In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 208

BETWEEN:

POLICE CONSTABLE GA — **Applicant**

-and-

(1) THE DIRECTOR OF PUBLIC PROSECUTIONS
(2) POLICE SERGEANT BP
(3) POLICE SERGEANT SR — **Respondents**

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Mark Pettingill of Chancery Legal Limited for the Applicant**

Mr. Ben Adamson of Conyers Dill & Pearman Limited for the First Respondent

Mr. Charles Richardson of Compass Law Chambers for the Second Respondent

Mr. Marc Daniels of Marc Geoffrey for the Third Respondent

Date of Hearing: **26-27 October 2020**

Date of Ruling: **5 January 2021**

JUDGEMENT

Application for judicial review of the decision of the Director of Public Prosecutions not to institute and undertake criminal proceedings against the Second and Third Respondents; test to be applied in reviewing the decision not to prosecute; whether the decision not to prosecute was perverse in all the circumstances

Introduction

1. In these proceedings Mr GA, a Police Constable in the Bermuda Police Service ("**BPS**"), ("**PC A**") seeks judicial review of the decision of the Director of Public Prosecutions ("**the DPP**") to allegedly withdraw charges of serious sexual assault and perverting the course of justice against Mr BP, a Sergeant in the BPS, ("**PS P**") and Mr SR, also a Sergeant in the BPS, ("**PS R**").

2. In these proceedings PC A seeks:

    1. An order for a declaratory ruling that the DPP was mistaken in law and acted with procedural unfairness in withdrawing the filed criminal charges against PS P and PS R and was unreasonable and irrational in his assessment of the evidence and application of the law in determining whether the prosecution should continue.

    2. An order of certiorari that the DPP's decision to withdraw the charges against PS P and PS R be quashed.

    3. An order of mandamus that the DPP reconsider his decision on the basis of proper legal analysis of the evidence and any declaratory ruling of this Court.

3. The grounds upon which this relief is sought are as follows:

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

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

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

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

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

The Applicant's Case

4. In brief outline, PC A states that at the beginning of April 2019 he received a WhatsApp message from PS P asking him if he wanted to play cards that evening. PC A agreed and asked PS P to pick him up after he finished his shift that day.

5. In this Witness Statement, PC A states that everyone that knows him knows that he is attracted to and intimate with men but he has never given PS P the impression that he was interested in him.

6. As arranged, PS P collected PC A from his residence in Southampton in a marked police car and said that they were going east to PS R's apartment to play cards. PC A has stated to another witness that he was not sure if it was a friendly drive or if it had any sexual connotations to it.

7. Once they arrived at PS R's apartment, all three officers retired to the bedroom to play strip poker. PS R declined to play the game but watched the other two officers play the game. Soon afterwards, according to PC A's statement, he was left with his undervest and boxer shorts, whilst PS P was sitting next to him in the nude. At the request of PS P, PC A engaged in a form of sexual activity with PS P on the bed. PC A states that at this stage PS P and PS R tried to rape him but he rebuffed their advances by acting "*like I was play wrestling*". Eventually, PS P and PS R desisted and left PC A alone. Thereafter, PS P and PS R engaged in sexual intercourse, which PC A observed while sitting on the foot of the bed. It is the allegation of attempted rape that forms the basis of the charge of serious sexual assault.

8. After taking a shower, PS P drove PC A home without any apparent complaint. It appears that PC A and PS P were in PS R's apartment for over 5 hours. No formal complaint of this incident was made by PC A until 7 months afterwards in November, 2019.

The DPP's Decision

9. The decision whether or not to institute and undertake criminal proceedings is informed by the policy document headed "*Department of Public Prosecutions (Bermuda) Code for Crown Counsel*." Section 4 of that document deals with the issue of the decision whether or not to prosecute. Section 4D sets out "*The Governing Criterion*":

> ***I. Sufficiency of the Evidence***
>
> *The first consideration in commencing or continuing a prosecution is the sufficiency of the evidence. The following principles inform the application of this evidential test:*
>
> 1. *A prosecution should only be commenced or continued if there is sufficient evidence to conclude that a reasonable magistrate or jury, properly directed, is more likely than not to convict the accused of the charge(s) alleged.*
>
> 2. *In circumstances in which there are multiple accused or multiple charges, Crown Counsel should apply the sufficiency of evidence test to each accused and each charge. A prosecution should only proceed against those accused and on those charges that meet the test.*
>
> ***II. The Public Interest***
>
> *If the sufficiency of evidence test is met, Crown Counsel should then consider whether the public interest requires a prosecution."* (emphasis added)

10. In his affidavit, Mr Larry Mussenden, the DPP, states that his reasons why he believes, based upon his experience as a prosecutor, defence lawyer and as a DPP, that a reasonable jury, properly directed, would (more likely than not) not convict PS P and PS R, are set out in his Decision Letter. He accepts that there is public interest in ensuring that these officers are not (and not considered) above the law. He also accepts that there are difficult questions

of consent in sexual assault cases but he has never shied away from prosecuting sexual assault cases where he believed that a reasonable jury would, more likely than not, convict based on the evidence he had seen.

11. In the Decision Letter the DPP expresses the view that the evidence in this case does not meet the DPP Code for Crown Counsel test for charge approval for a charge of serious sexual assault, namely that a reasonable jury, properly directed, is more likely than not to convict. Put otherwise, in his view, the Prosecution has little to no chance of securing a conviction in this case.

12. In coming to the view that a properly directed jury was unlikely to convict PS P and PS R on a charge of serious sexual offense the DPP took into account the following facts:

    1. PC A walked to the bedroom to sit on the bed with PS P.
    2. PC A suggested to play for clothes or strip poker.
    3. PC A removed his own clothes down to his undervest and boxer shorts.
    4. PC A continued playing until PS P was naked.
    5. PC A was convinced to engage in a sexual activity with PS P.
    6. PC A repositioned himself into a laying position on the bed.
    7. PC A engaged in a sexual activity with PS P while PS R was watching.
    8. PC A never shouted out when he says he was attacked by PS P and PS R, knowing that the car park complex was full and people were most likely in the complex.
    9. When PS P and PS R left him alone, PC A never walked out of the bedroom.
    10. PC A play wrestled, after the alleged assault, with 2 naked men on a bed for 2 hours while he was not wearing boxer shorts.
    11. PC A stayed in the bedroom and watched PC P and PS R engage in sexual intercourse.
    12. PC A, PS P and PS R were in PS R's apartment for 5 hours and did not leave the premises at any time in anger or disgust.

13. PC A allowed PS P to drive him home with no mention of any discussion, heated or otherwise, of the alleged incident.
14. PC A never made a formal complaint to the BPS until another Sergeant reported it to the authorities.

13. The DPP also considered the potential charge of perverting the course of justice. He was aware that PS P and PS R had made in January and February 2020 complaints respectively in the form of witness statements to the BPS about PC A on the basis that he may have been HIV-positive and had, or tried to have, sexual relations with them without informing them that he was HIV-positive. The filing of the statements was the basis for the earlier recommendation for perverting the course of justice.

14. The DPP declined to proceed with this charge based, *inter alia*, on *R v Rogerson* [1992] HCA, which requires that there be some evidence to support that the act complained of has a tendency to deflect the police from prosecuting a criminal offence. The DPP concluded that in respect of the actus reus there is only the fact of the making and filing of the witness statements by PS P and PS R setting out their version of events, their concerns and resulting acts approaching PC A on the subject of whether he was HIV-positive and requesting a prosecution of PC A. The DPP took the view that it was a very weak connection that this is an act which "*has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal, or from adducing evidence of true facts*" because by the time that PS P and PS R's witness statements were filed the investigation was well underway and PC A and other witnesses were interviewed and statements recorded from them. In the DPP's opinion, the filing of PS P and PS R's witness statements was not going to have the above-mentioned effects referred to in *Rogerson*.

Legal test for intervention in the DPP's decision

15. Under our constitutional arrangements, the sole power to decide whether criminal proceedings should be instituted against any person is the DPP. In the exercise of that power, the DPP is not subject to the direction or control of any person or authority. The constitutional role of the DPP, in relation to the commencement of criminal proceedings, is set out in sections 71 (A), 71(2) and (6):

*"**Director of Public Prosecutions***

71(A). At any time when the office of Attorney-General is held by a member of either House—

(a) there shall be a Director of Public Prosecutions whose office shall be a public office;

(b) the following provisions of this Constitution shall have effect as if references therein to the Attorney-General were references to the Director of Public Prosecutions, that is to say, subsections (2) to (6) of section 71, section 82(4), section 86, section 100(5), section 104(5), and section 105(3);

(c) section 93(2) of this Constitution shall have effect as if the reference therein to the Attorney-General included a reference to the Director of Public Prosecutions.

71(2) The Attorney-General 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;

(c) and to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.

71(6) In the exercise of the powers conferred on him by this section, the Attorney General shall not be subject to the direction or control of any other person or authority."

16. It is now established that the courts retain jurisdiction to review the decisions made by the DPP as to whether or not to institute and undertake criminal proceedings against any person in respect of any offence against any law in force in Bermuda (See: *Jeewan Mohit v The Director of a Public Prosecutions of Mauritius*, Privy Council Appeal No. 31 of 2005 at [17] and [18]). However, the cases also make it clear that the power to intervene would be "*sparingly exercised*" (*R v DPP ex parte C* [1995] 1 Cr App R 136); "*very rare indeed*" (*R (Pepushi) v* Crown *Prosecution Service* [2004] Imm AR 549 [49]); "*highly exceptional remedy*" (*Sharma v Browne-Antoine* [2007] 1 WLR 780 [14(5)]); and "*only in very rare cases*" (*S v Crown Prosecution Service* [2015] EWHC 2868 (Admin)).

17. The rationale that underpins the reluctance of the courts to intervene in prosecutorial decision-making is primarily due to the facts that (i) under section 71(A) of the Constitution the sole authority to decide whether to institute and undertake criminal proceedings against any person in respect of any offence against any law in force in Bermuda lies with the DPP and, in the exercise of that power, the DPP is not to be subject to the direction or control of any other person or authority; (ii) the decision involves an exercise of an informed judgment as to the likely outcome of the criminal trial before a jury, which necessarily involves an assessment of the strength of the evidence against the defendant and the likely defences; and (iii) "*…the great width of the DPP's discretion and the polycentric character of the official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits*" (*Matalulu v DPP* [2003] 4 LRC 712, a decision of the Supreme Court of Fiji, and the above passage was approved by the Privy Council in *Jeewan Mohit v The Director of Public Prosecutions Mauritius* [Privy Council Appeal No. 31 of 2005]).

18. This Court has no jurisdiction to intervene simply because it disagrees with the decision of the DPP in the sense that if the Court itself was exercising the discretion, it would have made a different decision. In order for the Court to intervene, leaving aside cases of obvious

errors of law, the decision has to be categorized as perverse in the sense that no prosecutor would have made the decision that is sought to be impugned in the judicial review proceedings.

19. In *Jeewan Mohit* the Privy Council had to consider the issue whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution, in exercise of its powers under section 72 (3)(c) of the 1968 Constitution, was in principle susceptible to review by the courts. Lord Bingham, giving the advice of the Board, accepted that such a decision in principle was subject to review by the courts but the scope of such a review was necessarily narrow and limited. Lord Bingham referred to the passage in the decision of the Supreme Court of Fiji in *Matalulu v DPP* at [17] in approving terms:

"There may be other circumstances not precisely covered by the above in which judicial review of prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to the relevant consideration or otherwise unreasonable, are unlikely to be vindicated because of the widths of the considerations to which the DPP may properly have regarded in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

20. At paragraph 18 Lord Bingham continued:

"... The grounds of potential challenge certainly include those listed in Matalulu, but need not necessarily be limited to those listed. But the establishment in the Constitution of the office of the DPP and the assignment to him and him alone of the powers listed in section 72(3) of the Constitution; the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and, in some cases, the difficulty or undesirability of explaining his decision: these factors necessarily mean that the threshold of a successful challenge is a high one."

21. In *Leonie Marshall v The Director of Public Prosecutions*, [2007] UKPC 4, Patrick Genius, a man of 26 years, was shot by police officers in Jamaica, sustaining wounds from which he died. An inquest jury subsequently brought in a verdict, which read *"person or persons criminally responsible*", but the DPP decided not to bring any prosecution. The mother of the deceased, Leonie Marshall, the appellant in the appeal before the Privy Council, brought an application for judicial review of the DPP's decision. Lord Carswell, giving the opinion of the Court, set out, at [18], the relevant considerations when reviewing the decision of the DPP based on an assessment of the evidence and the prospects of securing a conviction:

"Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict: R v Director of Public Prosecutions, ex parte Manning [2001] QB 330, 349, para 41, per Lord Bingham of Cornhill CJ. There are many examples of such statements by courts in the common law world relating to decisions to prosecute, as to which see Sharma v Browne-Antoine, supra, para 41. In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower. The reasons are set out in para 23 of the judgment of Lord Bingham CJ in Ex parte Manning, supra:

> *"23 Authority makes clear that a decision by the director not to prosecute is susceptible to judicial review: see, for example, R v Director of Public Prosecutions, ex p C [1995] 1 Cr App R 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to*

convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial… In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."' (emphasis added)

22. In *R(Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin) the court summarized its approach to the decisions made by the DPP and in particular to the decision letters at [46]:

"46. We distil the additional propositions from the authorities and the principles underlying them:

(1) particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: L at [32].

(2) a significant margin of discretion is given to prosecutors L: at [43].

(3) decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

(4) it is not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to

> *be made on the evidence as a whole, applying prosecutorial experience and expert judgment."*

23. In *R (on the application of Ann Torpey) v Director of Public Prosecutions* [2019] EWHC 1804 (Admin), the Court again addressed the proper approach to be taken in relation to a decision of the prosecutor relating to how the evidence will be received at trial and predicting the verdict at trial. At [27] the Farbey J stated:

> *"27. In Campaign Against Antisemitism v Director of Public Prosecutions [2019] EWHC 9 (Admin) the court referred to the particular experience and expertise of the CPS in making judgments about how disputed evidence is likely to be received at trial. The court nevertheless held that the margin allowed to the decision-maker and the deference this court will give to prosecutorial decisions depend upon the circumstances of the case. Where the issues involve disputed evidence of primary fact, the decision-maker's experience and expertise in considering how that evidence will be received at trial and predicting the verdict at trial will be a particularly powerful factor: this court will be slow to hold that the decision-maker's assessment is irrational. However, if the issue is essentially one of law, the decision-maker's experience and expertise are of less force, and this court will more readily be prepared to find that an error of law (see [15])."* (emphasis added)

The Applicant's contentions and discussion

24. At the outset, it should be noted that throughout his submissions, Mr. Pettingill, for the Applicant PC A, emphasized that this was a case where the DPP decided to withdraw the charges that had been laid against PS P and PS R. As the affidavit of Mr Mussenden, the DPP, correctly points out, this submission is factually incorrect. The correct position is that PS P and PS R were never formally charged. As Mr Mussenden explained in his affidavit, typically the police referred the file to his office to consider whether charges should be brought on the basis of the evidence contained in that file. If one of the prosecutors in the Department of Public Prosecutions approves the charges, the charges are laid by the filling out of an information, which is then sworn before a magistrate and read out to an accused

at a Plea Court session. In this matter, no information was sworn and no charges were formally laid in the Magistrates' Court.

25. The DPP accepts that PC A had been informed that the charges were approved. In this case, the Deputy Director, Cindy Clarke, had approved the filing of the charges and informed BPS case investigation officers of her decision. After some discussions with Ms. Clarke, the DPP decided to review the file before charges were laid in the Magistrates' Court, and after such review, the DPP decided that charges should not be filed. The DPP states that there was a difference of view between himself and Ms. Clarke as to whether it was appropriate to file charges in this case and that such differences are not uncommon between prosecutors.

26. Second, Mr. Pettingill subjected the Decision Letter of the DPP to minute forensic examination to show that some of the factors mentioned in the letter were either neutral or irrelevant. However, as the authorities such as *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin) emphasize, that is not an appropriate approach. The authorities show that when considering the adequacy of the reasons given by the DPP, the Court should not adopt the approach as if the Court was marking an examination paper but instead "*decision letters should be read in a broad and commonsense way, without being subjected to excessive or overly punctilious textual analysis."* From a commonsense point of view, the reasons given by the DPP appeared to be clear and relevant to the issue that he had to decide.

27. Third, Mr. Pettingill submitted that in relation to the requirement of sufficiency of evidence, the relevant test is: "*Is there evidence on which a jury properly directed <u>could</u> properly convict*?" in accordance with the decision in *R v Galbraith* [1981] 1 WLR 1039. As Mr. Adamson correctly pointed out this is in fact a different test from the test applied by the DPP in considering whether to exercise his statutory power under section 71(2) of the Constitution to institute criminal proceedings against a person in Bermuda. The relevant test in this regard requires that a prosecution should <u>only</u> be commenced if there is

sufficient evidence to conclude that a reasonable jury, properly directed, is more likely than not to convict the accused of the charges alleged.

28. Fourth, Mr. Pettingill complains that the DPP never met with PC A to explain his decision to withdraw the charge or directed any officer to give reasons to PC A for his decision not to prosecute. This allegation forms the basis of the ground that the DPP's decision to withdraw the charges was procedurally unfair. As noted above, the allegation that the DPP decided to withdraw the charges is factually incorrect. Furthermore, the DPP has a statutory power under section 71 (2) of the Constitution to decide not to prosecute in a particular case and there is no requirement in the Constitutional provisions that the victim of the alleged crime must be consulted or informed before arriving at the decision not to prosecute. As the decision in *Matalulu*, approved by the Privy Council in *Jeewan Mohit*, makes clear "*Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice*."

29. Fifth, Mr. Pettingill's main attack was that the DPP failed to take into account that a properly directed jury would be directed in accordance with the Judges Rules and that the DPP should have appreciated that these directions to the jury would have eliminated all risk of stereotypes and assumptions about sexual behavior and reaction to non-consensual sexual conduct. He argued that the relevant directions in accordance with the Judges Rules would have ensured convictions in this case.

30. Mr. Pettingill submitted that cases of sexual assault warrant specific directions by a judge in a trial and consequently warrant specific consideration by a prosecutor in considering whether to proceed with the charge, or withdraw a charge. He referred the Court to the decision in *D* [2008] EWCA Crim 2557, where the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behavior and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; (iii) a late complaint does not

necessarily mean it is a false complaint. The Court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment that may arise when the allegation is of sexual assault by a partner. There may be cases where guidance on myths and stereotypes may be appropriate to benefit a defendant.

31. By reference to the decision in *D*, Mr. Pettingill submits that the DPP based his review on "*dangerous assumptions*" the majority of which are particularly warned of and covered by the Judges Rules. He argues that, despite his indication to have considered that a jury must be "*properly directed*", the DPP clearly fails to take account of specific required directions that would have served to bring a balanced approach to his review. He further submitted that the DPP's review continuously indulges in stereotypes and assumptions about sexual behavior and reactions to a non-consent allegation that renders the review irrational and wrong in law, both in approach and in content. In his address to the Court Mr. Pettingill submitted that the DPP must make his decision on the basis that the jury will act in accordance with the directions given by the judge.

32. It appears to the Court that there are two difficulties with the submissions. First, the DPP has given sworn evidence that he believed, based on his experience as a prosecutor, defence lawyer and as DPP, that a reasonable jury, *properly directed*, would (more likely than not) not convict PS P and PS R. There is no reason to suppose that a *properly directed* jury would not receive the relevant directions in accordance with the Judges Rules and that the DPP took that into account.

33. Further, the proposition that a direction to the jury in accordance with the Judges Rules eliminates all risk of stereotypes and assumptions about sexual behavior and reactions to non-consensual sexual conduct appears to be unrealistic. Experience of the jury trials informs us that the jury decisions are not always dictated by the strict requirements of law but by a sense of what the jury considers to be "*just*" or "*fair*" in the circumstances of the case or indeed by other factors which may have little or no relevance to the merits of the

case.[1] In considering the likely outcome of a jury trial, the DPP is entitled, and indeed bound, to rely upon his own experience as to how juries actually behave in practice. It is unrealistic to require that the DPP should ignore his experience of jury trials in predicting the likely outcome in a particular case.

34. In the end, Mr Pettingill was driven to argue that the decision of the DPP not to prosecute PS P and PS R was perverse in the sense that it was a decision no reasonably competent prosecutor could have arrived at. The Court is unable to accept the submission. The issue that the DPP had to decide was whether it was more likely than not that a reasonable jury would find the incident, as described by PC A in his witness statement, took place in circumstances where this was denied by PS P and PS R. The DPP was clearly concerned with aspects of PC A's evidence as set out in paragraph 12 above. The DPP was entitled to rely on his experience and judgment in concluding that it was <u>not</u> more likely that a reasonable jury would so find. He was entitled to take that view in the circumstances of this case and his decision cannot be categorized as perverse. For the reasons set out in the Decision Letter, the DPP was also entitled not to proceed with the charge of perverting the course of justice.

35. Finally, I should note that in the grounds for judicial review the Applicant claimed that the DPP failed to take into account his right to be protected from "*inhuman or degrading treatment*" enshrined in section 3 of the Constitution and the right to "*enjoy his freedom of movement*" under section 11 of the Constitution. These arguments were not developed in the written submissions or the oral presentation to the Court. As presently advised, these

[1] Judge Jerome Frank, a federal judge in the United States and a leading proponent of the American realist movement, considered that when the jury comes to its verdict, they do not distinguish between law and fact, and in this state of confusion they decide the case on other grounds: "*Many juries in reaching their verdicts act on emotional responses to the lawyers and witnesses; they like or dislike, not any legal rule, but they do like an artful lawyer for the plaintiff, the poor widow, the brunette with soulful eyes, and they do dislike the big corporation, the Italian with a thick, foreign accent."* (J. Frank *Courts on Trial* (Princeton, NJ: Princeton University Press, 1949 p. 130))

provisions are not in conflict with section 71 (2) and (6) of the Constitution, providing the DPP with prosecutorial discretion. I accept Mr. Adamson's submission that there is no conflict between these principles as the Courts remain open to the Applicant if he wishes to bring a private prosecution. The State (with all its resources) only prosecutes if the DPP concludes that there are reasonable chances of success of conviction. This is, as the cases reviewed show, is a matter entirely for the DPP, as the constitutional organ for the State, to decide.

36. For the reasons given above, the application by PC A for the relief sought in paragraph 2 above is dismissed.
37. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 5th day of January 2021

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NARINDER K HARGUN
CHIEF JUSTICE