Neutral Citation Number: [2026] CA (Bda) 20 Crim

Criminal Appeal No. 2 of 2024

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
CASE No. 20 of 2022

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 5 November 2026

Before:

JUSTICE OF APPEAL THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL THE RT HON DAME ELIZABETH GLOSTER
JUSTICE OF APPEAL THE RT HON SIR GARY HICKINBOTTOM

- -

Between:

THE KING

Appellant

-and-

ISAIAH SMITH
OMARI WILLIAMS
JAJA DESILVA

Respondents

Appearances: **Mr Adley Duncan for the Appellant**
Ms Susan Mulligan for the Respondents

Hearing Date 17 November 2025
Further written submissions: 18 & 24 November 2025

Draft Judgment circulated: 22 October 2026
Judgment delivered: 5 November 2026

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JUDGMENT

CLARKE, J.A.

1. This is an appeal by the Crown from the decision of Wolffe J of 29 May 2024 (followed by a Ruling of 4 September 2024 with full reasons ("the Ruling")) whereby the learned judge declined to return the indictment in a murder trial to enable a *nolle prosequi* to be entered.

The history of the proceedings

2. On **20 August 2022** Marcus Wilson was killed as a result of an incident that occurred on that date. On **26 August 2022** Senior Magistrate Anderson made an order sending the Respondents to the Supreme Court for trial. On **28 September 2022** an indictment was issued containing two counts. Count 1 charged all three of the Respondents with the murder of Marcus Wilson on 20 August 2022. Count 2 charged Isaiah Smith and Omari Williams, the First and Second Respondents, with having a bladed article in a public place on the same date.

3. The trial commenced on **21 May 2024.** Things went catastrophically badly for the prosecution. As the judge put it at beginning of his ruling:

> *"2 I will be covering in greater detail later what transpired during the trial which commenced on the 21st of May 2024. Suffice it to say at this juncture that when giving his oral evidence at trial the Prosecution's primary witness, Mr. John Cox, failed to come up to proof in establishing the culpability of any of the Defendants for any of the offences charged. This was despite valiant but ultimately futile efforts by Mr. Adley Duncan (for the Prosecution) for him to utter even a scintilla of material evidence which was consistent with the lengthy 44 page witness statement that he gave to the police on the 23rd August 2022 (which appears on pages 67 to 110 of the Court Record)."*

4. At paragraph 11 of his Ruling the judge said this:

> *"11 Crucial to my decision to not allow the Prosecution to enter the nolle prosequi were (i) the grossly inherent weaknesses and inconsistencies in the evidence which the Prosecution was able to adduce at trial, and relatedly (ii) the devastatingly* [sic] *way in which the Prosecution's case imploded before the watchful eyes of the Jury. To illustrate and contextualize this it would be beneficial to give somewhat of a play-by-play commentary as to how the trial unwrapped."*

5. In paragraphs 12-24 the judge gave that commentary. No useful purpose would be served by setting it out again. It is, however, appropriate to summarize its contents.

6. Paragraphs 12-14 summarized what the jury was told in the prosecution's opening speech. This was that Smith and Mr Wilson (the deceased) lived on the same property; differences arose between them, and Smith was asked by Mr Wilson to leave. Instead of leaving Smith threatened Mr Wilson. A few days later Mr Wilson was stabbed and killed upon the return of Smith with Defendants Williams and DeSilva. The jury was told that they would not be hearing from a Prosecution witness that they actually saw the moment when Mr Wilson was stabbed or which of the Defendants stabbed him; but they should expect to hear Prosecution witnesses give oral testimony as to (i) who had knives and who did not; (ii) who made the threats; and (iii) that Mr Wilson suffered from multiple stab wounds after the three Defendants left Mr Wilsons's house that day. They were also told that the Prosecution would be calling witnesses that were present before, during, and after the incident and that their evidence would point to the guilt of the Defendants.

7. Paragraph 15 referred to the evidence of the first witness - DC Jason Savoury - who introduced CCTV footage of the Defendants in a vehicle together going to the residence of Mr White (see [8] below) on 20 August 2022.

8. Paragraphs 16-18 dealt with Mr White's evidence. The Prosecution case was (a) that Mr White drove the Defendants to Mr Wilson's residence; (b) that a physical altercation between Mr Wilson and at least one of the Defendants broke out; and (c) that he was the one who drove the Defendants away from the scene after Mr Wilson was killed. Mr White's evidence, the judge observed,

> "*did not squarely hit the mark in conclusively establishing, whether directly or circumstantially, the culpability of any of the Defendants. Other than placing the Defendants at the scene of the incident and stating that there was an altercation, Mr. White was not one of those witnesses who Mr. Kitson-Walters told the Jury would give evidence as to who had knives or as to who made any threats to Mr Wilson*".

9. In paragraph 17 the judge said that Mr White's evidence was also inconsistent with the evidence of Mr Cox (see [11] below) as to which of the Defendants were involved in the initial fight with Mr Wilson.

> "*Specifically, Mr. White saying that it was Defendant Williams who was first having a cordial conversation with Mr. Wilson but which then morphed into a physical fight, but Mr. Cox stating in his police interview that it was Defendant Smith who was first having a conversation with Mr. Wilson. This was a major inconsistency in the Prosecution's case because it cast reasonable doubt on the Prosecution's narrative as to who and what instigated the fight which culminated into the death of Mr. Wilson".*

10. The judge also expressed, in paragraph 18, some surprise that Mr White was not charged with any offence even though he appeared to have driven the Defendants to and from Mr Wilson's house. And in paragraph 19 he observed that the Prosecution had not called Mr Wilson's brother who had said in a police interview on the day of the incident that he was actually involved in a fight with the Defendants at the material time.

11. In paragraph 20 the judge observed that the Prosecution's case stood and fell on the evidence of Mr Cox and that he was THE (sic) primary witness for the Prosecution (as the DPP accepts) and that "*Unfortunate* [sic] *for the Prosecution Mr. Cox's evidence was not only replete with major consequential evidential issues but in spectacular fashion he failed to come up to proof*".

12. In paragraph 21 the judge said, "*One only needs to look at the deep and wide chasm between what Mr Cox said in his police statement and what he said on the witness stand*". The judge then set out in [21] – [22] what Mr Cox had said in his police interview.

13. However, as the judge observed at paragraph 23:

> "*Mr. Cox said none of this when he took the stand* ***on the 27th May 2024****, and by his verbal and physical demeanour which was palpable within minutes of him entering the witness box, it was pellucid that he was not prepared to*"
>
> and
>
> "*as the questions ventured into the territory as to what he saw, heard and did on the 20th August 2022 Mr. Cox's answers became more and more monosyllabic and evasive. Notably, his answers were also punctuated by obvious pregnant pauses between them and Mr. Duncan's questions*."

14. In paragraph [24], the judge set out large swathes of Mr Cox's evidence, which only lasted for 20 minutes. I will not set out that evidence again here, but what is set out in the judgment shows that the judge's description of his evidence at [20] - [23] was well founded. And, as he put it in [25]:

> "*25 It must surely have been to the chagrin of the Prosecution that Mr. Cox's police statement did not marry up with what he said in the presence of the Jury. Ergo, what Mr. Cox said in Court, or did not say, was nowhere near consistent with the Prosecution's opening address to the Jury. This unforeseen twist clearly took Mr. Duncan and Mr. Kitson-Walters by complete surprise. So much so that after trying to salvage the Prosecution's case by attempting to extract something of evidential value from Mr. Cox as to what he saw and did, and most importantly how Mr. Wilson came to his death, Mr. Duncan was forced to proverbially pull the plug on Mr. Cox's oral testimony after somewhat arduous questioning (which fell just short of Mr. Duncan treating Mr. Cox as a hostile witness). This was a devastating blow to the Prosecution's case against all of the Defendants and it is likely that*

> *the Jury may have also formed this opinion. Unsurprisingly, and smartly, neither Ms. Susan Mulligan (for Defendant Smith), Mr. Charles Richardson (for Defendant Williams), nor Mr. Marc Daniels (for Defendant Desilva) had any cross-examination for Mr. Cox."*

The Respondents, we were told, had throughout the trial taken the position that Mr Cox was an unreliable and dishonest witness, who could not possibly have seen the things that he claimed to the police that he had observed.

15. What happened thereafter was that Mr Duncan sought an adjournment for an hour to allow him to consult with the DPP. He was granted that adjournment and he returned an hour later with a notice of *Nolle Prosequi* signed by the DPP, dated **27 May 2024.** The case was then adjourned to the following day to enable the parties to make submissions on how to proceed in the light of the *nolle prosequi*. All the Defence Counsel indicated that they would be challenging the DPP's decision to enter a *nolle prosequi*. On **28 May 2024** the judge heard submissions as to whether he should enter the *nolle prosequi* or whether he should direct the jury to acquit the defendants.

16. On **29 May 2024** the judge gave his *ex tempore* ruling (with a more detailed one to follow later) in relation to *nolle prosequi*. In it he concluded *"in the circumstances of this case, that I should invoke my inherent jurisdiction to prevent an abuse of process and to secure fair treatment of the defendants. Accordingly, I decline to return the indictment so as to enable the nolle prosequi being entered*."

17. Immediately after the judge had given his ruling Mr Duncan informed the judge that the prosecution had closed its case. Shortly thereafter the judge acceded to the defendants' respective submissions that there was no case for their clients to answer and made a decision that there was no evidence upon which the jury could convict any of the defendants of either of the offences on the indictment. When the jury had returned to the Court the judge directed them to return verdicts of not guilty in respect of all the defendants in respect of the offences for which they were respectively charged. This they duly did. The judge then discharged all the defendants,

The Law

18. Section 487 of the **Criminal Code Act 1907**, as it appears in the Bermuda Laws Online website, provides as follows:

> **"Nolle prosequi**
>
> *487 (1) The Director of Public Prosecutions may inform the Supreme Court by writing under his hand, that the Crown will not then prefer any indictment, or he may, by writing under his hand or announcement in open court, inform the Supreme Court that the Crown will not then proceed further upon an*

> *indictment then pending before the Supreme Court.*
>
> *(2) When such information is given to the Supreme Court, the Supreme Court shall cause the accused person to be discharged from any further proceedings in respect of the charge or charges upon which the accused person was committed or, where an indictment is pending, which are contained in the indictment; but such discharge shall not operate as a bar to any further proceedings on the same the notice of any sending within twelve months of such sending".*

19. As is apparent from that wording, a *nolle prosequi* can be issued when an indictment is pending, as was the position in the present case, where the *nolle prosequi* was issued before the Prosecution had even ended its case.

20. As is also apparent, something appears to have has gone slightly amiss in relation to section 87 (2) where the words "*on the same the notice of any sending*" are something of a muddle.

21. To see what has happened it is necessary to look at the history of the legislation. As to that, before the passing of the **Criminal Jurisdiction and Procedure Act 2015**, section 487 (2) of the **Criminal Code Act 1907** (the 1907 Act) read as follows:

> *"(2) When such information is given to the Supreme Court, the Supreme Court shall cause the accused person to be discharged from any further proceedings in respect of the charge or charges upon which the accused person was committed or, where an indictment is pending, which are contained in the indictment; but such discharge shall not operate as a bar to any further proceedings on the same committal order within twelve months of such committal".*

22. This was the appropriate wording at a time when defendants were sent to the Supreme Court by a committal order, following committal proceedings which typically involved a full hearing before the Magistrate as to whether the sufficiency threshold was passed. That situation changed when the **Criminal Jurisdiction and Procedure Act 2015** introduced a process of sending accused persons for trial: see Part IV thereof. Section 89 (e) (i) of that Act amended section 487 (2) of the 1907 Act by deleting the words "*committal order*" and substituting the words "*the notice of any sending*". Section 89 (e) (ii) of that Act provided for the deletion of the word "*committal*" and the substitution of the word "*sending*".

23. The effect of those amendments was to produce the wording on the website as is apparent from the amendment of the original version of 487 (2) as set out below:

> *"(2) When such information is given to the Supreme Court, the Supreme Court shall cause the accused person to be discharged from any further proceedings in respect of the charge or charges upon which the accused person*

> *was committed or, where an indictment is pending, which are contained in the indictment; but such discharge shall not operate as a bar to any further proceedings on the same ~~committal order~~ the notice of any sending within twelve months of such ~~committal~~" sending."*

It is apparent that the correct way to address this problem is to ignore the superfluous "*the*" before "*notice*" in the penultimate line of section 487 (2).

24. The effect of section 487 (2) is, therefore, that the absence of a bar to any further proceedings on the same notice of sending only applies if those proceedings take place within 12 months of the date of the sending of that notice. In the present case the notice was sent on 26 August 2022 which would mean that, if the *nolle prosequi* took effect, there could not be any further proceedings on the August 2022 notice which had been sent some 19 months beforehand. It appears, however, that the judge took the view that the prosecution could be reinstated within 12 months of the date of the *nolle prosequi*: see para 29 of the Ruling.

25. There is a potential ambiguity as to what is meant by "*any further proceedings*", In particular does it mean (a) that any steps to move the case forward on the same notice of sending must be begun within 12 months of the sending; or (b) that the trial on the same notice of sending must take place (or begin) within the same period. In my judgment it must mean the former.

26. Mr Duncan drew attention to another feature of the **Criminal Jurisdiction and Procedure Act 2015.** Section 62 thereof provides:

> "*62 In any proceedings instituted before a magistrates' court, the Director of Public Prosecutions may at any stage of the proceedings, by writing under his hand, enter a nolle prosequi to stay proceedings on any information or summons, and upon receipt of such nolle prosequi the magistrate shall cause the accused person to be discharged from any further proceedings in respect of such information or summons; and such discharge shall operate as a bar to further proceedings on the same information or summons, unless the Director of Public Prosecutions by writing under his hand, consents to such further proceedings".*

Accordingly, the DPP is completely unrestricted from bringing any further proceedings on a stayed information in the Magistrates' Court.

27. The power of the DPP (i) 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 and (ii) to discontinue any criminal proceedings instituted by himself is recognized and established by sections 71 and 71A of the Bermuda Constitution. Section 71 (6) thereof, when read with section 71A, provides that in the exercise of such

power the DPP "*shall not be subject to the direction or control of any other person or authority"***.**

Common ground

28. It is common ground that the Supreme Court has a parallel power to that of the DPP, afforded to it by its inherent jurisdiction to prevent abuse of its process, in appropriate circumstances to refuse to accept a *nolle prosequi;* but that such circumstances would be exceptional. I take it to be common ground and, in any event, hold that the fact that in the exercise of its power the DPP is not "*subject to the direction or control of any other person or authority"* does not mean that the Court is precluded from exercising its jurisdiction to review the DPP's decision to enter a *nolle prosequi* and, in the light of that review, to decide whether to give effect to the *nolle prosequi* would amount to an abuse of its process. In addition, I would accept that there can be an abuse of the Court's process if the decision of the DPP to issue a *nolle prosequi* produces a result which is unfair to the defendants.

29. There are a number of examples of cases across different jurisdictions where interference with the DPP's power was held to be proper. It is instructive to consider some of them.

30. In the Queensland case of **R v Jell, ex p Attorney General** [1991] 1 Qd R 48 the trial judge refused the attempt to enter a *nolle prosequi* after a successful no-case submission *after* the totality of evidence was adduced and the closing address of the prosecutor was delivered, but *before* the formal direction to the jury by the court to return not-guilty verdicts. The prosecution sought to enter a *nolle prosequi* in order obtain the opinion of the Court of Criminal Appeal as to whether the judge was right or wrong on a particular ruling and, if that Court agreed with the Crown's contention that he was wrong, then to present a further indictment. The Court of Appeal held that it was open to the trial judge to act as he did. It was observed in *Jell* that it would be similarly appropriate to refuse to accept a *nolle prosequi* where a prosecutor sought to enter one when one or more requests for redirection from the jury may have so signalled their likely verdict that an unscrupulous prosecutor might seek to avoid it by entering *nolle prosequi* even at that late stage (page 54). The judgment also contains statements that the Court will exercise its jurisdiction to decline to give effect to a *nolle prosequi* in "*an extreme case*" (page 53) or in "*rare cases* "(page 68).

31. In the course of his judgment in that case Thomas J said:

> *"The entry of a nolle prosequi at the final stages of a trial is effectively an abortion of that trial and a unilateral preservation of rights by one party - the Crown. The accused has been in the jury's charge but is no longer. The judge tells the jury "the accused is no longer in your charge and you will not be asked for a verdict. The prosecution has ceased." The power of the court to prevent this happening when it is plainly intended as a means of enlivening an almost*

> *dead prosecution and where the further prosecution must be regarded as an oppressive abuse is simply an aspect of the court's duty to control its own process and to ensure that the accused receives a fair trial."*

32. In Queensland the accepted method by which a *nolle prosequi* was entered was for the prosecutor to request the return of the indictment from the court, whereupon the prosecutor makes the appropriate entry on that indictment indicating a *nolle prosequi* and returns it to the court. The accused is then to be discharged from all further proceedings upon that indictment. It appears that if the court declines to return the indictment for the purpose of allowing the appropriate entry to be made on it the result is that the *nolle prosequi* is ineffective. Different procedures apply in different Australian jurisdictions.

33. In **Melanie Tapper and anor v DPP and anor Suit Nos M 103 and 113 of 1998** the Supreme Court of Jamaica declared that the entry of a *nolle prosequi* was an abuse of process in circumstances where the *nolle prosequi* was entered so that another Magistrate, more favorable to the prosecution, could preside. In the same case the Court observed that it would be appropriate to refuse the entry of a *nolle prosequi* where it was entered maliciously to frustrate or otherwise improperly interfere with a private prosecution. Smith J indicated (page 22) that the Court "*may in rare and exceptional circumstance's refuse to accept a nolle prosequi entered by the DPP*".

34. In **R v Saunders** [1998] 2 Qd. R 270, in the Supreme Court of Brisbane, the trial judge refused the attempt to enter a *nolle prosequi* after a successful no-case submission *after* the totality of evidence was adduced and the closing address of the prosecutor was delivered, but *before* the formal direction to the jury by the court to return not-guilty verdicts. In that case the sole evidence against the defendant had been a tape recording which was acknowledged by all parties to have been a fabrication, In the course of his judgment the judge referred to the House of Lords case of *Connolly v DPP* [1964] AC where Lord Morris of Borth-y-Gest said:

> "*The power (which is inherent in a court's jurisdiction) to prevent abuse of its process and to control its own procedure must in a Criminal Court include a power to safeguard an accused person from oppression or prejudice."*

35. In **Matalulu v DPP** [2003] 4 LRC 712 the Supreme Court of Fiji observed:

> *"The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purposes to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:*
>
> …..

> *4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved*."

36. In **Mohit v DPP of Mauritius** [2006] UKPC 20 the issue was whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution, in exercise of his powers under section 72(3)(c) of the 1968 Constitution, was in principle susceptible to review by the courts. After reviewing the relevant Constitutional provisions of Mauritius in relation to the DPP (very similar to those relied on by the DPP in the present case) Lord Bingham observed at [11]:

> *"Provisions to the same or very similar effect as those quoted were included in a number of Constitutions of Commonwealth States. They have been the subject of judicial consideration in Guyana (Tappin v Lucas (1973) 20 WIR 229), Barbados (Re King's Application (1988) 40 WIR 15), Jamaica (Tapper v Director of Public Prosecutions (Supreme Court of Jamaica in the Constitutional Court, 8 February 1999, unreported)) and Fiji (Matalulu v DPP [2003] 4 LRC 712) as well as in Mauritius. While the reasoning of these judgments varies, in none (save in Mauritius) has the DPP's statutory power to discontinue proceedings been held to be immune from judicial review."*

The Privy Council held that the powers conferred on the DPP by section 72 (3) of the Mauritius Constitution, which included a power "*to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority*" were subject to judicial review.

37. At paragraph [21] Lord Bingham said:

> ".. *There is here nothing to displace the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review on grounds such as those listed in Matalulu. The Board would respectfully endorse the cited passage from the Supreme Court of Fiji's judgement in that case as an accurate and helpful summary of the law as applicable in Mauritius."*
>
> *The judge's ruling*

38. In his Ruling the judge decided a number of matters, including the following:

> (a) that authorities in Queensland Australia have held that the Court retains a concomitant inherent power not to accept a *nolle prosequi* so as "*to prevent an abuse of the Court's process and in order to secure fair treatment of an accused person*" [8];

(b) that the Court's jurisdiction to prevent the entry of a *nolle prosequi* should only be exercised in extreme, exceptional or rare cases, referring, inter alia, to dicta of Macrossan CJ in *Jell [9]*;

(c) that a combination of several considerable factors made the case so exceptional that he was "*irresistibly moved*" to exercise his inherent jurisdiction not to accept the *nolle prosequi* in order to prevent any abuse of process and to secure fair treatment for all of the defendants [27].He said that the factors to which he was referring were those set out in his earlier paragraphs : "*that is the woeful lack of evidence against all of the defendants; the inherent weaknesses and inconsistencies in the Prosecution's case against all of the Defendants; and that the Prosecution's main witness, Mr Cox, and to some degree Mr White, strikingly not coming up to proof*."

39. At paragraphs [28] and [29] of his Ruling the judge said this

"28 The Prosecution brought the Defendants to Court, and it is the Prosecution's duty and burden to prove its case against them beyond a reasonable doubt. In any criminal case the prosecution, through disclosure, particularization of the offences, provision of summaries of the evidence, and in opening addresses to the Jury, essentially nails its colours to the mast as to what its case is against an accused person. With this foundation, the prosecution marshals its evidence with the clear intention of meeting its burden. The prosecution then trusts in the trial process that if it has fulfilled its prosecutorial duty then there is a real likelihood that a properly directed jury will find the accused person guilty of the offence(s) charged. Of course, from the perspective of the accused person, they trust in the trial process that if the prosecution does not meet its burden, then they must be found not guilty of the offences for which they have appeared at trial for.

29. Therefore, it cannot be right or fair that in circumstances where the prosecution's case has taken fatal hits because of pervasive inherent weaknesses or inconsistencies in the evidence of their witnesses, or because their witnesses did not [come] *up to proof, that the prosecution can attempt to stop the hemorrhaging by using a nolle prosequi as a tourniquet. And then, in Jamaican disc jockey parlance, to "Wheel and come again" within twelve (12) months. That is not and should not be the purpose or effect of a nolle prosequi. If it were permissible then this would leave open limitless opportunities for the Prosecution to abruptly stop any trial at any time when its case is going badly, regroup, and then resuscitate the case later within a year. This surely would be an affront to every tenet underlining the proper administration of justice and the fair treatment of accused persons who would, despite a botched trial by the Prosecution, would have to endure further stress and anxiety (and possibly financial costs) for an unknown period of time waiting for the Sword of Damocles to precipitously fall. I reiterate, this cannot be right or fair"*

40. The judge recorded that Mr Duncan had submitted that the filing of the *nolle prosequi* was so that the Prosecution might launch an investigation into why Mr Cox would come up short in giving his evidence. The judge set out a host of reasons why that might be so; and observed that whatever the reason the Prosecution could not escape the fact that the rest of their case was extremely problematic because there were inherent weaknesses and inconsistencies between the police statements of Mr Cox and Mr White in respect of the individual and collective culpability of the defendants. In addition, Mr White did not give evidence as to which of the Defendants had knives and which of them would have threatened Mr Wilson.

41. In para 31 of his Ruling the judge then said this:

> "*31 So it begs the question: "What would any further inquiries into why Mr. Cox failed or refused to give evidence consistent with his police statements really achieve?" If it is revealed that Mr. Cox was nervous, forgetful, or no longer willing to give evidence then these reasons should not be the basis to enter a nolle prosequi as this has routinely happened at countless criminal trials and is an integral component of the Prosecution's duty to prove its case beyond a reasonable doubt. If Mr. Cox was uncertain as to whether his evidence was accurate then this speaks to his unreliability as a witness and it would be a piercing blow to the Prosecution's case against the Defendants if this matter is brought back to trial within 12 months. If Mr. Cox was paid off, then it is unlikely that he will give a witness statement about this because to do so would incriminate himself (of course the police may find independent evidence in regard). If Mr. Cox was fearful or intimidated then no doubt Mr. Cox would not only need to give an evidentially fulsome statement upon which the Defendants and/or their associates can be charged by the Prosecution, and if he does, to then give evidence to this effect at any eventual trial. One may be forgiven if they have feelings of deja view that Mr. Cox will not come up to proof at any trial of these new charges against the Defendants (whether they are joined with this current Indictment or whether they proceed as stand-alone charges on a separate indictment)."*

42. The judge then said that it was confounding to him that in the interim period between Mr Cox giving his evidence and the Prosecution filing the *nolle prosequi* the Prosecution did not seek to establish from Mr Cox why he did not say what was in his police statement.

43. The judge concluded his Ruling by saying:

> "*33 All of this leads me to conclude that whichever of the reasons pertain (even those which I did not list) the ultimate effect is that by entering a nolle prosequi the Prosecution will be granted the time and opportunity to have a "second bite of the cherry" and to try and revive a case which was on life support. The Defendants were brought to the Court by the Prosecution, and it was their right to compel the Prosecution to prove its case against them beyond a reasonable doubt. The Defendants, through their attorneys, successfully tested and challenged the evidence of Mr. White who was a material*

> *prosecution witness and Mr Cox, the Prosecution's primary witness, did not come up to proof. The trial process unfurled as it was constitutionally designed to. To now allow the Prosecution to enter a nolle prosequi against this backdrop would not only be contrary to how we should expect*
> *the trial process to operate but it would eradicate all of the efforts which Defence Counsel employed in testing and challenging the Prosecution's case. Most importantly though, it would deprive the Defendants of their constitutional right of having a fair trial and of being found "not guilty" in circumstances where the Prosecution have not proven its case against*
> *them beyond a reasonable doubt. The hallmark of our criminal justice system is that an accused person is "innocent until proven guilty" and that if the Prosecution fail to prove the guiltiness of an accused person, then he/she must be found "not guilty". The entering of a nolle prosequi in this case would totally circumvent this fundamental and overriding principle."*

44. Accordingly, the judge confirmed his original decision of 29 May 2024 to decline to return the Indictment to the Prosecution so as to enable the *nolle prosequi* to be entered, and said that he did so in order to prevent an abuse of process and to secure fair treatment of the Defendants.

45. The DPP contends that the judge was in error because the circumstances of the present case were not so extreme, exceptional or rare as to warrant the refusal by the Court to accept the *nolle prosequi*. The circumstances described by the judge ("*woeful lack of evidence against all of the Defendants*"/ "*the inherent weaknesses and inconsistencies in the Prosecution's case against all the Defendants*"/ "*the Prosecution's main witness … not coming up to proof*") were neither rare, extreme nor unusual, and the judge erred in improperly invoking the inherent jurisdiction of the Court to refuse to accept a *nolle prosequi*. Further, this was a case where there was no suggestion of prosecutorial impropriety. Accordingly, the judge should not have made the ruling which he did.

46. In my judgment the judge was not in error and was entitled to come to the conclusion that he did. I say that for a number of reasons.

47. First, in my judgment, the judge addressed himself to the right question, namely whether he should decline to accept the *nolle prosequi* in order to prevent an abuse of the process of the Court and to secure fair treatment for, and avoid unfairness or oppression, of the Defendants. He had an inherent power and jurisdiction to do that. I would accept that it is probably better to describe the Court as having a parallel, rather than a concomitant, power, and a power rather than a discretion. I also accept that we are not concerned with a judicial review of the decision of the DPP but of the validity of the judge's exercise of his separate jurisdiction.

48. Second, whilst I accept that the circumstances in which the Court will think it right to take the course which the judge took are likely to be exceptional, I would caution against treating "*exceptional*" (or "*extreme*" or "*rare*") as an inevitable part of the test as to

whether the judge should decline to accept the *nolle prosequi*. The question for the judge is the one set out in the previous paragraph; and it is possible to envisage cases in which, for instance, a DPP made a habit of entering a *nolle prosequi* in cases where things were going badly for the Prosecution for reasons which were not exceptional and where it was appropriate not to allow a *nolle prosequi* to take effect when he did so. (I am not suggesting that that is a course that the DPP in Bermuda would take). In any event, the circumstances of the present case may properly be characterized as exceptional. The Prosecution case simply collapsed. Whilst some cases fail because the main witness does not come up to proof it is exceptional for a case to fail as comprehensively as this one; and most unusual for the DPP to enter a *nolle prosequi* as the case collapses, in order to retain the opportunity of having a second bite at the cherry, rather than letting the criminal process run its course.

49. Third, what exactly the DPP expected to achieve by the *nolle prosequi* is, to me, unclear. Leaving aside, for the moment, the question as to whether there was a time bar on the DPP restoring the proceedings against the defendants in the future, which I consider below, the prospect of that restoration happening, or, if it did, leading to a successful prosecution, seems to me, as it did to the judge, entirely remote: see [30] – [31] of the Ruling. That view is confirmed by the fact that no attempt has in fact been made to restore the proceedings and that Mr Duncan informed the Court that the DPP did not seek to aside the verdict of the jurors. In those circumstances the effect of acceptance of the *nolle prosequi*, which does not establish innocence of the defendants, would, in all probability, have been that the defendants would have been deprived of the ability to secure a Not Guilty verdict despite the fact that the evidence was wholly insufficient to justify a Guilty verdict against any of them. And if there was a restoration of the proceedings and an acquittal, the Defendants would have bene put through two trials instead, as they were entitled to expect, of having their guilt or innocence determined at the trial in May 2024.

50. Fourth, the Defendants have been through the rigour of a murder trial. Two of them (Smith and Williams) had been in custody since their arrest whilst awaiting trial. Smith had brought several bail applications/reviews, all of which had been successfully opposed by the Prosecution, relying in part on the asserted strength of the Prosecution case. The Defendants were entitled to expect that, if the evidence the Prosecution chose to adduce could not support a verdict of Guilty, they should be acquitted. To preclude the grant of a Not Guilty verdict and condemn them to sit in some procedural limbo where they could neither be acquitted nor, in all probability, have the case against them proceed, is deeply unfair.

51. Fifth, I do not accept that the judge should simply have left the *nolle prosequi* in force and only acted by restraining the continuation of the proceedings if the DPP sought to continue them when there had been no change of circumstances since the date of the *nolle prosequi*. A submission to similar effect was rejected in *Jell* (page 65). (It is also unclear to me when exactly the judge could have done that if the DPP continued with the

proceedings). Nor do I accept that the course that the judge was bound to take was to accept the *nolle prosequi* and leave it to the Defendants to apply to the DPP to reinstate the proceedings in order for them to enter a plea of Not Guilty and be acquitted.

52. Sixth, to refuse a *nolle prosequi* would not leave the DPP without any (potential) ability to proceed against the Defendants in the future. Section 17 B of the **Court of Appeal Act 1964** provides:

> **"*17B Appeal by DPP where accused acquitted or discharged of serious offences***
>
> *(1) The Director of Public Prosecutions may, with leave of the Court of Appeal, appeal to that Court against the judgment of the Supreme Court where—*
>
> *(a) an accused person tried on indictment for a serious arrestable offence listed in Schedule 1 to the Police and Criminal Evidence Act 2006 has been acquitted or discharged or convicted of a lesser offence than the offence for which he was tried; and*
>
> *(b) new and compelling evidence, arising out of the circumstances of the offence for which he was tried, subsequently comes to light.*
>
> *(2) An appeal under subsection (1) can be made on any ground which—*
>
> *(a) involves a question of law alone or of fact alone; or*
>
> *(b) involves a question of mixed law and fact."*

53. Murder is included in Schedule 1 to the *Police and Criminal Evidence Act 2006*. Since no application has been made for leave to appeal under this section, I assume that no evidence falling within section 17 B (1) (b) has been found.

54. I would accordingly dismiss the DPP's appeal.

55. My conclusion in the previous paragraph is applicable even if the DPP has the right to bring (or continue) criminal proceedings against the Defendants. It is said by the Respondents, however, that the effect of section 487 (2), as amended, is that the DPP was barred from progressing any proceedings against the Defendants because by the time of the *nolle prosequ*i and the first ruling (27 & 29 May 2024) more than a year had already lapsed since the sending (on 26 August 2022).

56. If the position is as set out in the previous sentence that would, the Respondents contend, make it even more unfair to have allowed the *nolle prosequi* to take effect since the position would then be that the Defendants had not been acquitted; the proceedings against them would have come to a halt; and no further proceedings could be brought against them. As a result, they would have been deprived not only of a Not Guilty verdict at the trial but of the possibility of such a verdict being delivered at any subsequent trial.

57. The DPP contends that, if this is the correct position, it would, in practice, preclude the DPP from proceeding against defendants after the entering of a *nolle prosequi* since, in most, or at any rate, many cases a *nolle prosequi* would be entered after the expiry of a year from the sending. In those circumstances the Court should not interpret the statute so as to have such an unworkable and unreasonable result.

The constitutional point

58. In his oral submissions to us Mr Duncan submitted that there could be no legitimate bar which precluded the DPP from advancing proceedings in respect of the counts on the indictment (or a fresh one with the same counts) for essentially the following reasons:

(a) The Bermuda Constitution contains the following provisions:

> *"71 (2) (a) The [DPP] shall have power, in any case in which he considers it desirable so to do— 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;*
>
> *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****. [Bold added]"*

(b) In the light of those provisions, any requirement that the DPP should get permission from the Supreme Court to continue the proceedings against the Defendants is inconsistent with the Constitution and section 487 (2) cannot operate as a bar to prevent the DPP from doing so.

(c) This is consistent with the decision of this Court in *Durham v The King* [2023] CA (Bda) 10 Civ D where we upheld the decision of the then Chief Justice that the DPP could bring proceedings against the appellants, without the leave of the Supreme Court, despite the provisions of section 75 of the **Mental Health Act 1968** which provides:

> "*Protection for acts done in pursuance of this Act*
>
> *(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules or Code thereunder, unless the act was done in bad faith or without reasonable care.*

> *(2) No civil or **criminal proceedings** shall be brought against any person in any court in respect of any such act **without the leave of the Supreme Court** and the Supreme Court shall not give leave under this section unless satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care".*

59. I do not agree. The DPP is entitled to institute and undertake criminal proceedings and is not to be subject to the direction or control of any other authority, such as the Court, in doing so. But that provision does not, in my judgment, prevent the operation of a statutory provision for the discharge of a defendant following a *nolle prosequi*, from any (sic) further proceedings in respect of the charges contained in the indictment (sic). This discharge is not dependent on any direction of, or permission from, the Court or anyone else. I also do not accept, as was submitted, that Section 487(2) can be interpreted to mean that there was no bar to proceeding on the charges of the indictment if that was done within a year of the notice, but that after the expiry of those months there was not necessarily a bar.

Was the DPP able to make use of the exception to the bar on further proceedings contained in section 487 (2)?

60. Mr Duncan on behalf of the DPP pointed out, in his supplemental written submissions to us of 18 November 2025, that under the pre 2015 regime there were committal proceedings where there was a determination as to the sufficiency of evidence to support the committal and matters would remain in the Magistrates Court until they were ready for trial The **Criminal Jurisdiction and Procedure Act 2015** then replaced committal proceedings by the "*sending*" process. Under that regime the Magistrates Court "*shall send* [the defendant] *forthwith to the Supreme Court for trial*" if certain conditions are met, one of which is that the offence is triable only on indictment, such as Murder: see section 23 of that Act. So, the Magistrates Court has no power to retain a matter within its jurisdiction pending its readiness for trial. It sends the matter to the Supreme Court which assumes conduct of the case until it is ready for trial - however long that takes. The corollary of that is, Mr Duncan submits, that matters sent for trial on indictment do not receive a date for trial which is within 12 months of the sending, let alone could it be contemplated as possible for any trial suspended by the court by the entry of a *nolle prosequi* to be reinstated within 12 months of the sending.

61. At the time of his submissions in November 2025 Mr Duncan had, so he told us, confirmed with the DPP that not a single matter on the then Supreme Court criminal case list bore a trial date within 12 months of the case being sent. (He corrected that shortly thereafter to say that there was one matter which was sent on March 17 2025 and had a trial date of February 2 2026). The practical effect of that is said to be that, if the 12 months from sending rule applies, the DPP could never, or practically never, exercise her power to enter a *nolle prosequi* and thereafter secure a reinstatement of the proceedings.

62. The unworkable result of applying such a rule would, it is said, be particularly anomalous given the fact that in the Magistrates Court the DPP would be under no restrictions as to the time by which further proceedings on a stayed information could be brought: see [26] above. And in relation to triable either way offences the ability, following a *nolle prosequi*, to reinstate the proceedings would, if the case is to be tried in the Magistrate's Court on an information, be unrestricted but not if precisely the same charge is to be tried in the Supreme Court on indictment. Examples of such offences are (a) burglary; (b) sexual assault; (c) official corruption; (d) drug possession; and (e) firearm cases: see sections 339, 323, and 111of the *Criminal Code*; sections 6 & 27 of the *Misuse of Drugs Act* and the Schedule to the *Firearms Act 1973.*

63. In response Ms Mulligan makes the following points:

(i) Parliament introduced the "sending" regime and the 12 months from "sending" time limit in the same statute as abolished committal proceedings - the **Criminal Jurisdiction and Procedure Act 2015**. It must therefore to be taken to have had in mind (a) the new time limit which had to be complied with in order to avoid the bar on restoring proceedings after a *nolle prosequi*; and (b) the fact that committal proceedings were to be abolished and the "sending" regime introduced. In those circumstances it chose to create the new time limit for restoring proceedings after a *nolle prosequi* by clear words, which must be taken to mean what they say. Any amendment to that legislation is a matter for Parliament.

(ii) It is apparent from the debate over the second readings of what became the **Disclosure and Criminal Reform Act 2015 Act** and the **Criminal Jurisdiction and Disclosure Act 2015** and the **Criminal Jurisdiction and Procedure Act 2015** that the changes made by those Acts were intended to streamline the entire criminal justice process, to cut costs and eliminate delays. Limiting the time available to the DPP to pursue a prosecution, after a *nolle prosequi*, to 12 months from the date of sending was consistent with that stated purpose.

(iii) Requiring the DPP to decide whether or not to proceed after the making of a *nolle prosequi* within 12 months of the sending was plainly what Parliament intended There was no requirement that the trial itself take place within that period.

(iv) It is not correct to say that trials have not started within 12 months of sending. Ms Mulligan referred us to two trials, in which she was involved, which started on 27 August and 6 October 2025 when the sending was approximately 9 and 6 months earlier. She also identified five matters on the list at the time of her submissions (24 November 2025) where the trial

date proposed was within or very close to the 12 month window. In response Mr Duncan said that only two of those five matters actually had trial dates. The other three had tentative trial dates which had not actually been confirmed as dates for trial. And one of the five was sent on 22 March 2025 and had a trial date of 6 April 2026 i.e. more than 12 months after sending.

(v) The supposed anomaly arising from the difference between the DPP's entitlement to resume proceedings in the Magistrates' Court pursuant to section 62 and the position in relation to cases before the Supreme Court was no real anomaly. The difference is equally consistent with an appreciation by Parliament that it is far less prejudicial to have a summary offence potentially brought back after a *nolle prosequi* is entered, at the sole discretion of the DPP, than it is to have a Murder charge or other serious offence simply resumed at any time, at the sole discretion of the DPP. Similar considerations apply in relation to either way offences. And it makes sense to allow the attempt to resume cases after expiry of the 12 months from sending time limit only if the Court of Appeal grants leave to appeal under section 17B of the **Court of Appeal Act 1964**.

64. Mr Duncan's supplemental submissions to us ended with the following paragraphs:

> *"16 It might well be said that it would be most appropriate for the Legislature to coherently amend section 487 (2) of the Criminal Code. Pending such an amendment, it is open to this Court to presume that "Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable"*[1]*. The learned trial judge appears to have interpreted (or otherwise by implication believed or accepted)*[2] *that the twelve month period to which section 487 of the Criminal Code refers is the time period within which a prosecution could validly be re-instituted after the entry of a nolle prosequi.*
>
> *17 We respectfully ask that this Court not disturb that particular finding, and either decline to seek to construe section 487 (2) of the Criminal Code should this Court find it strictly not necessary to do so to resolve this appeal or otherwise construe section 487 (2) in a way that does not produce an illogical or practically unworkable result."*

65. I accept that it may well be appropriate for the Legislature to amend section 487 (2) of the **Criminal Code Act 1907**, not least because Parliament may not fully have appreciated that, under the new regime, where the Magistrates' Court will have conducted no preliminary inquiry and where the work required of the Supreme Court when a case has been sent to them may be time consuming, the occasion for filing a *nolle*

[1] *R* v *McCool*, fn 1 *supra*.
[2] Record of Appeal, pages 20-21 cf Ruling of Wolffe, J. para. 29

prosequi, or seeking to restore a case after a *nolle prosequi* has been filed, may not arise until after the 12 month period has expired.

66. I suspect, also:

(a) that the draftsman of section 487 of the **Criminal Code Act** (both in its original and its amended from) may not have had in mind the possibility of the DPP seeking to enter a *nolle prosequi* at the very end of a trial; and

(b) that under the 12 months from the committal order regime, there was a greater likelihood of the following (or at least items (ii) and (iii)) happening within 12 months of the committal order namely (i) a case coming to trial; (ii) a *nolle prosequi* being issued; and (iii) the DPP thereafter seeking to continue the proceedings.

67. I do not, however, accept that we can proceed on the basis that the twelve month period starts with the date of the *nolle prosequi*. That is not what the statute says. I agree that it is not strictly necessary for us to construe section 487 (2) in relation to the present issue. But it seems to me desirable that we should express a view upon it.

68. In my view the position lies thus. Under section 487 (2) the effect of a *nolle prosequi* is that the accused is discharged from <u>*any*</u> further proceedings in respect of the charge or charges which are contained in the indictment. Accordingly, subject to the closing words of the section ("*but such discharge shall not operate as a bar*…."), it would not be open to the DPP to seek to carry forward any proceedings against any of the Defendants in respect of any of the charges which form the two counts of the indictment.

69. The exception to the bar is that the DPP could continue with further proceedings on the same notice of sending if she did so within 12 months thereof. That period had, however, expired even before the DPP sought to enter a *nolle prosequi*. She was, thus, not entitled to the benefit of the exception. Whilst I accept that the 12 months from sending limit may make the renewed pursuit of proceedings after a *nolle prosequi* has been entered in many cases unworkable, that is, in my judgment, the effect of the legislation; and I can discern no legitimate interpretation of section 487 (2), as amended. that might be open to us to produce a different result.

70. Accordingly, giving effect to the *nolle prosequi* in the present case would have meant that there could be no further proceedings against the Defendants in respect of the charges – so that there would not have been even the possibility of a Not Guilty or a Guilty verdict being entered against them. In those circumstances the acceptance of a *nolle prosequi* would have been highly prejudicial to all three Defendants, who would have lost the practical certainty of securing a Not Guilty verdict from their trial, and of no benefit to the Prosecution, which would have had no prospect of resuming the prosecution. So, the acceptance of the *nolle prosequi* would have been even more of an abuse of process and

oppressive on the Defendants than it would have been if the bar on further proceedings did not apply.

71. Accordingly, I would dismiss the appeal.

Hickinbottom JA

72. I agree.

Gloster JA

73. I, also, agree.