2012 No. 12 – M (A) DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

In the matter of an application by **HENRY GREENE** for Writs or Orders of Certiorari and Prohibition.

BEFORE:

HON. MR. JUSTICE IAN CHANG, C.C.H, S.C – CHIEF JUSTICE (ag.)

Mr. Rex Mc Kay, S.C with Mr. Neil Boston, Mrs. B. Glasford and Mr. Maxwell Mc Kay for the Applicant.

Mr. H. Harnanan, Deputy Solicitor-General, for the named Respondents – the Director of Public Prosecutions, Commissioner of Police (ag.) Leroy Brummel and Assistant Commissioner of Police (Law Enforcement) Seelall Persaud.

HEARD ON:

2012

FEBRUARY 7

FEBRUARY 20

DECISION

Barring certain well-established areas of executive decision – making falling exclusively within the preserve of the executive, the

exercise of public law discretionary power is, as a matter of principle, subject to judicial review. Were it otherwise, immunity from the judicial review process would effectively conduce to the creation of public law powers which are absolute i.e. capable of being exercised in a manner which is arbitrary, capricious or irrational but which is nonetheless legally valid. Down that slippery slope lies the way to Caesarian dictatorship in matters of public affairs. The exercise of the public law power to prosecute or not to prosecute which is exercised by the Director of Public Prosecutions (D.P.P) or any prosecutorial body is no exception to this general principle that the exercise of discretionary public law power is subject to judicial control by the process of judicial review.

Since the D.P.P, in her Affidavit in Answer, has challenged the jurisdiction of the court to review her decision to prosecute and has prayed in support of her challenge Article 187 (4) of the Constitution, it is instructive to note that, in the case of **Brooks V D.P.P** (1994) 44 W.I.R 332, the Privy Council held that the words "any other person or authority" in section 94 (6) of the Jamaica Constitution do not include the High Court. Lord Woolf stated at 340:

> ***"Section 94 (6) does not refer to the Court since its primary purpose is to protect the Director of Public Prosecutions from the type of objectionable political interference referred to in the passage of Lord Diplock already cited. It is not intended to apply to judicial control of the proceedings".***

Article 187 (4) of the Guyana Constitution is *in ipsissimis verbis* with section 94 (6) of the Jamaica Constitution. It provides:

> ***"In the exercise of the powers conferred on him by this article, the Director shall not be subject to the direction or control of any other person or authority."***

Therefore, like section 94 (6) of the Jamaica Constitution, Article 187 (4) of the Guyana Constitution does not immunize the exercise of the powers of the D.P.P under Article 187 (1) from judicial review and control since the words "any other person or authority" therein do not include the High Court. (See also **Re King's Application (1988) 40 W.I.R 15** and **Mohit V D.P.P** (2006) 5 L.R.C. 234). It is instructive at this juncture to note that Article 232 (8) of the Constitution provides:

> ***"Subject to article 226 (6) and article 215 A (12), no provision of this Constitution that any person or authority shall be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding the court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."***

This court is acutely aware that a court of judicial review would be more disinclined to interfere where the D.P.P (or any prosecutorial body) makes a decision to do the positive i.e. to prosecute than where he makes a decision to do the negative i.e. not to prosecute. But the

disinclination of the court to interfere in cases where the decision is to prosecute stems from its reluctance to deal with issues which can adequately be dealt with in the criminal process itself and the undesirability of causing delays to the criminal process contrary to public interest and not from any principle of judicial limitation in contradistinction to judicial restraint. On the other hand, where the decision is not to prosecute, since the decision is final against the institution or continuation of criminal proceedings, courts are naturally unbridled by such restraints and are less unlikely to subject such negative decisions to the process of judicial review. But, even in the case of a decision to prosecute, there can be no doubt that it is open to the court to subject such decision to judicial review although the greater need for the application of judicial restraint arises in the exercise of the court's discretion.

In **Mohit v D.P.P** (2006) 5 L.R.C 234, it was held that the D.P.P had no prerogative power and, like any other public officer, he had to exercise his public law powers lawfully, properly and rationally and, any exercise of those powers that did not meet those criteria was open to challenge and review by the courts. In the text ***"Judicial Remedies in Public Law"*** (4th Edition) by Clive Lewis Q.C, the learned author summarized the position as follows at page 164:

> ***"A decision to prosecute is also subject, in principle, to judicial review but judicial review is likely to be available only in highly exceptional circumstances (Sharma V Antoine***

– Brown (2007) 1 WLR 780 and R V (Bergingham) (2007) 2 WLR 635). There are a number of reasons for this. First and foremost, if there is a decision to prosecute, there will be a trial and any challenge raised by the accused should, whenever possible, be resolved within the criminal trial process (Sharma V Antoine Brown (supra) and R V D.P.P, ex parte Kebilene (2000) 2 A.C. 236). Secondly, the discretion to prosecute is a broad one involving policy and public interest matters which may not be matters for the court or matters which they are unsuited to resolving. Thirdly, undesirable delay may be caused to the criminal process by the pursuit of judicial review proceedings. Consequently, the courts have emphasized that is only in highly exceptional circumstances that judicial review of a decision would be appropriate and should be granted only rarely

.....

.....

Early dicta indicating that decisions are not amenable to judicial review no longer represent the law. The correct position is that the courts have jurisdiction to grant judicial review of a decision to prosecute but the exercise of that jurisdiction is appropriate only in highly exceptional cases."

Thus, the **jurisdiction** of the court to review a decision to prosecute does not at all depend on the existence of exceptional circumstances. The existence of exceptional circumstances is not a condition precedent to

the **existence** of the court's review jurisdiction. Rather, it is relevant to the **exercise** of the discretionary power of the court whether it will entertain the application and/or it will grant the relief sought therein. Judicial interference with a prosecutorial discretion to institute criminal proceedings is very rare not because interference by way of judicial review is prohibited by law but because, in the absence of exceptional circumstances, the courts are strongly given to the exercise of judicial restraint.

It is true that, in the case of **Sharma V Browne-Antoine** (2006) 69 W.I.R 378, there are dicta which can be interpreted as suggesting that it is a condition of obtaining relief that a complaint cannot adequately be resolved within the criminal process before the court can entertain an application for judicial review or to grant the public relief sought. For example, in the joint judgment of Lord Bingham and Lord Walker, it is stated at page 394:

> ***"Nor did she consider which, if any, of the Chief Justice's complaints could not adequately be resolved within the criminal process itself either at the trial, or possibly by application for a stay of proceedings as an abuse of process. It is ordinarily a condition of obtaining relief that a complaint cannot be satisfactorily resolved in this way (as it cannot where the decision is not to prosecute) and a grant of leave which ignores this condition must be suspect."***

Baroness Hale, Lord Carswell and Lord Mance stated in their joint judgment at page 397:

> ***"A criminal judge would, we think, be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there was evidence fit to be left to the jury (both matters for him at separate stages of the trial) and if the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all the disadvantages in the balance along with any possible advantage which the Chief Justice might hope to gain by judicial review. That was, as we see it, the approach taken by Lord Steyn in ex parte Kebilene.***
>
> ***Viewing the matter as a whole, and in the light of what we had said in paras. (31) to (34) above, this is not a case where judicial review ought to be permitted. <u>We rest our decision on those grounds, and not upon any conclusion about the substantive strength and weakness of any challenge to the decision to prosecute."</u>***

But it does not appear to this Court that the Privy Council in the above passages was declaring that, as a matter of legal principle, a decision to prosecute cannot be challenged on a ground which can be dealt within the criminal process. What the Privy Council was saying is that, in an ordinary case i.e. a case in which the circumstances are not exceptional, in which the challenge to the decision to prosecute can be

dealt within the criminal process, the court would normally refrain from dealing with that challenge in judicial review proceedings. The **Sharma** case was viewed by the Privy Council as such an ordinary case. The Privy Council was not declaring that, as a matter of legal principle, the only exceptional circumstance which could trigger judicial review of a decision to prosecute is that the challenge could not be adequately dealt with in the criminal process.

It should be noted that in the case of RVD.P.P, ex parte Kebilene (1999) 3WLR 175, which was cited with approval in the Sharma case, Lord Bingham had stated: .

> ***"Where the grant of leave to move judicial review would delay or obstruct the conduct of criminal proceedings which ought, in the public interest, to be resolved with all appropriate expedition, the court will always scrutinise the application with the greatest care, both to satisfy itself that there are sound reasons for making the application and to satisfy itself that there are no discretionary grounds (such as delay or the availability of alternative remedies or vexatious conduct by the applicant) which should lead it to refuse leave.***
>
> ***The court will be very slow to intervene where the applicant's complaint is one that can be met with appropriate orders or directions in the criminal proceedings."***

Commenting on this principle, Lord Steyn in Kebilene said

> ***"There is a common principle ..... which provides a strong presumption against the Divisional Court entertaining a judicial review application where the complaint can be raised within the criminal trial and appeal process."***

Thus, Lord Bingham in **Kebilene** was saying the court would be "very slow to intervene" while Lord Steyn used terms as "common principle "which provides a "strong presumption". However, it would be wrong to interpret Lord Steyn's statement as saying that there was a strong presumption of law. Indeed, there is no such presumption of law and the court was not judicially legislating. All the learned law Lords were saying is that a challenge in the judicial review proceedings of a decision to prosecute strongly provokes the exercise of judicial restraint and caution as to whether to entertain the application or/and to grant the public law relief sought therein where the challenge can adequately be dealt with within the criminal process.

However, although such a fact provides a strong ground against judicial review, it does not ***ipso facto*** constitute an absolute fetter on the exercise of the court's discretion to hear the application or to grant the public law relief. Even if there were such a "presumption", the particular circumstances of the case can give rise to exceptional circumstances which can justify the court entertaining the application or providing relief despite the fact that the grounds of the challenge can be adequately dealt with in the criminal process. The point is: the fact that the

challenge can be adequately dealt with in the criminal process does not ***per se*** constitute an absolute prohibition against judicial review although it does provide a strong ground for the exercise of judicial restraint.

Assume for the purpose of analysis that a decision has been made to charge a person with the capital offence of Murder (for which bail cannot be granted by a Magistrate and can be granted by the High Court but only exceptionally) and that the statements on which the decision has been made plainly cannot implicate the person in the commission of the offence. Surely, the fact that the criminal process would allow the person to be discharged or acquitted on a no-case submission does not ***per se*** preclude the judicial review court from hearing the challenge to the decision to prosecute. Surely, such a person need not await the institution of the charge and the adduction of evidence by the prosecution – while all the time enduring incarceration so as to challenge an obviously irrational or unreasonable prosecutional decision to prosecute. The public interest must include the right of members of the public not to be subjected to the criminal process on charges having no realistic prospect of success.

While the Privy Council in the **Sharma** case stated that there is no known English case in which leave to challenge a decision to prosecute has been granted (and this speaks well for the prosecutorial authorities in England), the exercise of the constitutional discretion of the DPP to prosecute was successfully challenged in Kenya in the case of **Githunguri**

v. Republic of Kenya (1986) LRC (Const) 618 on the ground of abuse of process for reason of delay. But, in that case, the court held that magistrates in Kenya were not to be regarded as having an abuse of process jurisdiction since they were untrained lawyers and were not advised by trained lawyers. Here, in Guyana, in the case of **In the matter of an Application for a Writ Certiorari by Maurice Smith** (No 29 Apl of 2010 Demerara), an application challenging the decision of the D.P.P. to prosecute succeeded on the ground of unreasonableness before the Full Court. In **Eviston V D.P.P** (2002) 1 E.S.C.H 43 (31st July 2002), the Irish Supreme Court following its previous decision in **The State (Mc Cormack) V Curran** (1987) 1L.R.M 225, held that the D.P.P, in deciding whether to initiate a prosecution, was not confined to assessing the probative value of the evidence but his function or duty extended to acting with procedural fairness which went beyond the classic maxims of **audi alteram partem** and **nemo index in sua causa.** In that case, the Irish Supreme Court quashed the decision of the D.P.P to institute criminal proceedings against Mrs. Eviston on the ground of procedural unfairness.

It does appear to this court that, while it is only in highly exceptional circumstances that the court will entertain an application in challenge to a decision to prosecute, the particular circumstances of each case have to be balanced against the need for judicial restraint and caution and, moreso, where the points of challenge in the judicial review proceedings can be adequately dealt with in the criminal process.

It is true that what is being challenged in the instant case is the "advice" given by the D.P.P to the Commissioner of Police (ag) through the Assistant Commissioner of Police (Law Enforcement) to prosecute the applicant for the offence of Rape. The question arises as to whether such "advice" is outside the scope of the judicial review procedure. On this issue, it is instructive to note the observations of the learned author of **"Judicial Remedies in Public Law"** (4th Edition) by Clive Lewis Q.C under the caption of "Advice and Guidance "at page 170

> ***"Earlier decisions restricting the scope of Certiorari to determinations having binding effect have gradually been eroded with the evolution of judicial review. The courts have now moved to a position where such advice may, in appropriate circumstances, be reviewable.***
>
> ***Advice addressed to an individual which effectively amounts to a decision or determination will be subject to judicial review. In RV General Medical Council, ex parte Coleman (1989) C.O.D 313, the court accepted that advice given on behalf of the General Medical Council that proposed advertising by the applicant would involve a breach of the disciplinary code was reviewable. The advice amounted to a ruling that the action was a disciplinary offence. The court considered that it was better to allow Coleman to challenge the ruling and determine the legality rather than to act contrary to the advice and seek to***

challenge any disciplinary action taken as a result of a breach of the rules as interpreted.

The court will always review advice when the advice is likely in practice to be followed by the final decision – maker. The courts have quashed an opinion of a Minister that the development of land was desirable which, although not binding on a local planning authority, was likely to be followed by them. Similarly, the courts have granted a quashing order to quash an advisory opinion of a committee set up to advise a local planning authority on an application for accommodation of an agricultural worker as the advice was likely to be followed."

In the instant case, it can hardly be a matter of dispute that the advice given by the D.P.P who, under Article 187 of the Constitution, has an overarching power of control over all criminal proceedings (except court martial proceedings) amounted, in effect, to a decision or determination that the applicant be charged criminally. At the very least, as a matter of practice, it is likely that the advice of the D.P.P. will be followed by the Commissioner of Police (ag). Moreover, the advice of the D.P.P. contained the clearly implied ruling that the nature and quality of the available evidence was such that it was capable in law of yielding a valid conviction. The court has no doubt that such advice is subject to judicial review. It was not advice which, in practice, was non-binding. Rather, it was advice which was so backed by authoritative force as to be binding on the Commissioner of Police (ag) as a matter of practice and prudence

(if not of law) and which therefore attracts the judicial review process. (See **Steadroy Benjamin V Commissioner of Police and The Attorney-General of Antigua and Barbuda** H.C.V.A.P 2009/23).

That the applicant has challenged the advice (decision) of the D.P.P. to prosecute may have delayed the institution rather than the continuation of criminal proceedings, it cannot be to the discredit of the applicant that he has acted with promptitude before criminal proceedings were instituted. A useful analogy is the challenge to a committal order made by an inquiring Magistrate following a preliminary inquiry. It has never been to the discredit of a committed accused that he has instituted judicial review proceedings in challenge to the decision of the Magistrate to commit before the D.P.P. were to file an indictment in the High Court against him on the basis of the committal order. In judicial review proceedings, delay can ground the exercise of the court's discretion against relief.

In dealing with the application for the issue of the prerogative writs of Certiorari and Prohibition, this court is alive to the pitfall that its function is that of review and not that of an appellate court and that the court cannot substitute its own decision, advice or discretion for that of the D.P.P. The function of the court is simply to determine whether such advice or decision of the D.P.P can withstand the Rationality test in the Wednesbury sense. Only if the advice or decision is plainly irrational in the sense that no D.P.P could have rationally given such advice or made

such a decision, then and only then will the court be free to intervene and quash her advice or decision *ex debito justitiae*.

This Motion for Writs of Certiorari and Prohibition has its genesis in a report made by one Camille Joseph to the Police which alleged that the applicant, the then serving Commissioner of Police had unlawful sexual intercourse with her. Following the commencement of Police investigations into the report, the applicant, at his own request, went on special leave to facilitate the conduct of a fair and unbiased Police investigation. Deputy Commissioner Leroy Brummel was appointed to act as Commissioner of Police during the applicant's leave of absence. Six Police officers from Jamaica participated in the investigation in the interest of a fair and impartial investigation. After the completion of the investigation, the file was sent to the D.P.P. for her perusal and advice. The D.P.P later advised that the applicant be charged with offence of Rape.

Before criminal proceedings could have been instituted by the Police against the applicant in the magistrate's court, on the 7th February 2012, the applicant filed a Motion in the High Court for the issue of a Writ of Certiorari to quash the advice of the D.P.P and of a Writ of Prohibition to prohibit the Commissioner of Police (ag) and the Assistant Commissioner of Police (Law Enforcement) from acting on the D.P.P's advice and from instituting criminal proceedings against him as per her advice on the grounds that the advice given by her was irrational,

unreasonable, unfair, unlawful, unconstitutional null and void, and of no legal effect.

The applicant in his affidavit in support of Motion referred to and attached not only the written statement made by Camille Joseph to the Police but also statements taken by the Police in a separate but related criminal investigation which led to the encounter between the applicant and Camille Joseph. This court, having read the Motion and the Affidavit in support of Motion together with the statements attached, found that, if true, the contents of the said Affidavit and the statements contained sufficient exceptional circumstances to provoke its intervention even though the issues raised by the challenge could have been dealt with in the criminal process in the event of the institution of the charge as advised. The court therefore issued the Orders of Rules nisi of Certiorari and Prohibition as prayed for by the applicant in his Notice of Motion. In issuing the Orders or Rules nisi of Certiorari and Prohibition, the court was mindful of the instructive words of Lord Bingham in **Sharma V. Brown-Antoine** (2006) 69 W.I.R 379 at 387

> ***"The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such office. The maintenance of public***

confidence in the administration of justice requires that it be, and be seen to be, even-handed."

In his Affidavit in support of Motion, the applicant deposed that it was his practice to meet on Tuesdays members of the public who had complaints against members of the Guyana Police Force. On the 15th November 2011, one Camille Joseph requested to see him at his office and was cleared by his staff to see him. She complained to him that the Police were investigating an allegation against her and she was hearing nothing about the investigation and wanted to know what was happening. He noted her complaint and promised to look into the matter. He later requested information from the investigating ranks as to the status of the investigation and was informed that the investigation concerned an allegation made by one Shelly Henry that the said Camille Joseph had demanded $2 million from her or else she would go to the media and show to them the video of Shelly Henry having sex with her (Camille Joseph's) husband which she (Camille Joseph) had taken out with her cell phone in a hotel room.

According to the Affidavit of the applicant, on Tuesday the 22nd November 2011, Camille Joseph returned to his office and he informed her that the matter was referred to the D.P.P for advice. Camille Joseph then told him that a cell phone was taken away from her by the Police and was lodged at Sparendaam Police Station and she requested him to get back the cell phone or to get her access to it so that she could have

gotten the number of some friends in Trinidad. He told her that it was not possible for him to get back the phone for her because it was being used in the conduct of the investigation and that he could not prejudice the investigation. Later, in the afternoon, he called Camille Joseph and told her that one of the investigators confirmed that the file was with the D.P.P.. Camille Joseph then told him that she would like to see him socially. But he told her that he was having a meeting at the Officers' Mess at 7 P.M the said night and that the meeting would run late. Camille Joseph then told him that she would nevertheless go to the Officers' Mess. On the night of the 22nd November 2011, Camille Joseph visited the Officers' Mess and they spent some time together there imbibing beverages. They then decided to leave for somewhere private. They left and went to a hotel called "The Villa" where they entered a private room and had consensual sexual intercourse. They later left the hotel and drove to Regent Street where, at her request, they purchased food from a roadside food stall which was well attended. She purchased the food with money provided by him. That took 15 minutes. He then drove her to her home at Victoria, East Coast Demerara, where she identified a woman on the verandah as her mother. She showed him an unfinished house nearby which she claimed was hers. She then told him that she was sure that he had the influence to retrieve her phone for her. But he told her that the matter had reached the D.P.P and that she would have to await the D.P.P's advice. He shone the car lights to enable her to see her path clearly to her home and he saw her go into the house.

The applicant contended that a close examination of her first statement would certainly reveal that their sexual encounter was consensual and would negative the key contested issues of probable compulsion and lack of consent.

He further stated in his Affidavit that Camille Joseph gave several statements to the Police touching and concerning her rape allegation against him and that his Attorneys-at-Law were able to get one of those statements dated the 13th December 2011 which was given by her in the presence of her lawyer, Nigel Hughes (Exhibit HG). He said that they were several other statements taken by the Police from different persons relating to the rape allegation and that those statements were always available to the D.P.P but not his Attorneys-at-Law.

He contended that it was necessary to determine Camille Joseph's background and history because credible evidence from her was necessary to establish her allegation of rape against him.

Specifically, the applicant deposed in his Affidavit that Camille Joseph was under Police investigation since October 2011 for the offence of Attempted Extortion by demanding $2 million from Shelly Henry, the wife of policeman Matthew Craig, who (she alleged) had an adulterous relationship with her husband at an East Coast hotel. Camille Joseph said that she had hidden in the hotel room and took out photographs of her

husband and the woman having sex. In that investigation, Camille Joseph also gave the Police several statements relating to the allegation against her. She gave statements dated 12th and 14th October 2011 and 29th November 2011. Besides making those statements, she also made oral complaints to other Police ranks. In her written statement dated 14th October 2011, she stated that Matthew Craig had wanted to have sex with her and that he started to rub her vagina and he threatened to kill her. In the written statement dated the 22nd November 2011, she said that Matthew Craig had tried to put his hands into her panties besides holding her breasts. She had narrated the alleged incident with Craig to Sargeant Alexander but she had never told the Sargeant that Craig had rubbed her vagina. The applicant in his Affidavit exhibited the Statements taken by the Police in that investigation as Exhibit HG1, HG2, HG3, HG4 and contended that a close examination of those Statements would point to the singular conclusion that it is plain that the credibility of Camille Joseph could not meet the most basic evaluation and that her allegation of rape could not be viewed as credible.

In her Statement to the Police dated the 13th December 2011, exhibited by the Applicant, Camille Joseph had stated that, on the 8th October 2011, she had caught her husband ***in flagrante delicto*** having sex with a female individual at the Alpha hotel on the East Coast of Demerara and, using her cell-phone, had video-taped them in the act. The husband of the female individual was a member of the Guyana Police Force. Herself and the female individual made efforts to have the

matter settled between them. The incident was published in a daily newspaper and, on the 12th October 2011, the police from Cove and John Police Station contacted her in relation to that incident. She was taken to the Sparendaam Police Station. Her cell-phone of $60,000 value was detained by the police at Cove and John Police Station and transmitted to the Sparendaam Police Station. She stated that, as a result of the detention of that cell-phone, she decided to contact the applicant, the Commissioner of Police, then known to her only through the television. But it was until the 15th November 2011 that she visited him at his office. She told him that her visit had to do with the incident involving her husband, her harassment by a police officer and her desire to have her cell phone returned. The applicant made telephone contact with the Divisional Commander and arranged for the statements to be sent to him. He then took her phone numbers and told her that he would get on back to her and, if not, she should return the following Tuesday. Having not heard from the applicant, Camille Joseph repeated her visit the following Tuesday to the applicant's office. She then told the applicant that she wanted the phone so that she could get the telephone number of someone from New York who was going to assist her with foodstuff for her children who had nothing to eat. After some conversation, he took some money ($15,000) and offered it to her saying that he did not like to see children punish. After showing him some reluctance, she accepted the money. He promised to ensure that she got back the phone and promised to call her before 5P.M. He stored his cell-phone

numbers in her "Blackberry Curve Cell Phone" and told her that that was done so that she could call him.

At this juncture, the statement of Camille Joseph revealed that her cell phone was being detained by the Police in connection with the criminal offence of Attempted Extortion allegedly committed by her. She made a clearly brazen and bold decision to approach the Commissioner of Police in person to have that phone, which was obviously crucial to the Police investigation, returned to her. Surely, she was attempting to procure no less a person than the Commissioner of Police himself to pervert the course of criminal justice. It must have been obvious to Camille Joseph that her decision to do so was ambitious and to be successful much persuasion was necessary. As such, she advanced to the applicant the welfare of her children (non-availability of food) as the reason why it was necessary that the phone be returned to her. He offered her money and, after showing reluctance to do so, she nevertheless took it. Here was a woman, sporting a Blackberry Curve Cell phone, telling the applicant that she wanted her detained phone released to her to save her children from starving. Here was the applicant offering her money and putting his cell phone numbers into her Blackberry Curve Cell phone for her to call him and promising her that he would ensure that she got back the phone. Surely, the relationship between the applicant and Camille Joseph, even at that stage, had progressed beyond that of Commissioner of Police and a complaining member of the public.

According to the statement of Camille Joseph, as she was finishing her cooking sometime before 5PM on the 22nd November 2011, the applicant by telephone told her to ensure she found someone to look after her children and to go down to the Police Officers' Mess. She took a mini-bus and a taxi and went to the said Mess as requested. She thus agreed to meet with the applicant outside of the hours of work at the Officers' Mess, a place of relaxation for Senior Police officers, without being informed by the applicant why her presence was required there. She met the applicant who requested that she await the end of the Table Tennis Association Meeting in which he was participating. While she was awaiting the end of the meeting, her mother kept calling her requesting that she return home to look after the kids. Thus, taking care of her children took secondary place to meeting with the applicant at the Police Officers' Mess.

She stated that she attempted to leave but received a message from the applicant that he was wrapping up the meeting and that he had gotten her cell phone. She was served with orange juice and snacks while waiting. The applicant later came and she asked him if he had her cell phone and he said yes and pointed to his office. Later, he told her "Lets go" and when she asked where, he replied "to go and get the phone". She said that, at that juncture, he told her that he had to get something at home and he would ensure that she got home safe. He drove past the gate to his office. She again asked him for the phone and he said that he would get it. He then drove through several streets in

Georgetown until he came to a big peach building. He then drove through the side-gate of the building into its compound. He then requested her to come out of the vehicle and she refused and began to cry. He took a gun from a compartment of the car and, while not pointing the same at her, kept waving the same in front of her while telling her that men do not give women money just like that. She continued to cry while he demanded the return of his money. He then came to where she was and opened the car door. She then came out of the vehicle and he took her to Room 101 at the bottom flat of the building where there were two beds. At this juncture, it is clear that the applicant was saying that she was pressured into coming out of the car and going into the room with the applicant. She stated that she was about to run around one of the beds when the applicant held onto the front of her neck with his left hand and dealt her two slaps on the face with his right hand. He then choked and pushed her onto the bed. She began to see dark but was fighting to release his hand from her neck. She lost consciousness, she later recovered and found that her Pit Bull pants and her underwear were off and the applicant was naked, on his knees over her, and was fitting on a condom. She continued to attempt to free herself. But he again choked her with his left hand and inserted his erect penis into her vagina.

While Camille Joseph, in her statement, did set out circumstances which unequivocally point to the applicant's commission of the offence of rape against her, it strains one's credulity to believe that she,

succumbing to verbal pressure and any threatening conduct by the applicant, came out of the car and entered the hotel room without seeking to run away or escape from the applicant even though he had expressly made clear to her his intention of having sexual intercourse with her. It seems rather strange that she, having entered the hotel room without any attempt at running away, would attempt to do so only after she had entered the room. If the applicant had a gun in his hand, he had that gun in his hand before and after they entered the hotel room. If, when she attempted to run around one of the beds just after he had entered the room, how could the applicant have held the front of her neck with his left hand and slapped her twice on the face with the right hand if he was holding the gun in one of his hands?

According to Camille Joseph, when the applicant inserted his erect penis into her vagina she was crying and began to beg and scream but the applicant raised her legs in the air and had sex with her for a while when she tried talking him out of it by saying "Sir, please, I come four time and please let me come on top." She stated:

> ***"I was trying to free myself from him but he choked me again with his left hand and inserted his erected penis into my vagina with his right hand. I started begging and screaming and he raised my two legs in the air and had sex with me for a while. I tried talking him out by saying "Sir, please, I come four time and please let me come on top." I***

kept tapping his back to let him come off of me but he did not respond."

It is absolutely incredible even to the most credulous that Camille Joseph, who had just before been slapped and choked by her assailant and was begging and screaming during the act of forcible sexual intercourse, would inform her assailant during intercourse that she had four orgasms and make a request "to go on top". Such conduct was surely not the words of a victim of an ongoing rape but rather the conduct of a collaborating partner who clearly wanted to convey to her partner her enjoyment of the intercourse and her desire to play a more active or aggressive role.

Camille Joseph further stated that, after they left the hotel and were driving in the car, the applicant was talking as though they were lovers. The question must be asked: why would the applicant soon after assaulting and having forceful intercourse with Camille Joseph, speak to her as though they were lovers? Does this not reveal that her conduct must have given him the belief that what had just occurred was consensual?

Camille Joseph continued by stating that, while they were driving, the applicant asked her if she was hungry. He then drove to Regent Street opposite to Guyoil gas station where persons were selling food. At his request and insistence, she went and found out what kinds of food were being sold. She returned to the car and told him that chowmein

and pepperpot were being sold and he gave her money to make purchases. She went back, purchased one chowmein and one pepperpot and returned to the vehicle. He took the chowmein. He told her that he was going to drop her home. Here, there is the scenario of Camille Joseph, the alleged victim of violence and rape being asked if she was hungry and then going herself to find out what kinds of foods were being sold and then returning and making purchase of food with money provided by her alleged assailant. They apparently shared the food since she stated that he took the chowmein and the implication is that she kept the pepperpot. It should be noted that Camille Joseph did not state what was her reply when the applicant asked her whether she was hungry. However, the implication was that she did reply in the positive since immediately after he drove to Regent Street opposite the Guyoil gas station where food was being sold. Surely, her conduct in this ***ex post facto*** event can hardly be viewed as the conduct of a distressed victim of violence and rape and his conduct can hardly be viewed as that of a person who had just violated her. Indeed, his conduct was plainly consistent with her story that he was talking to her as if they were lovers.

Camille Joseph further recounted in her statement that the applicant stopped the vehicle by Celina resort, took her cell phone and began to send text messages from her phone to his phone and then asked her to call and tell him how much she loved him and enjoyed having sex with him. Was the applicant at this juncture seeking to falsely create evidence of a love affair between himself and Camille Joseph? Or,

was Camille Joseph in her ***ex post facto*** statement made to the Police three weeks after the event of intercourse after she had already consulted with a lawyer here seeking to belie and nullify the effect to text messages which she had indeed made to the applicant? It would indeed be inexplicable conduct on the part of the applicant, who, according to Camille Joseph herself, was speaking to her as if they were lovers. If the applicant had deluded himself into believing that they were lovers – despite all that Camille Joseph alleged that he had just earlier done, then such acts were certainly not the acts of such a deluded person. It seems more likely that Camille Joseph was here, in her ***ex post facto*** statement made three weeks after the alleged incident and after consulting with a lawyer, seeking to nullify the contents and effect of text messages from her phone to his phone, made after the incident, which tended to give the lie to her allegation of non-consensual sexual intercourse with the applicant.

She further stated that, on arrival at her home, the applicant told her that he would call her every day and that she must call him every day. Such a promise and request is wholly consistent with an amorous state of mind in the applicant and with a desire on his part to cement their relationship. Yet, Camille Joseph surprisingly stated that, at the same time, he began to threaten her life and to warn her that he would know if she went to any doctor in the country.

Camille Joseph continued that, during the following day, the applicant called her on her cell phone several times promising to send a police officer to take her to Georgetown but he failed to fulfill his promises. It is readily apparent that she did not reject his promise since she stated not that she rejected it but that he failed to fulfill it. She stated that she then sent a text message to him telling him how she felt about what he did to her but she did not state when she sent that text message. It does appear from her statement that such text message was sent only after she had spoken on the telephone to the applicant several times and, more significantly, after he had not honoured his promise to send a Police officer to take her to Georgetown. She said that, a few days after, she made contact by telephone with Help and Shelter, a social organization, known to be involved in looking after the interests of abused woman, and told one Carol what the applicant did to her.

It is strange that Camille Joseph did not express her feelings to the applicant when he was speaking to her on the phone the following day and was promising to send an officer to take her to Georgetown but chose to do so by text only after he had not honoured his promise to send an officer to her to take her to Georgetown. It does appear that a fair conclusion can readily be drawn that Camille Joseph began to entertain the feeling that the applicant, having had sexual intercourse with her, was not showing sufficient interest in her and was treating her with slight. Her statement reads:

"Mr. Greene called me on my cell phone several times the following day checking on me and promising to send a Police officer to bring me to Georgetown but he never did. I sent a text message to his cell phone telling him how I feel about what he did to me. A few days after I called Help and Shelter and spoke to one Miss Carol telling her what Mr. Greene did to me."

According to Camille Joseph, in her statement, on the 4th December 2011 i.e. about 11 days after she last spoke to the applicant on the phone, the applicant called her on her cell phone just before 7AM and informed her that he was trying to get on to her before and asked her if she had a man with her the night before since he was trying to get on to her but could not do so and that he hoped that whatever she did she did well. She tried to tell him that her phone was off but he began to curse and to ask her where she was going and she told him that she was going to church and he accused her of lying since she had a man in the house. She took a taxi and went to church but he kept calling while she was in church. While in church, she sent him a text message saying "I checked my phone and three missed calls. I am in church and I will pray for you and that you owe me an apology." He also texted back and asked why she wanted him to apologise since he did not owe her an apology. He also sent a text message saying "your phone could not record calls if it was off" and kept calling. She stated that she did not answer as she was in church. When she came out of church, she texted him saying that she

was in church and could not answer his calls and that she never said that her phone did not record his calls but that the phone showed three missed calls when she turned it on and his number turned up. She stated that, in that text, she accused him of giving her money to help her kids and then sexing it out of her. She also was expressing her anger at being told by him that whatever she did he hoped that she did it well. According to her, in her text message to him, she stated:

> ***"Do I look like a slut. Just talk to a man today and sex with him tonight. Well, that's how you make me feel. I moved out of Victoria."***

Clearly, Camille Joseph was expressing how undignified that applicant had made her feel since his conduct towards her made her feel that he was treating her as a woman without virtue. It was certainly not lost upon her that she had sex with the applicant soon after they met and he was then accusing her of being a woman of easy virtue. But it is significant that she did not accuse him of using violence to obtain sexual intercourse with her or of raping her. On the other hand, the applicant was behaving like or playing the role of a jealous lover. However, unbeknown to him, her feeling of indignation had already reached the stage that she had complained to an officer of Help and Shelter i.e. after he had breached his promises to send an officer to pick her up the day after intercourse took place and did not communicate with her for some days after. She did not then receive the detained cell phone and it does not appear that he mentioned it in his calls to her on the 23rd November 2011 i.e. the day after he had intercourse with her.

According to the story of Camille Joseph, two days later i.e. on the 6th December 2011, despite everything which had transpired before then, the applicant again called her on her cell phone and told her to come down to Georgetown or he would have his "dogs" come for her and that she should phone him when she was in Georgetown. She came down to Georgetown as instructed by him and he asked her to remind him of what he told her to come for. She replied that it was for the money. According to her story, he said okay and requested that she meet him at Camp Street by the Republic Bank. She told him that she was alright. He then asked her if she had procured all her windows and she replied in the negative. He then said that she was not alright and that she must go to Camp and Robb Streets and collect some money. She went to Kissoon's store at Camp and Robb Streets and told a female staff to look at her since she was scared but was waiting on the applicant who had failed to honour his promise to return her cell phone but wanted her to come and collect money. The applicant later came in his white Land Cruiser. She photographed the registration No. PLL 7411 with her camera and went to the left front door. He told her to enter. She opened the left front door and stood up. He then took some money from his left shirt pocket, gave it to her and drove off. She then photographed the vehicle. She checked the money and it amounted to $11,000. Most significantly, if the applicant had demanded back his money as a form of pressure to cause her to exit the vehicle and enter the hotel room, it is certainly incredible that Camille Joseph would again take money from him to assist her to purchase windows – especially as

she (as she stated in her further statement) had already procured the windows.

It is obvious that Camille Joseph had sometime before informed the applicant that she was in need of assistance to procure some windows and the applicant was providing monetary assistance to do so. The question arises as to why would she come to town to receive such assistance from a person who, according to her story, had violently raped her, had treated her with disrespect and, most significantly, she had reported to Help and Shelter and other persons (including a lawyer and some doctors). Surely her maintenance of communication with the applicant and her acceptance of monetary assistance from him after the event tend to belie her story that he had violently raped her.

It is not without significance that Camille Joseph stated that she told the female member of staff of Kissoon Furniture Store that the applicant had promised to return her cell phone to her but he never did so but then wanted to give her money. The significance of such statement to that female member of staff clearly showed that the giving of money was no substitute for fulfilment of his promise to return the cell phone. The question arises as to why did Camille Joseph feel that the applicant was under such an obligation. Surely, she could not have felt that he was under such an illegal obligation unless she had given consideration which could not be met by payment of money. Her concern was the return of the phone having regard to whatever

consideration she had given. Simply put, her concern was for specific performance and not compensation. Money was an inadequate substitute. But she nevertheless collected it.

The question arises as to why Camille Joseph was so concerned with the return of the cell phone. The answer lies in the Police investigation which was being or had been conducted against her.

The applicant had attached to his Affidavit copies of statements taken by the Police in their investigation against Camille Joseph on a report made by Shelly Henry. Since the applicant had referred to that investigation in her statement in which she made the allegation of rape against the applicant, the statements taken in that investigation were part and parcel of the entire story and was relevant to discovery why it was so necessary for Camille Joseph to have sought help or assistance from the applicant for the return of her cell phone.

Those statements reveal that Camille Joseph had become aware of a plan between one Shelly Henry and her (Camille Joseph's) husband to meet at Alpha hotel on the East Coast of Demerara, to engage in sexual intercourse. She went there by taxi and saw her husband exit a car and enter the hotel. He later came out of a room. She clandestinely entered that room and secreted herself in a wardrobe. She had armed herself with her Samsung cell phone. Her husband and Shelly Henry later entered the room and began to engage in sexual intercourse. She came

out of the wardrobe and began to video-record them with her cell phone. She then proclaimed that she had the media outside. Shelly Henry then requested her not to call the media and not to let her husband know of her act of infidelity. She offered her $2 million. But, according to Shelly Henry's statement, it was Camille Joseph who demanded $2 million from her. A perusal of Camille Joseph's statement reveals that she did tell Shelly Henry that she had to pay her $2 million for the pain she has caused her or $1.5 million if that sum was paid before the following Tuesday. The relevant part of Camille Joseph's statement made in that related investigation reads:

> ***"I took my Samsung cell phone and I started to video my husband and the female who I realize to be Shelly. I then yell to my husband and told him what is this. Shelly then told me that she will give me two million dollars to settle the matter. I am now saying that before Shelly offered me the money I told Shelly and Matthew that I have the media outside. Shelly told me not to call in the media and not to let her husband know about this. I then told Shelly "for the pain you have caused me give me two million dollars" and afterwards I told Shelly "do not bother with two million dollars, give me one million and five hundred thousand dollars before Tuesday". I then walked out of the hotel room and my husband came after me. I then went home to Victoria village."***

On the above statement, even though Camille Joseph was saying that it was Shelly Henry who had offered to her the sum of $2 million not to call in the media and to expose her illicit act to her husband, it is clear from what she stated immediately after that it was she (Camille Joseph) who had demanded $2 million from Shelly Henry for the pain she had caused her and that she later changed that demand to $1.5 million to be paid before the following Tuesday. That incident at the Alpha hotel occurred on the 8th October 2011.

There can be no doubt that Camille Joseph not only set out to catch her husband ***in fragrante delicto*** having illicit sex with Shelly Henry but also she set out to record their indiscretionate act in the permanent form of a video-recording. It is obvious that her purpose for video-recording Shelly having sexual intercourse with her husband was to extort money from the hapless but unfaithful Shelly Henry. In order to put Shelly Henry in an immediate state of fear and panic, she falsely told her that she had the media outside. Clearly, Camille Joseph set out to exploit the human frailty of Shelly Henry for the purpose of her own financial advancement. Clearly, she was bent on extortion. It was to extricate herself from her own criminality that she audaciously decided to approach no less a person than the Commissioner of Police to retrieve the cell phone which was in the custody of the Police as a crucial item of criminal investigation. How did she expect to persuade a Commissioner of Police to accede to her request to pervert the course of criminal justice? How far was the prepared to go to achieve her goal?

And so it was that, on the 15th November 2011, Camille Joseph approached the applicant at his office even though she did not know him except through the television.

In determining whether to advise the institution of criminal proceedings against the applicant for the offence of Rape, the D.P.P was under a duty to peruse and analyse all the relevant statements including what was said by the applicant himself in his Statement to the Police and then ask herself whether there was a realistic prospect of a successful prosecution. Since the applicant had admitted that he had sexual intercourse with Camille Joseph and the issue became simply whether there was a realistic prospect of a positive finding that there was no consent (in contradistinction to whether there was consent since the prosecution would bear the burden of proof of no consent). The credibility and reliability of the story told by Camille Joseph on that issue was therefore the crux of the matter as against that told by the applicant.

It is true that Section 69 (1) of the Sexual Offences Act 2010 not only restates the common law position that no corroboration of the evidence of a complaint is required for the conviction of an Offence of Rape but it went further and prohibited a trial judge from directing a jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 69 (1) of the said Act provides:

"No corroboration of the evidence of the complainant .....shall be required for a conviction of an offence under this Act, and the judge shall not direct the jury that it is unsafe to find the accused guilty in the absence of corroboration."

The statutory prohibition against a trial judge directing the jury that it is unsafe to convict an accused person in the absence of corroboration does not at all confer on the D.P.P or any other prosecutorial authority any licence to adopt a less responsible or more liberal approach in making decisions to prosecute in sexual offence cases based on the evidence of virtual complainants or in cases based on the evidence of children or young persons. While Parliament has seen the necessity of prohibiting judges from giving to juries directions which, as a matter of generality, discriminate against the credibility and reliability of such witnesses on the basis of their being victims or being young persons, prosecutorial authorities remain under the duty of making realistic assessments of their credibility and reliability particularly in cases where the case for the prosecution would rest solely on the evidence of such persons. This is so even though the absence of corroboration does not weaken the case for the prosecution. The instant case was such a case which engaged the attention of the D.P.P.

This court does not see it appropriate to look at the facts or the circumstances surrounding the allegation of sexual assault made by

Camille Joseph against Corporal Matthew Craig in the light of section 80 of the Sexual Offences Act 2010 which provides:

> ***"(1) The defence shall not introduce evidence directly or ask questions in cross-examination suggesting that previous allegations of sexual offences by the complainant may have been false without the prior permission of the court.***
>
> ***(2) The Court shall not give such permission unless***
>
> ***(a) the defence can adduce concrete evidence that the previous allegation was in fact false; and***
>
> ***(b) the relevance of the evidence to the case of the accused is demonstrated to the court."***

Even though the applicant attached to his Affidavit in support of Motion statements relating to an allegation of indecent sexual assault against Matthew Craig, the husband of Shelly Henry and a Corporal of Police, by Camille Joseph with a view of showing that Camille Joseph was given to the making of such false allegations, and therefore ought not to be accorded credibility with respect to her allegation against the applicant, in the light of section 80 of the Sexual Offences Act, this court attaches no error of law to the D.P.P if she had decided not to take into consideration those statements. It was not her function to determine the truth or falsity of that allegation which, in any event, was singular and was not admitted to have been falsely made. Even if it was false, that falsity could not ***per se*** point in the direction of falsity on her part in making the allegation of Rape against the applicant. It did not follow that

because she had falsely cried "wolf" on one occasion, any cry of "wolf" on another occasion by her would be false. The credibility and reliability of Camille Joseph's allegation had to be assessed on the basis of the contents of statements relevant to the specific allegation and not on extrinsic statements which related to her **general** credibility. This court therefore sees no reason why it should have regard to those statements in these proceedings.

In the English case of **R (FB) V D.P.P** (2009) I C.A.R 580, it was held by the Queen's Bench Divisional Court that the proper application of the "realistic prospect of conviction" test in the Code for Crown Prosecutors issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985 required the prosecutor to imagine himself to be the fact-finder and ask himself whether, **on balance**, the evidence was sufficient to merit a conviction taking into account what he knew after the defence case. The decision of the court had to do with paragraphs 5.2 and 5.3 of the Code for Crown Prosecutors which states:

> ***"5.2. Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence may be, and how, that is likely to affect the prosecution's case.***
>
> ***5.3. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates treating the case alone, properly directed in accordance with***

the law, is more likely than not to convict the defendant on the charge alleged. This is a separate test than the one that the criminal courts themselves must apply. A court should only convict if satisfied that it is sure of a defendant's guilt."

In the summary of the Recommendation for Dismissal in the case of the ***People of the State of New York V Dominique Strauss – Kahn Indictment No.*** 02526/2011, it was stated:

"But the nature and number of the complainant's falsehoods leave us unable to credit her version of events beyond a reasonable doubt, whatever the truth may be about the encounter between the complainant and the defendant. If we do not believe her beyond reasonable doubt, we cannot ask a jury to do so."

"Prosecutors must abide by unique rules that reflect our special role in the legal system. Most significantly, prosecutors must satisfy an exacting standard for conviction: proof of guilt beyond reasonable doubt. This requirement is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent [person] than to let a guilty [person] go free."

That standard of proof guides the decisions of prosecutors who must decide whether to proceed with the case, not just jurors who must decide whether to convict."

In determining whether the prosecution should be advised against the applicant, the D.P.P had to apply the "realistic prospect of conviction" test in the light of the case both for the prosecution and the defence while bearing in mind that it was for the prosecution to prove its case beyond reasonable doubt. If the DPP, viewing the matter holistically and objectively, came to the conclusion that the prosecution would be unlikely to satisfy a jury beyond reasonable doubt that Camille Joseph did not consent to having sexual intercourse with the applicant on the night of the 22nd November 2011, she ought to have advised no prosecution – since an objectively unlikely conviction can hardly be viewed as consistent with a prosecution which can be described as "having a realistic prospect" of success. Indeed, if a conviction is objectively unlikely, it would simply be too remote and prosecution would not have a prospect of success which can be described as realistic. In the instant case, the DPP advised the institution of criminal proceedings against the applicant.

Contrary to what was asserted by the D.P.P in her Affidavit in Answer, there is no presumption of rationality in favour of the D.P.P (or any other decision – maker) or that she applied the right test. This court as a court of judicial review must determine whether any D.P.P (or other

prosecutorial decision – maker) could rationally have come to the conclusion that there was a realistic or real prospect of success in the light of all the statements in the case. This court as a court of judicial review would interfere with the decision of the D.P.P only if the decision of the D.P.P was plainly or clearly irrational i.e. unreasonable in the Wednesbury sense.

In the instant case, the following facts emerged from the statement of Camille Joseph.

(1) Camille Joseph was implicated in the commission of the serious criminal offence of Attempted Extortion or Blackmail with the use of her cell phone.

(2) The matter was the subject of criminal investigations by the Police who detained the cell-phone as material evidence.

(3) She later decided to approach and did approach the applicant, who was the Commissioner of Police, for his intervention to retrieve the cell-phone and, therefore, for him to pervert the course of criminal justice.

(4) On her second visit to the applicant, she told him that she wanted the cell phone to get the phone number of someone who would provide food assistance to her children who had no food.

(5) She accepted financial assistance from him to provide food for her children.

(6) She gave him her cell phone to enable him to insert his numbers into her phone and she took his cell phone number.

(7) At the request of the applicant, she went to the Officers' Mess outside the official working hours to meet with the applicant.

(8) She waited for him there until a meeting of the Guyana Table Tennis Association was over even though her mother was calling upon her to return home to look after her children.

(9) She later joined the applicant in his vehicle and he drove her to the La Villa Hotel after driving through several Georgetown Streets.

(10) He expressly told her there that he wanted to have sexual intercourse with her.

(11) She came out of the vehicle on her own i.e. without any bodily force being applied to her.

(12) They went into the hotel room where during the act of sexual intercourse she told him "Sir, please, I come four time and please let me come on top."

(13) After leaving the hotel, he asked if she was hungry and drove opposite to the Guyoil gas station in Regent Street. At his request, she came out of the vehicle and went to some food vendors and enquired what food was

being sold. She went back to the applicant and told him what food was being sold.

(14) She returned to the food vendors, bought food with money provided by him and returned to the vehicle. They shared the food.

(15) The following day, the applicant called Camille Joseph on her cell phone several times and promised to send a Police Officer to take her from her home in Victoria to Georgetown. She never rejected such a promise.

(16) After the applicant had broken his promise to her, she texted him telling him how she felt about what he did to her even though before that she had spoken to him several times on the phone.

(17) Days after, she made contact with Help and Shelter and spoke to one Carol.

(18) Eleven days after she last spoke to him on the phone, the applicant eventually made telephone contact and accused her of not taking his calls because she was having a man in her house. There was an exchange of words by way of text messages over his missed calls which had showed up on her cell phone and she expressed to him that he had made her feel that she was cheap and that she had moved out of Victoria.

(19) Two days later, the applicant called Camille Joseph on her cell phone and requested that she come down to Georgetown and she must call him when she was in Georgetown. She complied and, when she contacted him by phone, he asked her to remind him why he told her to come to Georgetown she replied that is was for "the money". He told her to go to Camp and Robb Street. He came with a Land Cruiser. She opened the left side door and stood up. He gave her money to purchase windows for her unfinished house. He left.

Here Camille Joseph admitted she again took money from the applicant even though she had claimed that he had demanded back the $15,000 gifted to her as a form of pressure for her exit the vehicle and enter the hotel room.

(20) It was days after the applicant had sex with Camille Joseph and had not returned her cell phone and had breached his promise to send a police officer to take her to Georgetown and thereafter failed to communicate with her for days that she made contact by telephone with Help and Shelter.

In his statement dated the 12th January 2012, the applicant stated that it was his practice to meet on Tuesdays members of the public having complaints to make against the Police. On Tuesday the 15th

November 2011, Camille Joseph came and complained that an allegation was made against her and she wanted to know what was happening since she was not hearing anything. He noted her complaint, and promised her to look into it. He later received information from the investigators that one Shelly Henry had made an allegation that Camille Joseph had demanded (2) two million dollars from her otherwise she would expose to the media a video recording of Shelly Henry having sex with her (Camille Joseph's) husband which was made in the hotel room. The following Tuesday (22nd November 2011), Camille Joseph returned and he told her that the matter was being referred to the D.P.P for advice. She then told him that the Police had seized her cell phone and that it was lodged at Sparendaam Police Station and she requested him to procure its return or access to the phone for her so that she could get the number for some friends in Trinidad. He told her that he was unable to do that because of prejudice to the investigation.

According to his statement, sometime later in the afternoon (of the 22nd November 2011), he called Camille Joseph and informed her that one of the investigators had confirmed that the file was with the D.P.P. who would have to decide whether any charge should be instituted. He also told her that, if the D.P.P. did not advise a charge against her, the cell phone would be returned to her. She then told him that she would like to see him socially. He told her that he was having a meeting at the Police Officers' Mess at 7P.M. that night and that the meeting would run late. Camille Joseph then told him that she would still

visit him at the Mess. She did visit him there that evening and they spent some time there conversing and consuming beverages. During the course of conversing, they decided to leave the Mess for somewhere private. They then left the Mess and went to "The Villa" (a hotel), entered a private room and had consensual sex. He stated that he never had a gun in his possession that night.

According to his statement, when they left the hotel, he drove to Regent Street where there were several persons purchasing food from a food stall. They spent about 15 minutes there. She purchased food with money which he provided. He then drove her to her home where, on arrival, she identified a woman on the verandah as her mother. She also pointed out an unfinished building and told him that the building was hers. She then told him that she was sure that he could use his influence get back her phone for her.

It is clear from what Camille Joseph had stated that it was the applicant who had been aggressively seeking to promote their relationship beyond that of Commissioner and complaining member of the public. On the other hand, he was saying that it was Camille Joseph who explicitly expressed her desire to know him socially. Whether it was at the applicant's request or not, Camille Joseph came and met the applicant after the hours of work and waited at the Mess for him until the meeting he was having was over. It is also clear that they spent sometime there conversing and consuming beverages even though she

knew that her presence was required at her home in the interests of her children's welfare. His statement that she pointed out an unfinished building and said it was hers explains that part of her statement in which she stated that, weeks after the act of intercourse, she had to remind him that the purpose for which he had requested her to come to Georgetown and call him was to give her money to purchase windows for her unfinished house. In material respects, the statement of the applicant was supported by the Statement of Camille Joseph and, in many respects, they were discrepant. There was a major discrepancy on the material issue as to whether the applicant was in actual possession of a firearm on the night of the 22nd November 2011.

According to the Statement taken from Maxwell Thom, the hotel owner, the vehicle arrived at the Western side gate sometime after 9P.M on the 22nd November 2011. He opened that gate thereby allowing the vehicle into the compound. The vehicle stopped about 5 feet past the first door. He was standing by the Western door. Within a minute after the vehicle parked, the applicant exited the vehicle, approached him and greeted him. A few seconds after the applicant exited the vehicle, a female also exited the vehicle, walked towards them and said "goodnight". He returned the courtesy. He then opened the side door and entered with the applicant following immediately behind him and the female immediately behind the applicant. He took them to Room 101 and opened its door. The applicant entered the room followed by the female. He stated that when they entered the room, he did not hear

the female say anything suggesting that she was protesting and anything coming from her. He stated that she was following willingly. Sometime after 12 midnight, he heard the room opening and he called his receptionist via the Intercom and told her to open the gate. He then went through the Western door and saw the vehicle reversing out of the compound. He locked the gate. He mentioned that, during the time that the applicant and the female was in the room, he heard no conversation or anything else to cause him any concern. Significantly, he stated when the applicant came out of the vehicle and was approaching him, the applicant was pulling his pants and he did not see anything in his hands. The statement of Maxwell Thom is not only supportive of the claim of the applicant that he had no gun on the night of the 22nd November 2011 but also his claim that the intercourse which took place between himself and Camille Joseph that night was consensual. It is significant to note that his statement was given on the 6th January 2012 while the applicant's statement was dated on the 12th January 2012. In other words, the statement of Maxwell Thom was made before the statement of the applicant was made. Therefore, Maxwell Thom could not have been tailoring his statement to give support to what the applicant stated in his statement.

In the Statement of Nicola Searles, who was the receptionist at the Villa hotel on the night of the incident, she stated:

> ***"I also saw Mr. Thom together with Mr. Henry Greene and the female when he had entered the building. I did not see***

Mr. Greene with anything in his hand. When they entered the building, the female was behind Mr. Greene and she appeared to be normal and was having a normal conversation with Mr. Henry Greene. They then entered room 101 which is situated South of the receptionist area. The rooms at the hotel are not sound proof and as such, if anything unusual, that is a fight or quarrel, anyone at the receptionist area or who is in the opposite room will hear. Whilst Mr. Greene and the female were in room 101, I did not hear any unusual sound or scream. During their time in the room I was in the receptionist area."

The statement of Nicola Searles was given on the 9th January 2012 before the statement of the applicant was given. Therefore, she could not have been tailoring her statement to be consistent with the applicant's story.

On a referral note from Help and Shelter, Dr. Dalgleish Joseph, on the 29th November 2011, saw Camille Joseph. According to Dr. Joseph, Camille Joseph complained to him that she was sexually assaulted by the applicant. According to Dr. Joseph:

"She was from my observation obviously nervous and was crying throughout the whole session with me. My conclusion was that her condition necessitated a colleague with the ability to manage psychological conditions."

Not only did this observation take place a week after the alleged rape but also it would have been surprising to Dr. Joseph to learn that the same

nervous and crying Camille Joseph would, one week later (6th December 2011), meet the applicant and take his money for windows for her unfinished house - which she had already procured and no longer needed.

On the 1st December 2011 i.e. the day after Camille Joseph had met the applicant at Robb and Camp Street and accepted from him $11,000 to purchase windows for her unfinished home, she met Dr. Michaela Mc Rae and, again crying continuously, complained to her that the applicant had raped her using force and threats and that she was so traumatized that she could not sleep or eat and was having nightmares. According to the statement of Dr. Mc Rae she was of the view that Camille Joseph was "a patient with severe depression which was incapacitating her since she was spending all day thinking about the incident and was unable to attend to her children or her household chores or to eat or sleep". While her complaint and her apparent distressed condition could provide no support to her story that she was indeed raped by the applicant or, indeed, was raped at all, again the question must be asked if she was so traumatized and so distressed, her going to meet her alleged assailant (the applicant) to collect money from him just the day before i.e. the 6th December 2011, is hardly explicable. The inescapable conclusion was that she was simulating a distressed condition while complaining of rape to both Dr. Joseph and Dr. Mc Rae.

In the statement of Carol Innis-Baptiste, the Help and Shelter counsellor, dated the 6th January 2012, she stated that between October and November 2011, Camille Joseph came to her office and reported a matter. She did not state what Camille Joseph reported at that time. However, Carol Inniss-Baptiste stated that, on the 30th November 2011, Camille Joseph revisited her office and told her that she would like to be honest and speak the truth. The implication is that Camille Joseph was not being honest or frank in her previous report. Be that as it may, Carol Innis-Baptiste stated that on the 30th November 2011.

> ***"She (Camille Joseph) said that he (the applicant) proceeded to strip her, tearing her pants in the process and then he put on a condom and had vaginal sex with her and oral sex."***

But, Camille Joseph in her statement to the Police stated that it was when she regained consciousness after she was choked by the applicant that she found her Pitbull pants and her underwear off and the applicant on his knees putting down a condom. Moreover, at no time did Camille Joseph mention anything about the applicant having oral sex with her.

While the statements of Carol Innis-Baptiste, Dr. Dalgeish Joseph and Dr. Michaela Mc Rae could not have been used by the D.P.P against the applicant in considering whether to advise prosecution against the applicant, they could have been used in favour of the applicant if they

had disclosed any material inconsistencies in her story in her statement to the Police.

As complaints, what was told to these three persons by Camille Joseph was not legally admissible to support her story as told in her statement to the Police. They could not corroborate Camille Joseph's story since no one can corroborate himself by repeating his story to a number of persons (rule against self-corroboration). Again, since none of these persons had made any independent observation of an unsuspecting Camille Joseph, whatever distressed condition she appeared to be in at the time that they saw her was inadmissible to support her story of being forcibly raped. She was there to complain and was not observed independently of her complaint.

Yet, this is what the D.P.P stated in paragraph 3 of her Affidavit in Answer:

> ***"That the advice provided to the Police is based on the evidence in the file, more particularly, the statements made by Camille Joseph who is making the allegation against the applicant as well as statements made by the Counsellor and Child Care Protection Officer from Help and Shelter, Carol Innis-Baptistic, Dr. Dalgeish Joseph, and Dr. Mc Rae***

and in paragraph 3 of her supplementary Affidavit in Answer:

> ***"Upon careful consideration of the referred statements, more particularly that of the complainant, Ms. Camille Joseph, Ms. Carol Innis-Baptiste of Help and Shelter, Dr. Dalgeish Joseph and Dr. Michaela Mc Rae, I concluded that there exists sufficient evidence upon which a charge of Rape, contrary to Section 3 (3) of the Sexual Offences Act 2010 ought to be instituted against the applicant and I so advised the Guyana Police Force".***

Clearly, the D.P.P used evidence (statements) which was legally inadmissible against the applicant in advising herself as to the sufficiency of evidence and her advice was consequently legally flawed. She took into consideration the contents of statements which were legally inadmissible against the applicant. It is clear therefore her decision to prosecute was unlawful in that she took into consideration that which was irrelevant. In truth, it was the story of Camille Joseph as outlined in her statement to the Police alone, without regard to her complaints and her appearance of being distressed as a complainant to Carol Innis-Baptiste, Dr. Dalgeish Joseph and Dr. Michaela Mc Rae, on which the D.P.P decision should have been based – apart from the other statements which tended to support the applicant's claim of consensual sexual intercourse.

But, it does also appear that the decision of the D.P.P to advise prosecution against applicant was based solely on her finding that there was a ***prima facie*** case against the applicant for the offence of Rape. In

deciding whether to advise prosecution, she had not merely to determine whether there was a ***prima facie*** case but also whether there was realistic prospect of a conviction. A decision to prosecute cannot be founded merely on the existence of a bare ***prima facie*** case for the D.P.P could not have extracted the "plums" and left the "duff" behind.

She had to look at the matter holistically giving consideration also to the statements which tendered to support the defence i.e. of consent. She could not have simply taken the position that the issue of non-consent was a matter for the jury and that it was not her function as the prosecutorial authority responsible for making the decision as to whether to advise prosecution to assess the credibility and reliability of the contents of the Statements on the issue of non-consent. That decision did not at all solely involve the **legal** question as to whether there was a ***prima facie*** case. Otherwise, the D.P.P would have no prosecutorial discretion at all.

The point is aptly dealt with in "The Director's Policy as to the exercise of the General Prosecutorial Discretion" in Victoria:

> ***"In deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution, the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case, it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured."***

The Code for Crown Prosecutors published by the U.K. Crown Prosecution Service (already mentioned) provides that Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction". In 1989, the Economic and Social Council of the United Nations published draft guidelines on the role of prosecutors. Article 10 of those guidelines provides that:

> ***"Prosecutors, irrespective whether acting under the principle of legality or opportunity shall not initiate prosecution or shall stay proceedings when the charge appears unfounded or improvable.***

The International Association of Prosecutors has adopted a statement of Standards of Professional Responsibility of Prosecutors. Paragraph 4.2 of that Statement provides that, in criminal proceedings, prosecutors –

> ***"... will proceed only when the case is well founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence."***

While legal purists wedded to the austerity of legal tabulism are wont to say that such guidelines and Codes, strictly speaking, do not apply to Guyana, this court finds it absurd for anyone to argue that the D.P.P in Guyana would be lawfully exercising her public law discretionary power to prosecute once she determines that there is a ***prima facie*** case even though, objectively, the case as a whole has no realistic prospect of yielding a conviction. It certainly will not be in the public interest to advise prosecution when there is no realistic prospect of a conviction. In

Steadroy C.O. Benjamin V The Commissioner of Police and The Attorney-General of Antigua and Barbuda (*supra*), Baptiste J.A, in discussing the making of a decision to prosecute, stated:

> ***"The decision whether a person should be prosecuted is the most important step in the prosecutorial process. It encompasses an evaluation or assessment of the evidence, its reliability and adequacy, the application of the relevant law and a determination of the relevant law and a determination as to whether or not a prosecution is appropriate in all the circumstances. A decision to prosecute or not to prosecute should not be informed by political considerations or other undue or improper influence or pressure. Having reviewed the file in this matter, the Director of Public Prosecutions would have brought into play his experience and expertise, assessing the strength of the evidence against the defendant, as well as the defence case and make an informed judgment as to whether or not a prosecution should be instituted."***

In **Marshall V D.P.P** (2007) 70 W.I.R 193, the Privy Council refused to interfere with the decision of the D.P.P of Barbados not to prosecute – even though a court would be less likely to interfere with a decision not to prosecute because of the finality of such a decision. In that case, Lord Carswell endorsed dicta of Lord Bingham in **R V D.P.P, *ex parte* Manning** (2001) Q B 330 which included the following:

"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 subject 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. The 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."

In **R V D.P.P, *ex parte* Manning** (*supra*) Lord Bingham, after referring to the code for Crown Prosecutors in England, noted at 343 that:

"An explanatory memorandum emphasized that the evidential test was a realistic prospect of conviction." This had to be satisfied. If it was not satisfied there should be no prosecution, no matter how great the public interest in having the matter aired in court. It was not the role of the Crown Prosecution Service simply to give cases a public

hearing regardless of the strength of the evidence. There had to be an objective assessment of the evidence."

Jeremy W. Rapke Q.C., Director of Public Prosecutions in Victoria, Australia published an article following the Heads of Prosecution Agencies Conference held in Cape Town South Africa in November 2009. That conference considered the Evidentiary Test in the Decision to Prosecute". In the opening paragraph of that Article, the D.P.P of Victoria stated:

"In most, if not all common law jurisdictions around the world, it is accepted by prosecuting authorities that a prosecution should not commence or be maintained unless the evidence in the case passes an evidentiary test and, if that is satisfied, a public interest test. If the case fails the evidentiary test, it is difficult to conceive of the circumstances for the case to proceed no matter how significant it may be or how clamorous may be the public calls for a trial."

In the instant case, on the Affidavit in Answer filed by the D.P.P, it is clear that her advice was based on no more than a finding that there was a ***prima facie*** case and that the issue of non-consent was not a matter for her assessment of the credibility of the relevant "witnesses" but was exclusively a matter for the court. In her Affidavit in Answer, the D.P.P deposed:

"5. Based on all the statements in the file, the main issue is whether Camille Joseph consented to have sex with the applicant, that since this is an issue of fact as to who should be believed as credible, this credibility has to be tested by cross-examination .....and is ultimately for the jury's determination."

The main issue in the case was not whether Camille Joseph had consented. Rather, the main issue in the case was whether she had not consented for it was the prosecution which bore the burden of proving non-consent rather than consent. But that apart, it does appear that the D.P.P took the position that, since credibility was ultimately a question of fact for the jury, the assessment of the witnesses' credibility did not fall within her province as a prosecutorial decision – maker. The fact that the jury would be the ultimate arbiter of fact did not relieve her of her duty as prosecutorial decision-maker to make a realistic assessment of the credibility and reliability of the statements of the relevant witnesses. She seemed to have thought that, once she had found that there was a ***prima facie*** case, she had to advise prosecution irrespective of whether or not the evidence in support thereof was credible and reliable.

But, assuming that the D.P.P did give careful consideration to the contents of all the statements (as claimed) and advised prosecution of the applicant, this court nevertheless makes the finding that her decision to so advise was irrational in the sense that no prosecutorial authority, having made an objective assessment of the prosecution's chance of

securing a conviction, could have found that those statements gave rise to a realistic prospect of a conviction. Indeed, any proper and objective assessment of the contents of the relevant statements would lead to the conclusion that, on the issue of non-consent, the prosecution was likely to fail. It does appear from the Affidavits of the D.P.P herself that she took into consideration the contents of the statements of Carol Inniss-Baptiste, Dr. Joseph and Dr. Mc Rae on that issue. Her decision was unlawful and, even if not unlawful, was irrational.

While it may well be true that the credibility and reliability of Camille Joseph's story and the admissibility of the contents of the statements of Carol Inniss-Baptiste, Dr. Dalgeish Joseph and Dr. Michaela Mc Rae could have been adequately dealt with within the criminal trial process, this court finds that the circumstances of this case were very exceptional in that it required an insightful analysis of unusual circumstantial evidence on the part of the D.P.P – which was obviously not done and, if done, could not have passed the "realistic prospect of conviction" test. It was a case which cried out for a proper application of the "evidentiary test" by the D.P.P before advising prosecution against the applicant. It was a case in which no less an authority than the D.P.P obviously felt that this test involved little or no more than answering the question whether there was a ***prima facie*** case against the applicant. It was a case in which such a misunderstanding of her function as a prosecutorial authority had to be corrected by way of judicial review in the public interest. The court felt that the case was an appropriate one

for a challenge to the decision of the D.P.P to prosecute and an appropriate occasion to debunk the pervasive fallacy that the decision whether or not to prosecute rests solely on the answer to the legal question as to whether there is a ***prima facie*** case and that the reliability of the contents of statements made to the Police in criminal investigations is within the exclusive province of the jury. The low rate of prosecutorial success and the heavy backlog of criminal matters pending hearing may well have a functional relationship with this fallacy which seems to permeate the mindset of the prosecutorial authorities in Guyana.

The decision whether or not to prosecute is of fundamental importance in the criminal justice system – particularly in an accusatorial system which obtains in Guyana. It is a very important stage in the criminal process since it involves far – reaching consequences to those affected by it. The consequences for a defendant frequently do involve irretrievable loss of reputation or employment, disruption of family relations, substantial financial expenditure and even deprivation of pre-trial liberty. The consequences for the victim of a crime where an incorrect decision not to prosecute is made can be equally damaging. As such, it behoves prosecutorial authorities, such as the D.P.P to perform their function in such decision – making carefully and consistently with rationality and legality (and with procedural fairness). A court of judicial review would naturally be less inclined to interfere with a decision to prosecute because the **ultimate** responsibility for a finding of guilt would

rest within the jury. Nonetheless, the D.P.P is the most important arbiter on decisions to prosecute and what was stated in the Privy Council decision in **Sharma V Brown Antoine** (*supra*) confers no licence to prosecutorial authorities, particularly the D.P.P, to "pass the buck" (so to speak). Where the decision of a prosecutorial authority is **plainly** irrational or unlawful, judicial restraint is trumped by the demands of administrative justice when the jurisdiction of a court of review is engaged. In **plain** cases of irrationality or unlawfulness, a court of judicial review ought not to give a Nelson's eye to such irrationality or illegality. It ought to act and cannot consider itself unduly hidebound by the principle of judicial restraint – or else, it would be lending itself to such irrationality or unlawfulness ***ex post facto***.

In the light of what has been stated above, this court sees it fit to order that the Orders or Rules nisi of Certiorari and Prohibition made on the 7th day of February 2012 be made absolute. The court so orders. There will be costs to the applicant in the sum of $50,000.00.

THE SUPREME COURT OF JUDICATURE OF TRINIDAD AND TOBAGO

.....
Ian N. Chang, C.C.H, S.C
Chief Justice (ag.)

Dated this 29th day of March, 2012.