 4 All ER 941*).

Especially if the trial process is equipped to deal with the issues at hand (*R (Ebrahim) v. Feltham Magistrates' Court*, *Mouat v. DPP [2001] EWHC Admin 130* and *R v. Scott Crawley et al. [2014] EWCA Crim 1028*).

10. Further, neither party took issue with the underlying conclusions drawn by Hargun CJ in his judgment in the JR proceedings. In particular, that:

(i) Pursuant to section 71 of the Bermuda Constitution Order 1968 that constitutionally a DPP has the sole power to commence or stop criminal proceedings against an accused person.

(ii) The decision whether or not to institute and undertake criminal proceedings emanates from section 4 of the "Department of Public Prosecutions (Bermuda) Code for Crown Counsel" (the "DPP Code"). In particular, the two (2) tests of: (a) the sufficiency of the evidence i.e. that a prosecution should only be commenced if *"there is sufficient evidence to conclude that a reasonable magistrate or jury, properly directed, is more likely than not to convict the accused of the charge(s) alleged"*; and if so (b) whether the public interest requires a prosecution.

(iii) Notwithstanding the overriding constitutionality of a DPP's decision whether or not to prosecute the Court still retains the power to review such a decision[6]. Hargun CJ does however qualify the Court's power to review the prosecutorial decision of a DPP and warns that the scope of such review is narrow and limited[7] and that the power should only be deployed in rare situations.[8] To this, Hargun CJ stated that the Court:

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6 Hargun CJ references the authority of *Jeewan Mohit v. The Director of Public Prosecutions of Mauritius, Privy Council Appeal No 31 of 2005*.

7 Hargun CJ followed the advice of Lord Bingham in *Jeewan Mohit* who referenced the decision of the Supreme Court of Fiji in *Matalulu v. DPP [2003] 4 LRC 712*.

8 Hargun CJ references the authorities of *R v DPP ex parte C [1995] 1 Cr App R 136*, *R (Pepushi) v Crown Prosecution Service [2004] Imm AR 549*, *Sharma v Browne-Antoine [2007] 1 WLR 780*, and *S v Crown Prosecution Service [2015] EWHC 2868 (Admin)*.

> *"..... has no jurisdiction to intervene simply because it disagrees with the decision of the DPP in the sense that if the Court itself was exercising the discretion, it would have made a different decision. In order for the Court to intervene, leaving aside cases of obvious errors of law, the decision has to be categorized as perverse in the sense that no prosecutor would have made the decision that is sought to be impugned in the judicial review proceedings."*

11. With the above in mind I turn my attention to the jurisprudence which sets the guardrails for stay applications for abuse of process. Specifically, the seminal cases of *R v. Horseferry Road Magistrates' Court ex p Bennett [1993] 3 ALL ER 138*, *Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72*, *Maxwell*, *Warren v. A-G for Jersey [2012] 1 AC 22*, and *Crawley*. Lord Dyson in *Maxwell* encapsulates the principles succinctly by stating that:

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

12. It is this reasoning of Lord Dyson in *Maxwell* which courses through the paragraphs of the earlier authorities of *Horseferry Road Magistrates' Court ex p Bennett*, *Attorney General's Reference (No. 2 of 2001)* and *R v. Latif and Shahzad [1996] 1 WLR 104*, and also through the later authorities of *Warren* and *Crawley*. For example, Lord Steyn in *Latif* says that:

> *"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42 Ex parte Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches*

in Ex parte Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

13. Likewise, in Crawley Sir Brian Leveson P said:

"As is clear from decisions such as Attorney General's Reference (No 2 of 2001) [2004] 2 AC 72, there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.

Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort. As Lord Bingham observed in Attorney General's Reference (No. 2 of 2001) supra (at para. 24G):

> *"The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."*

The threshold is, therefore, a high one. This is all the more so where the fairness of the trial can be cured by expedition or adjournment or other steps, particularly where there may well be an opportunity as matters develop to repeat an abuse argument."

14. The distillation of all of these cited authorities is that the Court has the power to stay proceedings in the following circumstances:

(a) Where it will be impossible to give the accused person a fair trial; or

(b) Where a stay is necessary to protect the integrity of the criminal justice system.

15. It is important to point out that whilst there may be some overlap between the two limbs they should be handled as different entities by the Court. In this regard, Davis LJ in D Ltd. v. A [2017] EWCA Crim 1172 is quoted as saying that the two limbs are *"legally distinct and have to be considered separately"* and that *"consideration which may be relevant to the first limb may not be relevant to the second limb and vice-versa"*. David LJ goes on to say that *"the second limb requires a balance of the competing interests, whereas the first limb does not"*. Therefore, the Court may ultimately conclude that an accused person could have a fair trial but still go on to order a stay if such stay is necessary to protect the integrity of the criminal justice system.

16. Pivoting to the case at bar, as stated earlier the Defendants' rely on the second limb of cases which are set out in *Maxwell* and *Crawley* i.e. that a stay of the prosecution against the Defendants is necessary in order to protect the integrity of the criminal justice system. In respect of this category of cases Sir Brian Leveson in *Crawley* contributes the following words:

> *"……cases in which it may be unfair to try the accused (the second category of case) will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct……..the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means: the touchstone is the integrity of the criminal justice system".*[9]

17. So in principle, and recognizing that constitutionally the ultimate power to launch or terminate a prosecution solely rests with the appointed DPP, it would be entirely permissible for a new DPP (as was DPP Clarke) to review a matter and then to change the direction taken by a former DPP (as was DPP Mussenden). As an adjunct, there is nothing unreasonable in the police asking a DPP to review a prosecutorial decision

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[9] See Footnote 8 above.

whether to prosecute or not. However, this prosecutorial power is not absolute and there are necessary checks and balances imposed to ensure that the prosecution (or the police) do not arbitrarily execute a 180 degree turn-around in consequential decisions, such as whether to prosecute someone or not (the DPP Code states that *"The decision to prosecute a person for an offence is a significant step which has serious implications for defendant, victims, witnesses, communities and the public"*). Indeed, there are a slew of cases which firmly support the proposition that where a prosecuting authority unambiguously represents that they would not prosecute an individual but then subsequently changes its mind and decides to prosecute then this could be "capable" of constituting an abuse of process. Cases such as: *R v. Croydon Justices ex parte Dean (1993) QB 769*; *R v. Mark Bloomfield [1997] 1 Cr App R 135*; *R v. Mulla [2003] EWCA Crim 1881*, *R v. Abu Hamza [2007] QB 659*; *Dowty [2011] EWCA Crim 3138;* and, *R v. Killick [2011] EWCA Crim 1608*.

18. *Croydon Justices ex parte Dean* and *Bloomfield* somewhat set the stage in relation to applications for a stay founded on a prosecutorial *volte-face* of a decision not to prosecute. Lord Justice Staughton in *Croydon Justices ex parte Dean* stated that:

> *"In my judgment the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process."*

19. In *Bloomfield* Lord Justice Staughton answered the question "Can the Crown Prosecution Service.....revoke a previous decision which he has made and has communicated to a defendant and the court to offer no evidence, or is it capable of being an abuse of process if the Crown seeks to do that?" as follows:

> *"The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was made coram judice, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was.*

Of course the circumstances of each case have to be looked at carefully, and many other factors considered. As the Court said in the Mahdi decision, we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this appellant. In those circumstances the appropriate course is to allow the appeal and quash this conviction."

20. *Mulla* was a case in which prosecuting Counsel, in the trial judge's chambers and in open court, indicated that the prosecution will not be proceeding with a charge of dangerous driving against the appellant as there were "evidential difficulties" with the prosecution's case. The trial judge stated that the matter should be left to the jury to decide and adjourned the case. Over the lunch break on the same day the prosecutor received advice from a senior prosecutor and then decided to proceed with the trial. The appellant made an unsuccessful stay application and was subsequently convicted of the offences. He appealed the trial judge's decision but the Court of Appeal dismissed the appeal. In doing so Rose LJ held that:

"There were five issues to take into account in such a case where it was alleged that an abuse of process had arisen: (i) whether the prosecution had indicated a view not to proceed; (ii) whether the judge had expressed a view; (iii) whether there had been a significant time between the prosecution's change of view; (iv) whether the defendant's hopes had been inappropriately raised and then dashed and (v) whether there had been prejudice caused to the defendant. In the instant case, the judge had acted properly and in accordance with legal principle. He had been entitled to express his dissent to the prosecutor's course of action but the final decision to whether to proceed with the dangerous driving charge was for counsel. The defendant had not been prejudiced because he had known from the beginning that the judge had not approved of the course of action the prosecutor had proposed and had not received any private assurance from his counsel that a lesser plea would be accepted."

21. Of course, the distinguishing feature between the facts in the case at bar and those in *Mulla* is that in this case there was no representation by the DPP's Office in Court that it would not proceed with the charge. The other four (4) issues which *Mulla* took into account are applicable to this matter and I will refer to them later.

22. It would appear though that the headline case is *Hamza*. The facts in *Hamza* are that the appellant faced a multitude of offences including the possession of threatening, abusive or insulting recordings with the intent to stir up racial hatred (contrary to the Public Order Act 1986 (UK)) and the possession of a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism (contrary to the Terrorism Act 2000 (UK)). During the trial a stay application was made on the basis that five (5) years prior to the decision to prosecute the appellant the police returned to the appellant the material which was the subject of these offences. It was argued that the return of the material gave the appellant a "legitimate expectation" that he would not be prosecuted for the relevant offences. It was argued that in these circumstances it was an abuse of process to prosecute the appellant five (5) years after the police had returned the material. The trial judge dismissed the stay application and the appellant was convicted of the offences and sentenced to various terms of imprisonment.

23. On appeal it was argued by the Crown that the return of the material did not constitute an assurance that the property would not form part of the subject matter of any charges. Referring to the ruling of the trial judge Lord Phillips CJ in *Hamza* said:

> *"... circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of 'legitimate expectation' in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.*
>
> *Such circumstances can arise if police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment."*

24. Lord Phillips CJ, in considering *Croydon Justices ex parte Dean* and *Bloomfield*, went on to say:

> *"These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceedings with the prosecution despite the representation."*

25. The Lord Chief Justice then conclusively decided that the return of the material to the appellant did not constitute an "unequivocal assurance" that the appellant would not be prosecuted and that there was no reason to conclude that the appellant placed any reliance on the return of the material. It was accordingly held that the trial judge in *Hamza* was correct to dismiss the appellant's stay application.

26. In the same vein of *Hamza*, Thomas LJ in *Killick* stated:

> *"It is, in our judgement, plain on the authorities that if a clear unequivocal representation has been made and upon which the Defendant relies to his detriment, it will be open to a court to find that to proceed against him will be an abuse of process. We do not think it necessary to go further, because we agree with the observation of the court in Abu Hamza that there can be circumstances where even in that situation, it would not be an abuse of process to proceed."*

27. This reasoning was also adopted in the more recent case of *R v. LG [2018] EWCA Crim 736* in which Lord Justice Davies said:

> *"In cases where an indication has been given that there will be no prosecution, a stay of a subsequent prosecution will ordinarily not be granted unless there is an unequivocal representation to that effect and that the defendant in question has acted to his detriment in reliance upon that unequivocal representation."*

28. Therefore, in determining whether DPP Clarke's decision to reverse DPP Mussenden's decision not to prosecute constitutes an abuse of process I am moved to consider the following:

(i) Whether the Defendants received a promise, undertaking or representation or "unequivocal representation or assurance" from DPP Mussenden that they would not be prosecuted; and if so,

(ii) Whether the Defendants have acted on DPP Mussenden's decision not to prosecute to their detriment and that they would be significantly prejudiced if the prosecution against them proceeded; and if so,

(iii) Whether the circumstances of this case are so exceptional that DPP Clarke's decision to prosecute the Defendants constitutes an abuse of process; and if so,

(iv) Whether a stay of these proceedings is necessary to protect the integrity of the criminal justice system.

The Defendants' Submission

29. Unsurprisingly, Mr. Lynch answers all of the above questions in the affirmative. He characterizes the trajectory of the circumstances of this matter in this way:

- DDPP Clarke decides to prosecute the Defendants;
- DPP Mussenden, in his ultimate authority as DPP, overrules DDPP Clarke's decision and decides not to prosecute the Defendants;
- The Defendants rely on DPP Mussenden's unequivocal decision not to prosecute them;
- The Complaint launches JR proceedings against the decision of DPP Mussenden not to prosecute;
- Hargun CJ hears the Complainant's JR application;
- DDPP Clarke becomes DPP Clarke and the next day is asked by the Commissioner of Police to review DPP Mussenden's decision not to prosecute;

- Hargun CJ dismisses the Complainant's JR application essentially ruling that DPP Mussenden's decision not to prosecute the Defendants was unimpeachable;
- DPP Clarke, in a "flash of hubris", ignores Hargun CJ's ruling and decides to prosecute the Defendants anyway for the offence of serious sexual assault.

30. It is against this chronological synopsis that Mr. Lynch, in his Skeleton Submissions (revised 28th May 2022) and orally before the Court, submitted that the prosecution of the Defendants should be stayed for an abuse of process for the following reasons:

(i) It was not open for the Prosecution through DPP Clarke to reverse the decision of DPP Mussenden not to prosecute the Defendants unless there was (a) a clear legal error in the decision, (b) a successful JR of the decision, and (c) fresh evidence adduced in the allegations against the Defendants.

(ii) In coming to his decision not to prosecute the Defendants DPP Mussenden, as evidenced in his letter to the Commissioner of Police on 19th June 2020 and in his affidavit filed in relation to the JR proceedings, comprehensively took into consideration the prosecutorial guidance set out in section 4D of the DPP Code.

To this, Mr. Lynch asserted that DPP Mussenden carried out "a detailed and careful analysis" of the allegations which included an assessment of the credibility of the Complainant and the reliability of the Defendants' evidence.

(iii) Then DDPP Clarke should have complied with Code 4D of the DPP Code and consulted with DPP Mussenden regarding her decision to prosecute the Defendants particularly because the matter was of a highly significant and unusual nature given that the Defendants and the Complainant were serving police officers (as stated earlier the Defendants held the rank of Sergeant).

(iv) The Defendants have acted upon the decision of DPP Mussenden not to prosecute to their detriment and that they would be prejudiced if DPP Clarke's decision to prosecute them is allowed to stand (*Hamza* and *Killick*).

In respect of Defendant AB, in an affidavit sworn on the 7th June 2022, he states that:

- He parted with a phone and hard drive which contained strong evidence which would have assisted him in any defence which he may have. Hence, it is argued, he cannot now have a fair trial.

- His personal and professional life have been put on hold for a considerable period of time.

- His conduct in certain internal police disciplinary matters under the Police Conduct Orders 2016 was predicated on his reliance on DPP Mussenden's decision not to prosecute. Therefore, Defendant AB says, the outcome of certain internal police investigations would be impacted by DPP Clarke's decision to prosecute.

- He has had to endure considerable stress and anxiety because of DPP Clarke's decision to prosecute. To the extent that he required psychiatric intervention which included therapy and medication.

In respect of Defendant CD, in an affidavit sworn on the 26th May 2022, he states that he too has suffered tremendous stress and anxiety and that he sought the assistance of a psychiatrist and medication to deal with his mental health challenges. He says that at one point he started to have suicidal ideations.

31. The crescendo of Mr. Lynch's submission is that the circuitous route which led to DPP Clarke's decision to prosecute the Defendants on the 21st January 2021 irredeemably

impales the integrity of the criminal justice system and therefore the proceedings against the Defendants should be stayed (*Maxwell* and *Crawley*). Especially since, Mr. Lynch argues, DPP Clarke's decision was taken after a comprehensive and unambiguous decision of DPP Mussenden not to prosecute the Defendants on the 19th June 2020 and after a fulsome ruling of Hargun CJ in the JR proceedings on 5th January 2021 that DPP Mussenden's decision not to prosecute should not be impugned.

32. As I understand it, Mr. Lynch's criticism is not that the Defendants will not have a fair trial (the first limb) but that it is because of the unfairness of DPP Clarke's decision to prosecute them that they should not stand trial at all. Further, notwithstanding Mr. Lynch's comment that DPP Clarke acted in a "flash of hubris" in coming to her decision to prosecute, it did not appear that Mr. Lynch asserted with strenuous conviction that in reaching her decision to prosecute the Defendants that DPP Clarke or the police acted in bad faith, or that DPP Clarke embarked upon prosecutorial misconduct, or that DPP Clarke in some way manipulated the prosecutorial processes (as per the words of Sir Brian Leveson in *Crawley*). This may have been a well advised strategy on his part. Not only did I not see any sustainable evidence of this (by inference or otherwise) but Staughton LJ in *Croydon Justices, ex part Dean* held that in such stay applications that it is unnecessary for the accused person to show that there was bad faith on the part of the police.[10]

The Prosecution's Submissions

33. On behalf of the Prosecution Ms. Christopher submitted that DPP Clarke's decision to prosecute the Defendants should not be disturbed and therefore the prosecution against the Defendants should be allowed to continue unabated. In this regard, Ms. Christopher submitted that:

(i) The granting of a stay is an exceptional remedy that should be sparingly used particularly because the Defendants have not acted to their detriment by relying on

[10] As stated in paragraph D3.89 of Blackstone's Criminal Practice (2019 Edition).

DPP Mussenden's decision not to prosecute them (*Maxwell*, *Crawley* and *DPP, ex p Chaudhary (1995) 1 Cr. App. R. 136*).

(ii) The integrity of the criminal justice system would be best protected by pursing a criminal prosecution against the Defendants (*Crawley*).

(iii) It would be disproportionate for the DPP's Office not to have a system of review without recourse to Court proceedings.

(iv) The Complainant had a continuing right to seek a review of DPP Mussenden's decision not to prosecute the Defendants notwithstanding Hargun CJ's ruling in the JR proceedings. Further, that the rights and interest of the Complainant to have the Defendants prosecuted should not be subordinate to those of the Defendants.

(v) DPP Clarke had a positive duty to review DPP Mussenden's decision not to prosecute given the "disquiet" of the Complainant.

(vi) The decision of DPP Mussenden not to prosecute the Defendants was wrong (although the Prosecution need not show that it was), it was not made on public interest grounds, and that in fact it went against the public interest. Particularly, the fact that the offence, which is serious, was allegedly committed by serving police sergeants.

(vii) The mere fact that the Defendants have received psychiatric attention for any purported stress or anxiety does not amount to any prejudice that may have been sustained by them, and that any stress or anxiety that they may be experiencing is no different from that which any accused person may endure. Particularly since no psychiatric reports were exhibited to their respective affidavits.

Ms. Christopher also brings into question the qualifications of those who treated the Defendants.

(viii) The Defendants have not lost any opportunity to put forth their defenses because of the loss of phone or laptop data as that data is in the possession of the BPS and can therefore be provided to the Defendants.

34. It is therefore the Prosecution's steadfast position that it cannot be said that DPP Clarke's decision to prosecute the Defendants is "an affront to the integrity of the criminal justice system or that it might bring the administration of justice into disrepute".

35. Much of Mr. Lynch's and Ms. Christopher's submissions amounted to a comparative forensic analysis of the contents of DPP Mussenden's nine page letter to the Commissioner of Police and the contents of his affidavit justifying why he decided not to prosecute the Defendants vis-à-vis the contents of DPP Clarke's first and second affidavits justifying why she decided to prosecute the Defendants when she was DDPP and then when she was DPP. In particular, whether DPP Mussenden's or DPP Clarke's respective decisions met the tests of sufficiency and public interest as called for by the DPP Code. Whilst it may have been necessary in the JR proceedings to have embarked upon an assessment of the evidential basis upon which DPP Mussenden decided not to prosecute the Defendants, it is unnecessary for me in these stay proceedings to trawl through DPP Mussenden's letter and affidavit, or indeed the affidavits of DPP Clarke, in order establish whether they acted within their powers as DPP or whether their respective handling of the evidence which undergirds the charge against the Defendants are questionable. This is because Hargun CJ, in his judgment in the JR proceedings, has already carefully and comprehensively addressed each of these issues as they relate to DPP Mussenden's decision to not prosecute the Defendants.

36. To put this into context, the grounds advanced by the Complainant in the JR proceedings (through his Counsel Mr. Mark Pettingill) in challenging DPP Mussenden's decision not to prosecute the Defendants were as follows:

"1. That the DPP failed to properly review the evidence of the complaint with regard to an allegation of serious sexual assault.

2. That the DPP failed to properly bring a prosecution against PS P and PS R and took into account irrelevant considerations of evidence that properly should be left to the trier of fact.

3. That the DPP failed in withdrawing the charges against PS P and PS R[11] to properly consider the Department of Public Prosecutions (Bermuda) Code for Crown Counsel; and that his withdrawal of the charges was unreasonable in the circumstances and contrary to the evidence provided by investigating officers and the approval of criminal charges by another senior prosecuting officer.

4. That the DPP's decision to withdraw the charges was procedurally unfair, and unreasonable and irrational in the circumstances.

5. That pursuant to Schedule 2 of the Bermuda Constitution Order 1968 ("the Constitution"), the DPP failed to properly consider section 1 of the Constitution as read with section 71 (A) in properly exercising its power to investigate criminal proceedings and consider the rights of the victim enshrined in the Constitution, namely section 3 protection not to be subjected to inhumane and degrading treatment and section 11 protection relating to his freedom of movement."[12]

37. Before roundly rejecting these grounds and deciding that DPP Mussenden's decision not to prosecute was not "perverse" Hargun CJ commented that from *"a commonsense point of view, the reasons given by the DPP* [Mussenden] *appeared to be clear and relevant to the issue that he had to decide*"[13].

38. Further, in dismissing the JR relief sought by the Complainant Hargun CJ recognized pertinent guiding principles from various cited authorities which held that: *"where the decision* [of a DPP] *is based on the assessment of the evidence and the prospects of securing a conviction, the court will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict"(Leonie Marshall v The Director of Public Prosecutions [2007] UKPC 4* and *Campaign Against Antisemitism v*

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[11] These were the names Hargun CJ used to anonymize the Defendants in the JR proceedings.
[12] Page 3 of Hargun CJ's Judgment.
[13] Paragraph 26 on page 14 of Hargun CJ's Judgment.

Director of Public Prosecutions [2019] EWHC 9 (Admin)*; "...where a CPS[14] review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse" (R(Monica) v Director of Public Prosecutions [2018] EWHC 3507 (Admin))*; and that *"it is not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment" (R(Monica))*. Presumably being guided by these principles Hargun CJ summarized DPP Mussenden's decision to not prosecute the Defendants as follows:

> *"In his affidavit, Mr Larry Mussenden, the DPP, states that his reasons why he believes, based upon his experience as a prosecutor, defence lawyer and as a DPP, that a reasonable jury, properly directed, would (more likely than not) not convict PS P and PS R, are set out in his Decision Letter. He accepts that there is public interest in ensuring that these officers are not (and not considered) above the law. He also accepts that there are difficult questions of consent in sexual assault cases but he has never shied away from prosecuting sexual assault cases where he believed that a reasonable jury would, more likely than not, convict based on the evidence he had seen.*
>
> *In the Decision Letter the DPP expresses the view that the evidence in this case does not meet the DPP Code for Crown Counsel test for charge approval for a charge of serious sexual assault, namely that a reasonable jury, properly directed, is more likely than not to convict. Put otherwise, in his view, the Prosecution has little to no chance of securing a conviction in this case."*

39. It should be noted that Hargun CJ did not seek to establish whether DPP Mussenden's decision not to prosecute was right or wrong evidentially. It was the process by which DPP Mussenden reached his decision which was the fulcrum of Hargun CJ's decision to dismiss the Complainant's JR application.

40. I therefore do not propose to re-litigate the issues that were before Hargun CJ in the JR proceedings, nor will I go behind or critique Hargun CJ's decision in a quasi-appellate jurisdiction, and nor will I venture down a road where these stay proceedings take on the appearance of judicial review proceedings. Hence, the authorities of *R (on the Application*

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[14] "CPS" is the acronym for Crown Prosecution Service in the United Kingdom which is equivalent to the Department of Public Prosecutions in Bermuda.

of Dominic Purvis) v Director of Public Prosecutions [2018] EWCA 1844 (Admin) and *Cole (2019) EWCA Crim 1033* (both referred to by Ms. Christopher) do not assist me in my determination of these stay proceedings.

41. This is not however to be taken to mean that Hargun CJ's decision in the JR proceedings has no use or value in these stay proceedings. Quite the contrary, it has a considerable amount of vital utility. The fact the JR proceedings took place, that the issues were fully ventilated before Hargun CJ, and that Hargun CJ rendered a decision on those issues are extremely crucial to answering my earlier posed questions. To which I will now address.

Whether the Defendants received a promise, undertaking or representation or "unequivocal representation or assurance" from DPP Mussenden that they would not be prosecuted

42. There should be no dispute that the length and content of the nine-page letter from DPP Mussenden to the Commissioner of Police dated 19th June 2020, and then forwarded to the Defendants, constituted an unequivocal representation or assurance to the Defendants that they would not be prosecuted. If there was any dispute I disabuse anyone of the notion that DPP Mussenden's letter was not an unequivocal representation to the Defendants that they would not be prosecuted by immediately directing attention to the concluding sentences of the letter. In clear English language DPP Mussenden pens the words:

> *"Having now declined to approve such charges, I direct that AB and CD be informed that I have reviewed the original decision and I have now not approved a prosecution for charges arising out of these circumstances and they will not be prosecuted for such conduct. Also, they should be released from bail and informed that there is no requirement for them to appear in Plea Court. Please confirm to me when these actions have been completed."*

43. Comparing these pellucid words of DPP Mussenden with the returning of the material in *Hamza* there is no doubt, and I accordingly find, that the Defendants received an unequivocal and concrete representation from the DPP Mussenden that they would not be prosecuted.

44. I should add that Ms. Christopher relied on the authority of *LG* in which the Court of Appeal held that a decision of a judge sitting in the Crown Court to stay proceedings for an abuse of process was wrong. Ms. Christopher may have pointed to *LG* for other reasons but it is of note that in reaching their decision the Court of Appeal's must have factored in their finding, and interestingly that of the Crown Court judge, that there was no unequivocal representation by the prosecution to the respondent that he would never be prosecuted.

Whether the Defendants have acted on DPP Mussenden's decision not to prosecute to their detriment and that they would be significantly prejudiced if the prosecution proceeded

45. Ms. Christopher raises a legitimate point that every accused person, when faced with being prosecuted for a criminal offence, will endure a heightened level of stress and anxiety, will have their lives suddenly put on hold, and that they will invariably experience some prejudice (*LG* refers to this as *"the natural disappointed expectations"* of an accused person). The Defendants would have understandably experienced "normal" stress and anxiety from the time that they were arrested on the 29th November 2019 through to the 21st May 2020 when then DDPP Clarke communicated that they would be prosecuted. However, the circumstances of this matter do not fall within the normal "run-of-the-mill" criminal matters. Stealing the words of Rose LJ in *Mulla*, the Defendants' hopes were *"inappropriately raised and then dashed"* by the changing positions of the DPP's Office.

46. Surely, whatever stress or anxiety that the Defendants would have felt from their arrest on the 29th November 2019 and from DDPP Clarke's decision to prosecute them on the 21st May 2020 would likely have been released like a pressure valve once DPP Mussenden rendered his thorough decision not to prosecute them on the 19th June 2020. Not unreasonably, this most likely would have given them the green light to get on with their personal and professional lives (as much as they were able to). A period of seven (7) months then elapsed between DPP Mussenden's decision not to prosecute and when DPP Clarke decided to prosecute on the 21st January 2021. During this time the Defendants' would likely have experienced a rollercoaster of emotions in that their hopes would have

been inappropriately raised by DPP Mussenden's decision not to prosecute them, then dashed by the Complainant's institution of JR proceedings on the 29th June 2020 challenging DPP Mussenden's decision, then raised again by Hargun CJ's decision on the 21st January 2021that DPP Mussenden's decision was not perverse, and then dashed again by DPP Clarke's decision to prosecute them.

47. Following *Mulla*, and coupled with my heretofore finding that the Defendants were given an unequivocal assurance that they would not be prosecuted, I find that the stress and anxiety that the Defendants suffered over the seven month period far exceeded that which an accused person would have normally been expected to experience and endure.

48. For the avoidance of doubt, Ms. Christopher's dismissive comments regarding the credentials of the persons who tended to the psychological/psychiatric needs of the Defendants did not hit their intended mark and were quite frankly unsubstantiated. Accordingly, I find that the Defendants did seek and obtain proper psychological/psychiatric intervention for the stress and anxiety that they endured throughout the history of this matter.

49. Moreover, I accept Mr. Lynch's submissions that the Defendants acted on DPP Mussenden's unequivocal assurance that they would not be prosecuted and that they did so to their detriment. Seven months is not an insignificant amount of time and so it is understandable that during that period that the Defendants would have likely steered their thoughts and efforts away from the prospects of facing a trial. This would have likely involved the discarding of both mental and physical evidence which may have existed at the time or by not pursing the acquisition of evidence which may have assisted them in their defence had they been compelled to face a trial. To this, it is not enough for the Prosecution to say that the police have data extracted from the telephone and computer and that the Defendants should be satisfied with that.

50. I therefore accept Mr. Lynch's submission that by Defendant AB parting with his phone and hard drive (which may have been of evidential value and assisted him at any trial)

prejudices the Defendants' ability to launch a proper defence and *ergo* reduces the possibility of them having a fair trial.

51. Of lesser gravity, but still a factor to be considered, is that the manner in which Defendant AB conducted his internal police disciplinary proceedings was predicated on DPP Mussenden's decision not to prosecute him (I should note that Lord Justice Holroyd in *Purvis* commented that although disciplinary proceedings against an accused person is a relevant factor to be considered it was not necessarily a reason why there should be no prosecution[15]). Presumably, these internal disciplinary proceedings were instituted to determine whether the Defendants should be penalized for what may have occurred on the 27th April 2019 (whether or not it amounted to a criminal offence), and if so whether they should receive the ultimate penalty of termination from the BPS. I do not know what has transpired during these internal proceedings, and nor should I, but common sense would lead me to surmise that in his defence in those proceedings that the Defendants would have placed heavy reliance on the reasons why DPP Mussenden decided not to prosecute him. Therefore, it would not be a stretch of one's imagination to conclude that DPP Mussenden's decision would, and still may, figure quite prominently in the outcome of the internal disciplinary proceedings. I could therefore see how DPP Clarke's decision to prosecute the Defendants placed their approach to the internal disciplinary hearings in flux and further prolonged any decision in those proceedings.

52. In consideration of the above, I find that the Defendants have acted DPP Mussenden's decision not to prosecute and that they have done so to their detriment. I accordingly find that the Defendants have been significantly prejudiced over and above natural disappointed expectations of an accused person (as characterized in *LG*).

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[15] Paragraph 79 of *Purvis*.

Whether the circumstances of this case are so exceptional that DPP Clarke's decision to prosecute the Defendants constitutes an abuse of process

53. I stated earlier that for the purposes of these stay proceedings that it is unnecessary for me to reassess the evidential basis upon which DPP Mussenden reached his decision to prosecute the Defendants. I take the same position in respect of DPP Clarke's decision to prosecute the Defendants. Whether or not she adhered to the test of sufficiency and public interests of the DPP Code in arriving at her decision is useful by way of background information but the central focus should be on the circumstances under which DPP Clarke arrived at her decision to prosecute.

54. This was not simply a matter of DPP Mussenden disagreeing with DDPP Clarke by deciding to prosecute the Defendants and then DPP Clarke later disagreeing with DPP Mussenden by deciding to prosecute. As was accepted by both parties, and as is shown by the authorities, there is nothing inherently wrong with one prosecutor disagreeing with another prosecutor when deciding whether or not to prosecute. But timing and context is everything and the circumstances of this matter are exceptional in this regard.

55. Proverbially, a lot of water flowed under the bridge. As covered in lesser detail earlier, in the intervening period between then DDPP Clarke's decision on the 21st May 2020 to prosecute the Defendants and DPP Clarke's decision to reverse DPP Mussenden's decision on the 21st January 2021 not to prosecute there was: the nine page letter from DPP Mussenden setting out the basis upon which he decided not to prosecute; a conveyance of DPP Mussenden's letter to the Commissioner of Police and to the Defendants informing them of his decision not to prosecute; the Complainant launching the JR proceedings in which the Complainant swore an affidavit in support; the swearing of an affidavit by DPP Mussenden in support of the DPP Office's resistance of the Complainant's JR application; the hearing of the Complainants JR application before Hargun CJ (both sides retained Counsel); the Commissioner of Police requesting that DPP Clarke review the evidence in the case; Hargun CJ rendering his decision that there was nothing wrong in DPP

Mussenden's decision not to prosecute the Defendants; and then, DPP Clarke deciding to prosecute the Defendants after Hargun CJ delivers his decision.

56. Mr. Lynch claimed that DPP Clarke "ignored" Hargun CJ's judgment in the JR proceedings and he alluded to DPP Clarke being "capricious" in making her decision to prosecute. I do not accept this as I am sure that DPP Clarke carefully went through the judgment and I am certain that DPP Clarke would not have been disrespectful to the Court by not considering the contents of the judgment before making her decision to prosecute the Defendants. I would even be open to saying that DPP Clarke was genuinely and legitimately of the view that she would be doing right by the Complainant to review the matter and make a decision to prosecute. However, it seems to me that before reaching her decision to prosecute that DPP Clarke should have placed more weight on the circumstances leading up to the JR proceedings (including the contents of DPP Mussenden's letter), what transpired at the JR proceedings, and of course the contents of Hargun CJ's judgment. It seems as if DPP Clarke placed exceedingly more reliance on her original decision to prosecute when she was DDPP and/or on the request by the Commissioner of Police to review the evidence in the case rather than being guided by Hargun CJ's judgment. Particularly because it was only a mere two (2) days after DPP Mussenden left office, and one (1) day after DPP Clarke was appointed DPP, that the Commissioner of Police asked DPP Clarke to review the case. I cannot say whether this was a "happy coincidence" as stated by Mr. Lynch but it does lead one to draw the inference that the Commissioner of Police waited until DPP Mussenden's elevation to the bench to approach DPP Clarke, with apparent speed and urgency, to look at the matter again. No doubt the Commissioner of Police would have done this given DPP Clarke's earlier decision as DDPP to prosecute the Defendants.

57. To exacerbate this, in neither of DPP Clarke's affidavits is there any indication as to the basis upon which the Commissioner of Police asked her to review the evidence in this case. It seems that DPP Clarke would have reviewed the same evidence that she reviewed as DDPP and that it was the same evidence on which DPP Mussenden assessed in his letter when informing the Commissioner of Police of his decision not to prosecute the

Defendants. Most crucially, it appears to be the same evidence which was the subject of Hargun CJ's judgment in the JR proceedings. Referring to LG Ms. Christopher appears to play down the need for the Prosecution to have something like fresh evidence when considering a review of a prosecutorial decision. However, her submissions are inconsistent with section 4C of the DPP Code which states:

> *"The initial review of the merits of a prosecution does not mean that once the decision has been made to proceed, that decision is never revisited. Indeed, once a decision has been made to prosecute a charge, that decision must be reviewed if new and relevant information is received."*[16]

58. I am cognizant of the fact that the DPP Code is silent as to what is the criteria to be met when a decision not to prosecute is reversed upon review. However, using the logic of section 4C of the DPP Code one can extrapolate that for a decision not to prosecute to be reversed that new and relevant information must be received by the police/prosecuting authority which would justify the change in prosecutorial tact. It cannot be, and nor should it be, simply a matter of a prosecutor taking a subjective second look at the same evidence and reaching a different decision (whether her own decision or that of another prosecutor). Or worse, changing a decision not to prosecute in order to assuage the requests or demands of the police.

59. In the absence of new and relevant information it appears that DPP Clarke's decision to prosecute really amounted to her having a different interpretation of the same evidence which DPP Mussenden had already reviewed (which is not surprising since as DDPP she decided to prosecute). In essence, there does not appear to be any sustainable rationale behind DPP Clarke's reversal of DPP Mussenden's decision not to prosecute other than her having a divergent take on the same evidence which he and Hargun CJ had reviewed.

60. More specifically about any review process, Ms. Christopher rightly submitted that a complainant (as a member of the public) should have the right and the corresponding

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[16] This is akin to the guidance provided by the CPS in relation to instituting fresh proceedings which states that *"Fresh proceedings may be commenced if further evidence, sufficient to provide a realistic prospect of conviction, subsequently comes to light"* (quoted in paragraph 18 of Cole).

mechanism to impress upon a prosecuting authority to review a decision not to prosecute their alleged assailants without having to resort to Court action (which can be costly and time consuming). The proper administration of justice demands that such a review process should be known and readily available to a complainant. The cases of *Killick* and that of *R (FNM) v DPP (2020) EWCA 870* support this and no-one would take issue with the article of Keir Starmer (referenced from the Crim L.R. 2012 526 – 534) which provides that a decision to prosecute or not to prosecute should not be strictly final and should be open to review. However, the tenor of Ms. Christopher's submissions is that the Complainant in the case-at-bar did not, or was not allowed to, exercise his right to review DPP Mussenden's decision not to prosecute the Defendants. The fact that the Complainant thoroughly challenged DPP Mussenden's decision in the JR proceedings, and that Hargun CJ scrutinized DPP Mussenden's decision, totally belies any suggestion that the Complainant did not exercise his right to review DPP Mussenden's decision.

61. It is not lost on me that in her submissions Ms. Christopher did not spend too much time or energy on the contents of Hargun CJ's judgment other than to say that the Complainant's decision to institute JR may not have been the correct tactic to employ as it was a "high bar" to surmount. Be that as it may, the fact remains that by way of the JR proceedings DPP Mussenden's rationale and decision not to prosecute the Defendants was comprehensively "reviewed" (similar to the decisions in *Chaudhary* and *B v. DPP [2009] EWHC 106*) and Hargun CJ ultimately concluded that DPP Mussenden's decision should not be toppled. Without any intention to belittle the Complainant's "disquiet" for DPP Mussenden's decision I maintain that the bottom line is that he had his day in Court. This is not unlike the claimants in *Purvis* and *FNM* (both of which was cited by Ms. Christopher) who, by way of judicial review, complained about a decision not to prosecute and in doing so essentially raised the same or similar issues to those that were considered by Hargun CJ (including whether the reviewing Crown Prosecutor complied with the UK's "Code for Crown Prosecutors" when deciding whether to prosecute). The fact that Hargun CJ ruled against the Complainant does not diminish that he [the Complainant] exhausted a process of review of DPP Mussenden's decision not to prosecute the Defendants.

62. So while I agree with Ms. Christopher that there should be a system of review in place for a complainant to request (or even demand) that a prosecuting authority review a prosecutorial decision (especially when the decision is not to prosecute), a red line must be drawn in the sand. The right to have a review does not mean, and nor should it mean, that a complainant can repeatedly ask for a review, whether within the prosecuting authority or through the Courts, until they get the answer that they want. In this case, the Complainant sought the pinnacle of review and relief in the forum of the Courts by way of the JR proceedings. Any prosecution of the Defendants should have stopped within the precincts of the Court after Hargun CJ rendered his judgment unless the DPP's Office was in receipt of new and relevant evidence pointing to the commission of the offence alleged (or any other offence).

63. Taking all of this, along with my above findings that DPP Mussenden's decision was an unequivocal assurance to the Defendants that there would not be prosecuted and that the Defendants acted on DPP Mussenden's decision to their detriment, I find that the factual, procedural, and legal route that this matter has taken puts its circumstances into the category of being exceptional.

Whether a stay of these proceedings is necessary to protect the integrity of the criminal justice system

64. In balancing the rights and interest of the Complainant with those of the Defendants (as called for in *LG*) I place more weight on those of the Defendants given how this matter has unfolded over the years. Specifically, from DDPP Clarke's decision to prosecute through to DPP Mussenden's decision not to prosecute through to the JR proceedings being instituted and heard through to Hargun CJ's judgment through to the Commissioner of Police requesting DPP Clarke to review the matter without new and relevant evidence, and finally, through to DPP Clarke's decision to prosecute.

65. In these circumstances, which I find to be exceptional, I find that a stay of these proceedings is necessary to protect the integrity of the criminal justice system.

Conclusion

66. For the reasons stated in the above paragraphs I confirm my decision made on the 27th September 2022 that the Defendant's application for a stay of the prosecution against the Defendant is hereby granted.

Dated the 30th day of January 2023

The Hon. Justice Mr. Juan P. Wolffe
Puisne Judge of the Supreme Court of Bermuda