Neutral Citation Number: [2026] CA (Bda) 19 Civ

Criminal Appeal No. 8 of 2026

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE CRIMINAL JURISDICTION
BEFORE THE HON JUSTICE ALAN RICHARDS
CASE NUMBER 2026 No. 12

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 27 October 2026

Before:

PRESIDENT THE HON IAN KAWALEY
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER
and
JUSTICE OF APPEAL THE RT HON SIR JULIAN FLAUX

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Between:

SHELTON BAKER

Appellant

- and -

JEROME ASTWOOD

Respondent

Appearances: Ms Nicole Smith, The Legal Aid Office, for the Appellant
Mr Adley Duncan, Office of the Director of Public Prosecutions, for the Respondent

Hearing date(s): 16 June 2026
Date of Decision: 16 June 2026
Draft Reasons circulated: 20 October 2026
Date of Reasons: 27 October 2026

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Consent of DPP for prosecution-whether consent may be signified by subordinate officers-Criminal Code section 199(4)-Bermuda Constitution section 71 (2)(a), (3)

REASONS

KAWALEY P

Introductory

1. This appeal raised a very short but important point which has never been previously considered by this Court. Was a prosecution for intruding on the privacy of a female contrary to section 199 of the Criminal, which resulted in the Appellant being convicted in the Magistrates' Court, invalidly commenced because the required consent of the Director of Public Prosecutions ("DPP") had not been validly obtained? The "*fiat*" was signed by the Deputy DPP; the Appellant contended that the personal signature of the DPP was required.

2. Following a short hearing on 16 June 2026, we concluded that it was clear the requisite consent had been validly obtained, and could be signified through a fiat signed by a subordinate of the DPP. We accordingly dismissed the appeal. These are the reasons for that decision.

3. The appeal was argued on the narrow basis that section 199(4) of the Criminal Code did not require the DPP personally to sign the fiat evidencing her consent to the commencement of proceedings. From the Bench I raised a wider ground for allowing the appeal, namely that section 71 of the Constitution did not permit the Legislature to prescribe how the consent should be exercised in any event. Reluctantly, but instinctively, I indicated that I did not consider it was appropriate to dispose of the appeal on that wider, unargued basis.

4. Although the appeal was dismissed on this narrower basis, I have set out my strong provisional views on the wider basis which I consider to be too fundamental to simply ignore.

Procedural history

5. The procedural history so far as is material can be stated briefly. On 1 May 2023, an Information was laid against the Appellant for intruding on the privacy of a girl contrary

to section 199 (2) of the Criminal Code. Beneath the single charge was the following wording:

> "*I consent to the institution of this prosecution against eth accused person named herein in respect of the charges herein set out.*
> *Dated the 3rd day of May 2023*
> *Carrington Mahoney* [signed]
> *For the Director of Public Prosecutions*"

6. The Appellant initially appealed against the decision of the Supreme Court (Richards J) (the "Judge") dated 17 April 2025, for reasons delivered on 24 April 2025, in relation to the construction of section 199 (4) of the Criminal Code directly to this Court. Richards J reversed the 31 January 2025 decision of the Magistrates Court (Wor Craig Attridge- the "Magistrate") to the effect that section 199 (4) required the DPP personally to sign the fiat authorising the laying of the Information against the Appellant. Following upon the remittal of the matter to the Magistrates' Court, the Appellant was convicted on 29 April 2025. After the Crown raised a jurisdictional challenge to an initial appeal against the Judgment directly to this Court, an appeal against conviction was filed with the Supreme Court in relation to the same construction of section 199 (4) point. On 4 May 2026, Richards J summarily dismissed that appeal, and simply confirmed his findings in his 2025 decision (the "Judgment").

7. By a Notice of Appeal dated 5 May 2026, the Appellant appealed against the 2025 Supreme Court decision although this was, technically, an appeal against Richards the Judgment. The main ground of appeal was as follows:

> "*(1) That the learned judge erred in law by construing s.199 (4) of the Criminal Code to require the consent of the DPP, or her delegates*…"

The legislative framework-preliminary views

8. Section 199 ("***Acts intruding upon the privacy of child or other person***") of the Criminal Code provides in salient part as follows:

> "
> …
>
> *(2) Any person who intrudes upon the privacy of a child or other person in such a way as to be likely to alarm, insult or offend a child or other person and does in fact alarm, insult or offend the child or other person whose privacy he intrudes upon is guilty of an offence, and is liable on conviction by a court of summary jurisdiction to imprisonment for five years and on conviction on indictment to imprisonment for a term not exceeding ten years.*
> …

> *(4) A prosecution shall not be instituted under this section without the consent of the Director of Public Prosecutions.*"

9. Section 199 is an 'either way' offence, triable either summarily or indictment. In seriousness, it lies between offences which can only be tried on indictment and offences which can only be tried summarily. The words "*consent of the Director of Public Prosecutions*" do not at first blush appear to speak at all to the question of how the DPP's consent should be expressed.

10. The critical statutory provision governing how the DPP's constitutional powers should be exercised is found, as one would expect, in the Bermuda Constitution. Section 71 relevantly provides:

> "(2) *The* [DPP] *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 civil court of Bermuda in respect of any offence against any law in force in Bermuda;*
>
> *(b) to take over and continue any such criminal proceedings that have been instituted or undertaken 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.*
>
> *(3)The powers of the* [DPP] *under subsection (2) of this section may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions.*
>
> *(4)The powers conferred upon the* [DPP] *by paragraphs (b) and (c) of subsection (2) of this section shall be vested in him to the exclusion of any other person:*
>
> *Provided that, where any other person or authority has instituted criminal proceedings which have not been taken over and continued by the* [DPP] *under the said paragraph (b), nothing in this subsection shall, save when the* [DPP]*has exercised his powers under the said paragraph (b), prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court…*
>
> *(6) In the exercise of the powers conferred on him by this section, the* [DPP] *shall not be subject to the direction or control of any other person or authority*"
>
> [Emphasis added]

11. As a matter of first impression, section 71(3) provides unambiguously that the powers of the DPP in relation to, *inter alia*, the institution of criminal proceedings "*under any law*"[1] may validly be exercised in any of the following ways:

    (a) personally; or

    (b) by subordinate officers acting under and in accordance with general instructions; or

    (c) by subordinate officers acting under and in accordance with special instructions.

12. As a matter of first impression, in my judgment subsection (4) of section 71 does not derogate in any way from subsection (3); subsection (4) in referring to "*any other person*" appears to be referring to any other person who may have commenced criminal proceedings (e.g. the Commissioner of Police or a private prosecutor). The subsection provides that such "*other person*" may discontinue proceedings they have commenced where the DPP has not taken them over.

13. It is also pertinent to note that there is no qualifying wording in section 71 reserving to the Legislature the right to expand or limit the constitutionally prescribed way in which the DPP's powers may be exercised. Section 71 (2) merely contemplates that offences may be created by the Legislature, while section 71 (6) makes it clear that no "*person or authority*"[2] may direct the DPP as to the exercise of the powers conferred by subsection (2).

14. In the course of argument I referred to the basic principle that the Legislature's powers may only be exercised in accordance with the Constitution. The ancient common law principle of the sovereignty of Parliament is significantly limited, not just by Chapter I of the Constitution ("*PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL*", but also by the following provision:

    "***Power to make laws***
    34 Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda."

15. Section 34 limits the legislative competence of the Legislature created by the Bermuda Constitution, looking forward, to make laws from the operative date of the Constitution. Section 5 (1) of the Bermuda Constitution Order (the UK legislative instrument which

[1] Section 102(1) of the Constitution provides: "*'law' includes any instrument having the force of law and any unwritten rule of law, and 'lawful' and 'lawfully' shall be construed accordingly.*"

[2] Section 107 preserves the jurisdiction of the courts to determine whether the DPP's powers have been exercised in accordance with the Constitution. There is no reservation in relation to whether the DPP's powers have exercised in relation to the general law.

extends the scheduled Constitution to Bermuda), looking backwards, prevents pre-existing laws ("*existing laws*") from undermining the integrity of the Constitution by providing as follows:

> "*Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day* [2 June 1968] *as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

16. An additional legal basis for the invalidity legislation which is inconsistent with the Constitution is the Colonial Laws (Validity) Act 1865 (UK), which provides that the laws of any colonial legislature which are inconsistent with an act of the British Parliament extending to it shall "*to the extent of such repugnancy…be absolutely void and inoperative*"[3]. The Bermuda Constitution is scheduled to a UK Order-in-Council made under a UK Act[4]. These basic constitutional principles tacitly informed my approach to the present appeal. I also noted in the course of argument that the drafting approach of the Constitution is to explicitly indicate, when defining the powers of constitutional offices, when the Legislature is empowered to supplement the relevant constitutional provisions. Four examples will suffice to illustrate this proposition:

(a) Section 15 (5) of the Constitution provides: "*The Legislature may by law confer upon the Supreme Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by this section*";

(b) Section 73 (1) of the Constitution provides: "*There shall be a Supreme Court for Bermuda which shall have such jurisdiction and powers as may be conferred upon it by this Constitution and any other law*"[5] [Emphasis added];

(c) Section 84 (5) provides that "*the Governor, acting after consultation with the Premier and the Public Service Commission, may by regulations make provision for regulating and facilitating the performance by the Commission of its functions under this Constitution, including…(a)*

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[3] 1865, c.62. Section 2 provides:
"*Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.*"

[4] UK S.I. 1968 No.182, made under the Bermuda Constitution Act 1967, c.63, section 1. The Privy Council struck down legislation on the basis of section 2 of the 1865 Act in *Selassie-v- R* [2013] UKPC 29 at [9], [18].

[5] Section 77 (1) makes similar provision in relation to the Court of Appeal.

conferring powers and imposing duties on any public officer…" [Emphasis added]; and

(d) Section 93B (1) provides: "*The Ombudsman shall have such functions and jurisdiction as may be prescribed by law*". [Emphasis added]

17. It also is or ought to be obvious that operational independence lies at the heart of the constitutional function of the DPP and other constitutional offices which are similar in this regard. Section 93B (2) of the Constitution, for example, makes equivalent provision in relation to the Ombudsman to section 71 (6) even though the functions and jurisdiction may be prescribed by the Legislature. The same principle surely applies, despite a somewhat different constitutional framework, to the function of the courts. It is clear that jurisdiction and powers can be prescribed by the Legislature because the Constitution says so. However, the independence of the courts when exercising their adjudicative functions is guaranteed by other provisions, notably the right to a fair hearing before an "*independent*" court (section 6 (1), (8)) and the security of tenure provisions for Supreme Court and Court of Appeal Judges (sections 74, 78). The drafters of the Constitution considered it was sufficient to expressly provide that courts should be "*independent*" without the need to explicitly provide (as in the case of other constitutional offices) that no person or authority can direct how the courts manage their caseloads or decide their cases. Section 86 (4)-(5) provide similar security of tenure provisions for the DPP to those provided for Judges, which further confirms and contextualises the parameters of the operational independence explicitly conferred on the office by section 71(6) of the Constitution. Just as one would react with surprise to the suggestion that a legislative provision could validly prescribe what cases the Chief Justice should deal with personally and what cases he should assign to other judges, I instinctively found the suggestion that ordinary legislation could prescribe what acts the DPP should perform personally and what acts could be assigned to subordinates (in the face of the express terms of section 71 (3)) an eyebrow-raising one.

18. The logical starting point for any consideration of the question of whether any constitutional officer's powers can be limited by the Legislature ought to be identifying a constitutional provision conferring such authority on the Legislature. The need to construe the scope of a legislative provision said to regulate the power of someone such as the DPP ought to be a secondary step rather than the initial step in the analysis. Bearing in mind that the Constitution has been in force for nearly 60 years, the basic approach to constitutional construction ought not to require express recitation in each and every case where the interaction between the Constitution and ordinary legislation is being considered.

The Appellant's submissions

19. The Appellant's submissions essentially invited the Court to ignore the primacy of the Constitution and assume that the legislature had free rein to prescribe how the powers of

the DPP should be exercised. The central arguments advanced in the '*Appellant's Submissions*' at [2]:

> "*On the literal meaning of the statute the DPP must have knowledge of the offence, be cognizant of the sufficiency of the evidence and indicate his or her agreement to lay an Information and proceed with a prosecution…In essence it is clear that that the import of s. 199 (4) suspends the general power given to the DPP's subordinates when the institution of s. 199 proceedings arise. Further we submit that s. 199 (4) is the exception to the exercise of the general power in s. 71 of the Constitution…*"

20. The arguments had three strands: (1) consent under section 199 (4) requires the DPP personally to have to signify their consent, (2) section 199 (4) suspends the power to act through subordinates conferred by section 71 of the Constitution; and (3) section 199 (4) is an exception to the general power to act through subordinates conferred by section 71. The first argument is entirely valid as a matter of statutory construction ignoring the existence of section 71 (3). The second and third arguments appear on their face to be entirely circular, effectively contending that because section 199 (4) exists, it is intended to suspend or operate as an exception to the general authority conferred on the DPP to exercise the power to, *inter alia*, commence criminal proceedings, through subordinates.

21. These propositions, with respect, appear to be premised upon the existence of an '*Alice through the Looking Glass World*' in which ordinary legislation has primacy over the Constitution, instead of the converse real world position. Ms Smith in oral argument was unsurprisingly unable to improve upon these written submissions. However, the Appellant's counsel's arguments had originally succeeded in the Magistrates' Court, and the basis on which the arguments were rejected on the Crown's appeal to the Supreme Court lent credence to the idea that the point turned primarily on a question of statutory construction. Ms Smith addressed the following authorities:

    (a) in *Fiona Miller-v-Shayne James* [2019] SC (Bda) 21 App[6] concerned with a *nolle prosequi* under section 62 of the Criminal Jurisdiction and Procedure Act 2015, this Court rejected the argument that section 71 (3) allowed subordinates to execute what section 62 required to be signified by "*writing under the* [DPP's] *hand*";

    (b) Criminal Appeal 2001/992, *Whitter-v- DPP,* Judgment dated 21 June 2002 (LA Ward CJ) was no longer good law in light of *James* where the statute was merely looked at, and *Philpott-v-Wolffe and Cooke* [2011] Bda LR 72 (Ground CJ) where its reasoning was disapproved;

[6] This is the citation of the authority placed before the Court and clearly the decision relied upon. The Submissions referred to an appeal to this Court against conviction following a Supreme Court trial, a decision which did not deal with any issues of present concern.

(c) *R-v- NM*, Criminal Jurisdiction 2014/27, Judgment dated 21 November 2014 (Simmons J) should not be followed as even Richards J, in purporting to follow it in the present case in the Court below, doubted some of its reasoning;

(d) *Lalchan-v- R* [2022] EWCA Crim 736 illustrated why in certain contexts the DPP's personal involvement was required.

22. The three local cases which considered certification when authority was not in dispute were all decided on the tacit basis that the Legislature was competent not only to require the DPP's involvement in commencing, continuing or discontinuing criminal proceedings, but also to prescribe when her personal involvement was or was not required.

The Respondent's submissions

23. Mr Duncan was not called upon to respond to the Appellant's submissions in oral argument. However he handed up a schedule which set out the wide array of similar statutory provisions, in addition to section 199 (4), requiring the DPP's "*consent*", "*written consent*", "*direction*", "*certificate in writing*", "*notice in writing*", or "*sanction*", principally for the commencement of prosecutions:

- Administration of Justice (Contempt of Court) Act 1979, section 5 (3) ("*consent*");
- Agriculture Act 1930, section 62 ("*written consent*");
- Amenities (Control of Ruinous Structures) Act 1950, section 12 ("*written consent*" ;
- Anti-Terrorism (Financial and Other Measures) Act, section 22 ("*consent*");
- Bail Act 2005, section 14 (5) ("consent");
- Criminal Code, section 94 (4), ("*consent*");
- Criminal Code, section 96 (3), ("*written consent*");
- Criminal Code, section 116 (3), ("*direction*");
- Criminal Code, section 176B (2), ("*consent*") ;
- Criminal Code, section 182K, ("*consent*") ;
- Criminal Code, section 198(5), ("*consent*");

- Criminal Code, section 363(3), ("*consent*");
- Criminal Code, section 392 (2), ("*consent*");
- Criminal Code, section 394 (2), ("*sanction*");
- Criminal Code, section 405M(2), ("*consent*");
- Criminal Code, section 450, ("*certificate in writing*");
- Criminal Code, section 476L (3), ("*consent*") ;
- Criminal Code, section 487 (1), *nolle prosequi*, ("*writing under his hand*";
- Criminal Jurisdiction and Procedure Act 2015, section 12 (40 (c)), trial of either way offence on indictment, ("*certificate in writing*");
- Criminal Jurisdiction and Procedure Act 2015, section 25, ("*notice in writing*")[7];
- Criminal Jurisdiction and Procedure Act 2015, section 62, *nolle prosequi*, "*writing under his hand*");
- Criminal Jurisdiction and Procedure Act 2015, section 80, extending the 12 months limitation period for commencing prosecutions, ("*certificate purporting to be under the hand of*");
- Commissions of Inquiry Act 1935, section 16, ("*direction*").

24. Guidance from the Court was sought in relation to these various provisions. However, the chart was significant to my mind primarily because it reinforced the view I expressed during the hearing about how administratively unworkable it would be to require the DPP to personally certify all decisions made pursuant to section 71 of the Constitution. I observed that section 71 (3) was clearly designed to promote administrative efficacy and to prevent the need for the DPP's personal involvement in signifying her consent under provisions such as section 199 (4).

25. It was submitted in the Respondent's Submissions[8], after reciting section 71 of the Constitution:

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[7] Section 25 (5) provides: "*The functions of the Director of Public Prosecutions under this section may be exercised by counsel instructed by him and acting on his behalf*".

[8] These submissions were forwarded to me electronically in advance of the hearing with the correct criminal appeal number in the heading, but with the Respondent described as "*R*" rather than the Informant, "*Augustus*". I accordingly mistakenly assumed that these submissions related to the other appeal brought by this Appellant which did not proceed in the June session. This is why I was initially surprised that the Respondent was prepared to contest the merits of the present appeal. I also failed to note that the electronic Appeal Record had been updated

"*11. Therefore, instituting proceedings is one of the powers the DPP's subordinate can validly exercise, once exercising that power is done under and in accordance with her special or general instructions.*

12. One effect of section 199 (4) of the Code is that any private prosecution for Intrusion carries with it an extra step of requiring the DPP's prior consent to initiate it. The Respondent respectfully submits however that a subordinate acting under the DPP's general instructions is not in the same position as a citizen seeking to initiate a private prosecution and, unlike a private prosecutor, the DPP's subordinate acting under her general instructions is not also required to obtain the DPP's prior consent to institute a prosecution for Intrusion.

13. The learned judge in the court below appears to have thought as much. As expressed by him in paragraph 37 of his judgment, with which the Respondent would most humbly and respectfully seek to align:

> *'In my judgment, the second question is or should be whether, when it is that clear a subordinate of the DPP (acting as such) has instituted proceedings for an offence that may only be prosecuted with her consent, the DPP must also separately signify that consent... When a subordinate of the DPP acts pursuant to 71(2)(a), as they are entitled by section 71(3), they are exercising a portion of her constitutional authority. The only person who may stop them is the DPP herself, but I do not believe they need more than her "general instructions" to act validly in her stead pursuant to section 71(2)(a)... If the DPP does not need separately to signify her consent to proceedings which she personally institutes, it seems to me that those who are entitled to do so on her behalf do not need her to do so either.'*

14. In this regard, the authorities prayed in aid by the Appellant must be distinguished…

19. The Respondent's argument can be expressed in this way: the DPP's subordinate can generally validly exercise any of her constitutional powers, once he or she is acting under her special or general instructions. Legislation, however, can and may require some specific things to be done by the DPP herself. Those things, we say, will be reflected in legislative language that signifies the requirement of some personal act by the DPP."

26. The Respondent did not rely upon the point which I considered to be fundamental; namely that before the Legislature can specify the way in which the DPP's powers are to be exercised, it requires constitutional authority to do so. However, the central thrust of the response was that in this case section 71 (3) of the Constitution was dispositive because the Legislature had not in terms required personal certification under section 199

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after the March Session, when only the jurisdictional challenge was scheduled to be heard, to include materials which resolved the original jurisdictional concerns, the change of status not being directly drawn to my attention.

(4). This was a perhaps understandably safe submission to advance in light of the previous decisions of the Supreme Court which implied that clear statutory language could indeed displace the usual rule found in section 71 (3) of the Constitution. As regards the previous cases to consider the extent to which the DPP's powers had to be exercised personally as opposed to through subordinates, Mr Duncan submitted:

(a) the *James* case was distinguishable, because section 62 of the 2015 Act mandated written consent "*under the hand of*" the DPP;

(b) the *Philpott* case was distinguishable, because the words of what is now section 80 of the 2015 Act also required certification "*under the hand*" the DPP, and Ground CJ held in any event that the section 71 powers were not involved;

(c) the reasoning in *Whitter* (that delegation was possible) could not be supported, but the case was distinguishable in any because of the different statutory wording ("*under the hand of*");

(d) the reasoning in *NM* was problematic, as Richards J found in the present case, but the statutory language in section 199(4) did not signify a need for the DPP to personally signify consent.

The Ruling and the Judgment

27. The Ruling concluded that the consent required by section 199 (4) of the Criminal Code was not within the ambit of section 71 (3) for two main reasons. Firstly, section 71 (3) had to be construed strictly based on the reasoning in a case binding on the Magistrates' Court, *Philpott* (at [15]). Secondly, the Magistrate concluded that on a purposive construction of section 199 (4), the DPP's personal consent was required. He reached this conclusion after considering other Supreme Court decisions in which it was common ground that whether or not section 71 (3) of the Constitution authorised the DPP to act through subordinates depended upon construing the relevant legislative provision governing the DPP's powers. In addition, supplementary reliance was placed on the fact that in England and Wales separate statutory provision had been made for consents and instituting and commencing proceedings. As a result, the purported consent of the subordinate in the present case was a nullity. The most relevant case dealing with the same statutory provision was unfortunately not cited to the Magistrate.

28. The Judgment reached the contrary conclusion. Primary reliance was placed on *NM,* which concerned section 199 (4) of the Criminal Code, a judgment which was not published and was not considered in any other case. However, the Judge framed the issue in the following way:

> "*35…To my mind the question is not whether the power to consent to proceedings is delegable. Instead the first question should be whether, when it is clear that it is the DPP who has instituted proceedings for an offence that may only be prosecuted with her consent, she must also separately signify that consent. In my judgment it would be absurd to require her to do so…*
>
> *37. ..When a subordinate of the DPP acts pursuant to section 72 (1) (a), as they are entitled by section 71 (3), they are exercising a portion of her Constitutional authority. The only person who may stop them is the DPP herself, but I do not believe they need more than her 'general instructions' to act validly in her stead pursuant to section 71 (2) (a)…*"

29. The Judge, following the approach of Simmons J in *NM*, primarily relied on an analysis of section 71 of the Constitution rather than the legislation requiring the DPP's consent in concluding that the requisite consent could be given through a subordinate acting under general instructions.

Findings: merits of appeal

Narrow view: findings on merits of appeal

30. Section 199 (4) simply provides that a "*prosecution shall not be instituted…without the consent of*" the DPP for an offence under that section. Consenting to the prosecution of an accused person under section 199 (4) is clearly an exercise by the DPP of the power conferred by section 71(2) (a). When that consent is signified, whether before or after the prosecution has commenced, is unlikely to be problematic assuming the charge has been laid by a Police Officer or private prosecutor before the requisite consent is obtained, because section 71 (2) also confers the following power on the DPP:

> *"(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority…"*

31. How does the Constitution require the DPP's powers to be carried out? Section 71 (3) provides that the subsection (2) powers "*may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions*". It is therefore a matter for the DPP as a matter of internal departmental organisation to decide whether she wishes to perform all of her duties personally or not, and what duties can be performed by subordinate officers under direct or indirect instructions. As far as third parties are concerned, when a subordinate officer exercises a section 71(2) power, and assuming there is no basis for impugning their authority for acting in the relevant way, section 71 (3) eliminates any valid basis for suggesting that the DPP's personal involvement is required unless one assumes, as both parties did for the purposes of the present appeal, that ordinary legislation can narrow or cut down provisions of the Constitution. Even on what seems to me to be the heretical hypothesis that the DPP's powers could validly be circumscribed by ordinary legislation such as

section 199(4), the relevant provisions of the Criminal Code do not by their terms suggest that personal certification is a *sine qua non*, or essential requirement, for the valid exercise of the consent power. All that is required is the DPP's consent.

32. Had the *NM* case been published in the online register of judgments, the Magistrate would likely have followed it and the 'to-ing and fro-ing' between the Magistrates' Court, the Supreme Court and this Court would likely not have occurred. *NM* was a case which directly considered section 199 (4) of the Criminal Code and where the charges were held to be valid because the DPP's fiat did not, contrary to the usual practice, appear on the Information at all. Ms Christopher for the accused in that case conceded, rightly in my view, that if the *fiat* had been signed by the DPP or a subordinate, consent would validly have been given. Against this background, Simmons J recorded the following concise but entirely valid conclusions (strictly *obiter*) in relation to the central issue which also arises on the present appeal:

> "*15. In my view section 199 (4) of the Criminal Code must be read with section 71 subsections (2) (a) and (3) of the Constitution. When this is done section 199 (4) should be understood to mean that such a prosecution can only be instituted by the DPP or his subordinates…*"

33. That is a pithy summary of why the present appeal was dismissed. No basis was established for disapplying the provisions of section 71 (3) of the Constitution and section 199 (4) of the Criminal Code could not be read as expressing any such legislative intent. The other local cases relied upon by the Appellant's counsel and said to be distinguishable by the Respondent's counsel (on the hypothesis that the Legislature could override the general rule prescribed by section 71 (3) of the Constitution) do merit brief comment:

    (a) *Whitter* is distinguishable, because a certificate of when facts first came to the attention of the DPP for the purposes of extending the standard limitation period of 12 months for certain offences is not precisely the same as a consent *fiat*. However, it is also arguable that the relevant certifying act falls within section 71 (2) (a), purposively read, nonetheless, so that section 71 (3) applies. This view is more straightforward than attributing to the Legislature the competence to empower the DPP to perform acts she is not empowered by the Constitution to perform. I respectfully disagree with the suggestion (at page 4), that formal proof of delegation is required if the authority of the subordinate is challenged. Delegation in the strict sense is not required;

    (b) *Philpott* is distinguishable for the same reasons as *Whitter*. While I agree with the views expressed with respect to delegation not being involved under section 71 (3), I respectfully disagree with the view that in issuing a certificate about when facts came to the DPP's knowledge for the

purposes of instituting proceedings which would otherwise have been out of time, the DPP is not exercising section 71 (2) (a) powers to which section 71 (3) applies. The Constitution is the sole source of the DPP's powers;

(c) *James* is clearly distinguishable, not just because in that case the DPP himself was seeking to invalidate the *nolle prosequi* filed by the subordinate and so more than statutory construction was really involved. The relevant statutory provision required the DPP's decision to be "*under his hand*", and the Court was presumably constrained as matter of comity to follow the previous Supreme Court decision on the same statutory language in *Philpott*, unless satisfied it was plainly wrong (which no one seemingly contended). However, for the reasons stated below in relation to the point which was not argued, I respectfully disagree with the suggestion that the language of the statute ("*under his hand*") has any general relevance to deciding whether section 71 (3) applies.

34. Assuming for present purposes that the Legislature was competent to mandate that the DPP must personally memorialise any relevant decision, the appeal was dismissed on the narrow basis that section 199 (4) did not impose any such requirement of personal involvement and that *NM* was correctly decided (albeit by way of concession) by Simmons J in the Supreme Court.

Wider basis for dismissing the appeal: provisional views

35. I expressed reticence during the course of argument about deciding a point which had not received the benefit of full argument, namely whether it was possible for the provisions of section 71 (3) to be cut down by ordinary legislation. On one view, this is not a new or potentially controversial point which can form the subject of sensible argument. In fact, as already noted, the critical point is somewhat more nuanced than that. It is whether the legislative competence to require the DPP's involvement in the commencement and discontinuance, as an element of creating criminal offence, also incorporates, by necessary implication, an incidental legislative power to require the DPP to act personally in appropriate cases. If it was obvious that no such legislative competence exists, as I initially felt it to be, the various previous decisions cited would not have made the contrary assumption. It would also be wrong to dilute the fair hearing rights guaranteed by section 6 of the Constitution in an overly enthusiastic desire to vindicate the integrity of section 71 of the Constitution. My provisional views as to why the Legislature cannot cut down the scope of section 71 (3) of the Constitution are set out below. These are very much my personal views, and not that of the Court. They are set out primarily in response to the Crown's expressed concern about the wider implications of these statutory provisions. But also, because this wider analysis influenced my own approach to the narrow basis on which the appeal was argued to such an extent that failing to acknowledge this would border on intellectual dishonesty I fully accept that it is possible

that some valid basis for a legislative competence to mandate that the DPP must exercise certain powers personally might potentially be identified with the benefit of adversarial argument and further legal analysis. However, no such basis can be easily extracted from the previous Supreme Court cases which have considered this topic.

36. The legislative power to create offences in relation to which the DPP's powers can be exercised, acknowledged by section 71 (2) (a) of the Constitution, potentially includes (by necessary implication) the power of the Legislature to prescribe (a) procedural mechanisms such as "writing" and (b) whether or not the DPP must act personally. The present appeal was argued on the implicit basis that the Legislature could validly regulate both (a) and (b). Clearly it is competent to prescribe matters falling within the ambit of (a). However, my provisional view is that legislative competence does not extend to (b) at all. I feel obliged to set out these provisional views in the interests of transparency as they shaped the view I formed of the merits of the appeal narrowly framed. The primacy of the Constitution, and the fact that the Legislature's competence is circumscribed by it, is a trite point which forms the bedrock of our legal system. It is impossible to properly analyse any interaction between ordinary legislation and the Constitution without having regard to its primacy, however counsel may choose to frame their submissions .

37. That said, one of the biggest challenges in Bermudian litigation practice is analytically adapting to the exceptional legal contexts when it is inappropriate to approach legal issues in the same way as would be done as a matter of English law. When navigating the legal seas between the coasts of the Constitution and ordinary legislation, the Bermudian lawyer and judge must, Odysseus-like, block their ears against the Siren songs of British Parliamentary sovereignty. A failure to do this may well explain why what appears to me to be an ultimately straightforward question has provoked so many legal contortions in this and previous cases on this topic. The distinction between the English and Bermudian positions may be summarised as follows:

    (a) under English law, there is a common law rule of statutory construction which presumes that Parliament does not intend to interfere with fundamental rights such as the right to jury trial or vested property rights. However Parliament is competent to interfere with such rights as long as plain language is used;

    (b) under Bermuda law, there is a positive and hard-edged legal principle that the Legislature is not competent to enact laws which conflict with the Constitution. This principle is never actively engaged in the vast majority of cases which come before the Courts.

38. The DPP is a creature of the Constitution, not ordinary legislation. Her powers are defined by the Constitution, which does not (within the ambit of section 71 at least) empower the Legislature to embellish them, let alone modify them. Accordingly, any person wishing to suggest that the Legislature is competent to limit the DPP's

constitutional powers, or indeed to amplify them, assumes a heavy burden to displace the foundational principles of constitutional supremacy, unless they can identify some overlooked source of legislative authority within the Constitution itself. The Legislature is clearly competent to prescribe particular legislative criminal contexts in which the DPP's constitutional powers may be exercised. Section 71 (2) empowers the DPP to act in relation to offences created by "*any law*". But the Legislature cannot possibly be competent to confer additional powers on the DPP beyond those carefully delineated by the Constitution, for example by requiring civil or disciplinary proceedings to be commenced with the DPP's consent. Nor indeed can the Legislature prescribe how the DPP should exercise her constitutional powers, absent express legislative authority conferred by the Constitution itself. If the Legislature were to be assumed to have *carte blanche* to prescribe how the DPP's powers should be exercised, this would run a coach and horses through arguably the central pillar of section 71: "*(6) In the exercise of the powers conferred on him by this section, the* [DPP] *shall not be subject to the direction or control of any other person or authority*".

39. Requiring the DPP to consent to the institution of criminal proceedings is prescribing a legal context in which the DPP's constitutional powers may be independently exercised. This is very much within the ambit of the Legislature's power to "*make laws for the peace, order and good government of Bermuda*" (Bermuda Constitution, section 34) and entails no incursion into the DPP's protected zone of operational autonomy. Requiring the DPP to exercise certain powers in a certain manner, some personally, others through subordinates, when the Constitution has expressly dealt with this matter, is figuratively equivalent to legislators stepping into the DPP's office and telling her how to run it. The central purpose of the constitutional creation of the DPP is to ensure, where the Attorney-General is a member of the legislative branch of Government as she now is), that the commencement, prosecution and discontinuance of criminal proceedings is independent of political control. This includes, by necessary implication, operational independence and security of tenure (which is expressly guaranteed) as well. Unless there is a bright dividing line between the exercise of the DPP's powers and the Legislature, one potentially enters 'slippery slope' territory. It becomes difficult to identify any coherent basis in principle for demarcating what aspects of the DPP's powers the Legislature can or cannot prescribe. The answer cannot merely be that the Legislature has clearly expressed the intention to prescribe the matter in question, unless one steps into a parallel legal universe in which the Bermuda Constitution does not exist. The proposition that Parliament should be entitled to decide what offences are sufficiently serious to warrant the DPP's personal involvement underpinned Ms Smith's construction of section 199 (4). That argument only holds water if one ignores the principles of constitutional primacy which exist in Bermuda's real legal world, and one succumbs to the lure of notions of Parliamentary sovereignty which do not apply here.

40. Section 71(2) most pertinently for present purposes confers the following power on the DPP:

> "*(a) to institute and undertake criminal proceedings against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;*
>
> *(b) to take over and continue any such criminal proceedings that have been instituted or undertaken 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.*"

41. That these powers embrace commencing, prosecuting, taking over and discontinuing criminal proceedings is self-evident. It requires little analysis, once one reminds oneself that the DPP's powers are constitutionally defined, to conclude that subsections (a) and (c) are the powers which are engaged when a statutory provision requires the DPP's consent to be obtained before proceedings are commenced, or for the DPP to implement a decision to discontinue proceedings. By necessary implication, the Legislature is permitted to create offences in relation to which the relevant constitutional powers may be exercised and to specify what is procedurally required. Bermuda does not have common law offences. The DPP's powers would be wholly ineffective without statutory provisions creating offences in relation to which the constitutional powers could be exercised. Requiring *fiats* and similar certifications of a DPP decision through legislation is quite clearly also necessarily incidental to the legislative power to create criminal offences, as is requiring decisions to be recorded in writing and requiring opinions to be formed about the existence of particular facts for limitation purposes. However there is a huge, logical gap between this proposition and the notion that the Legislature can exercise an implied power to prescribe when the DPP must act personally or can act through subordinates. Prescribing how the DPP, as a matter of internal office administration, ought to signify that any of these constitutional powers has been exercised is not, on any proper analysis, necessarily incidental to creating a statutory basis for the exercise of the power in relation to a particular offence, in circumstances where section 71 (3) of the Constitution explicitly deals with this very topic. If section 71 (3) was not intended to mandate the last word on this topic, one would expect to find qualifying language such as "*save as may be prescribed by law*". The main difficulty with the assumption that the power to create legal offences in relation to which the DPP's powers will be exercised includes the power to prescribe when the DPP must act personally is that this power does not arise by <u>necessary</u> implication at all. It might very plausibly arise if section 71 (3) did not exist, but as the topic of authority has been dealt with expressly, there is no gap to be filled by implication in relation to the matter of how the DPP's authority is exercised at all.

42. It may be helpful, by way of analogy, to consider the parallel domain of judicial operational autonomy, as judicial independence is a more universal principle which is more instinctively understood. The Constitution expressly contemplates that the jurisdiction of the courts will be prescribed by the Legislature (unlike the position with

the DPP, because of the different character of judicial functions). A variety of statutes uncontroversially confer jurisdiction and powers on the courts. However, because the Constitution also guarantees judicial independence, the Legislature's authority does not extend to matters which would compromise judicial independence. The notion of operational autonomy as an incident of judicial independence is more implicit than explicit in constitutional terms. However, statutory provisions which purported to prescribe what judges should hear what cases, or to impose statutory requirements in relation to the length of judgments, or impose criminal penalties on judges for delivering more than one judgment against the government in any one calendar year, would surely all be liable to be struck-down as impermissibly contravening the constitutional principle of judicial independence. It is unthinkable, of course, that any such legislative incursions would be enacted, because the parameters of judicial independence are so well legally understood at a conscious and instinctive level. It bears noting that none of the relevant statutory provisions contain language which explicitly requires the relevant decision to be recorded by the DPP personally; none of the previous cases refer to legislative history supporting any such subjective legislative intent.

43. It therefore provisionally seems to me that the analogous constitutional principles of operational independence applicable to the DPP make it impermissible for the Legislature to modify the constitutionally entrenched rule that the DPP can act personally or through subordinates. How the DPP chooses to manage her office in terms of assigning and distributing work relating to the exercise of her constitutional powers ought to be beyond the competence of the Legislature, on an ultimately straightforward reading of section 71 (2), (3) and (6) of the Constitution. However, a formal decision on this matter will have to be postponed to another day.

Other statutory provisions relating to the DPP's constitutional powers

44. This appeal has been dismissed on the narrow basis on which it was primarily argued, that the relevant statute did not by its terms require the DPP to personally sign the *fiat*.

45. As regards the more than 20 other statutory provisions governing the exercise of the DPP's constitutional powers which Mr Duncan placed before the Court, the operative part of the present decision would appear to apply by analogy to all those statutory provisions which do <u>not</u> have language which potentially suggests that the DPP's personal signification is required (e.g. "*writing under his hand*") .The same reasoning which informs the construction of section 199 (4) of the Criminal Code in relation to section 71 (2)-(3) of the Constitution ought in principle to apply by analogy to similarly-worded provisions.

46. I have set out above my views on the wider and more fundamental point that the Legislature is not competent to override the provisions of section 71 (3) of the Constitution in any event, which permits the DPP (at her own election) to act personally or through subordinates in unqualified terms. When the Constitution has so clearly

empowered the DPP to act through subordinates at her election presumably for reasons of operational efficiency, mental gymnastics ought not to be required to determine whether this constitutional mandate can be and/or has been displaced by ordinary legislation. These views should, it bears repeating, be regarded as my provisional views until the point is properly resolved perhaps on an application by the DPP for declaratory relief in the Supreme Court, with the Attorney-General as Respondent.

47. Whether or not the DPP does indeed enjoy the unfettered operational autonomy the Constitution appears to confer upon them is not a trifling matter, is one which may indirectly have implications for other constitutional offices, and should not properly be subject to any doubt.

Summary

48. For these reasons, on 16 June 2026, the Appellant's appeal against the Judgment was dismissed. If the wider legal position on the DPP's operational autonomy (as to which I have personally provisionally opined above) can in due course be clarified, the present appeal though unsuccessful, will have served a very useful public purpose indeed.

Dame Elizabeth Gloster JA

49. I agree that this appeal should be dismissed on the narrow ground, which was argued before us, namely that section 199 (4) of the Criminal Code did not require the DPP personally to sign the fiat evidencing her consent to the commencement of proceedings. Since we received no argument on the wider ground referred to by the President, I would prefer to express no view on that issue.

Sir Julian Flaux JA

50. I agree that the appeal should be dismissed on the narrow ground but, like Gloster JA, I would prefer not to express a view on the wider ground.