IN THE SUPREME COURT OF JUDUCATURE OF JAMAICA

CLAIM NO. 2011 HCV 03210

CORAM: THE HONOURABLE MR. JUSTICE RAYMUND KING
THE HONOURABLE MRS. JUSTICE ALMARIE SINCLAIR-HAYNES
THE HONOURABLE MR. JUSTICE EVAN BROWN

BETWEEN	**DIRECTOR OF PUBLIC PROSECUTIONS**	**CLAIMANT**
A N D	**SENIOR RESIDENT MAGISTRATE FOR THE CORPORATE AREA**	**DEFENDANT**

Lord Anthony Gifford Q.C., Ms. Tracey Johnson, Mrs. Kamar Henry-Anderson and Ms. Kerri Ann Kemble for the Claimant.

Miss Jacqueline Samuels-Brown Q.C., and Miss Tanya Mott for the Defendant.

HEARD: December 12, 13, 14, 15, 16, 20, 2011& March 26, 2012

Judicial review – whether subpoena for DPP to testify should be set aside – whether motive for subpoena improper-whether DPP can give relevant evidence – effect of section 94 (6) of Constitution

KING, J.

THE BACKGROUND

[1] On the 27th February 2008 Kern Spencer, Rodney Chin and Colleen Wright were charged before the Senior Resident Magistrate at the Resident Magistrate Court for the Corporate Area with a number of breaches of the Corruption Prevention Act and the Proceeds of Crime Act and with Fraud.

[2] On the 4th November 2008 a further information was laid against Kern Spencer alleging that he had while he was a Minister of State in the Ministry of Industry, Technology and Commerce, facilitated the engagement of Rodney Chin's firm to gain a benefit for himself.

[3] On the 22nd December 2008, the Director of Public Prosecutions, (D.P.P.) the lead prosecutor in the case wrote to Spencer's Attorney-at-Law informing him that she did not intend to proceed with the case against Rodney Chin, and she also so informed the Court on the same day.

[4] On the 21st January 2009 when a Nolle Prosequi was entered in respect of Chin the matter was adjourned on the application of the Defence.

[5] On the 16th April 2010, in response to an application from Defence Counsel, the Learned Resident Magistrate (R.M) ruled that the D.P.P should disclose to the Defence the substance of the interview which she had conducted with Rodney Chin prior to her discontinuing the prosecution against him. The D.P.P. purported to do by letter dated 19th April 2010.

[6] Dissatisfied with what was disclosed in the letter the Defence continued to make attempts to obtain further disclosure. Eventually, when the trial resumed on the 11th April 2011, the attorney-at-Law for the defendant Spencer announced that he intended to call the D.P.P. as a witness and requested that she be made

to stay out of hearing during the rest of the evidence of Rodney Chin who was then in the witness box.

[7] On the 12th April 2011 the Learned Resident Magistrate, in acceding to that request of the Defence ordered that the D.P.P., Miss Paula Llewellyn, remain out of hearing for the remainder of Rodney Chin's evidence.

[8] On the 13th April Miss Llewellyn was served with a subpoena issued on the 12th April 2011, addressed to her in her personal capacity, requiring her to appear on the 19th April 2011 to give evidence on behalf of the Defence. The D.P.P. requested that the Learned Resident Magistrate vacate the subpoena.

[9] On the 19th April 2011 the Learned Resident Magistrate refused to set aside the subpoena, ordering that "the usual behaviour adopted by subpoenaed witnesses is to be adopted by Miss Llewellyn". Miss Llewellyn was bound over to appear as a witness on the 30th May 2011.

[10] On the 24th May 2011 the D.P.P. obtained leave to make this application for Judicial Review and the trial was stayed pending the determination of the application.

THE APPLICATION

[11] In the application made by Fixed Date Claim Form filed on the 7th June 2011 the D.P.P. seeks the following relief:-

(a). a declaration that the issuing of a subpoena dated the 12th April 2011 by the Clerk of Courts for the Resident Magistrate's Court for the Corporate Area at the instance of the accused Colleen Wright; to Paula Llewellyn, the Director of Public Prosecutions and returnable on the 19th day of April 2011 in the Resident Magistrate's

Court for the Corporate Area is an abuse of the process of the Court.

(b). an order of Certiorari to squash the decision of the Senior Resident Magistrate for the Corporate Area refusing to set aside the subpoena.

(c). an order of Certiorari to quash the subpoena.

(d). an order of Certiorari to quash the order of the Senior Resident Magistrate for the Corporate Area, that Paula Llewellyn, the D.P.P, should remain out of hearing for the remainder of the testimony of the witness Rodney Chin.

[12] The Grounds stated in the application were in the interest of clarity reformulated by Lord Gifford Q.C., appearing on behalf of the D.P.P., and, as presented, those grounds may be summarized thus:

FIRST GROUND

[13] (Referred to by Counsel as the Primary Ground, and encompassing grounds 3, 4, 1(e) and 5).

The issuing of the subpoena was an abuse of the process of the court, it not having been sought for the bona fide purpose of obtaining relevant evidence, but for an improper and ulterior purpose, viz.,

(a) to embark on a fishing expedition to seek support for allegations of misconduct and corruption on the part of the D.P.P. for which there is absolutely no foundation; and

(b) for the further ulterior motive (referred to in grounds 1 (c) and 1 (d) of embarrassing and weakening the prosecution by removing the D.P.P from her role as lead prosecutor.

SECOND GROUND

[14] (Re-stating grounds 1 (b) and (2)

The intent and/or consequences of requiring the D.P.P. to testify is that she will be exposed, directly or indirectly to questions about the reason for her decision to discontinue the prosecution of Mr. Chin, thus undermining her independence which the constitution guarantees in its S.94.

THIRD GROUND

[15] The Learned Resident Magistrate's decision is flawed because no reasons have been given. (This ground was not pursued.)

FOURTH GROUND

[16] (With reference to grounds 1(a) and 1(b)

It is accepted on behalf of the D.P.P. that a subpoena obtained in good faith for the eliciting of relevant evidence could not be set aside merely on the grounds that other witnesses are available to give that evidence.

This fourth ground then, makes a concession in relation to grounds 1 (a) and 1 (b) of the grounds in the Fixed Date Claim Form in so far as they complain of the availability of other witnesses as a ground for quashing the subpoena.

LOCUS STANDI

[17] Though it was not argued in limine, it is convenient at this stage to deal with a point raised by Mrs. Samuels-Brown Q.C. on behalf of that Respondent. It was contended that the D.P.P. in her official capacity had no LOCUS STANDI to apply for Judicial Review, this being a procedure developed for the protection of private citizens against the excessive acts of the state. Whereas a statutory body created to represent and protect the interests of private citizens might seek Judicial Review, the same does not apply to the D.P.P., she being, it is argued, a public servant, an arm of government, and a member of the executive.

[18] The arguments on both sides of this issue and the representative authorities in support thereof have been comprehensively described in the judgment of my Learned Colleagues which I have had the advantage of having read. I agree with their conclusion that the D.P.P. does have standing to bring this application. Though the subpoena was addressed to her in her personal capacity it is to have her testify in relation to her activities at D.P.P. thus in her personal capacity she is undoubtedly a person compelled to attend court, willingly or not, and therefore is adversely affected (CPR 56.2(a)). In her official capacity, the matters about which she is being summoned to testify certainly take the subject matter of this application within her statutory remit (C.P.R 56.2 (d)).

[19] The necessity to act through or with the permission of the Attorney General in a relator action applies to private law civil suits, and not to application for Judicial Review. The intervention of the Attorney General is necessary where a claimant seeks the private law remedies of a declaration or an injunction in respect of a public wrong from which the Claimant neither had any right of his own infringed, nor suffered any particulars damage over and above that suffered by the general public.

[20] For centuries before the introduction of the Civil Procedure Rules the common law offered remedies for public wrongs through the prerogative writs of certiorari, mandamus and prohibition. The Judicature Supreme Court Act by the provisions of section 51 (1) empowered the Supreme Court to grant the remedies previously available through the prerogative writs, by way of Orders of Mandamus, Prohibition, and Certiorari. The Civil Procedure Rules in 2003 sought to regulate the procedure for applying for and obtaining these remedies. The application was to be for “Judicial Review” specifying which of the remedies was being applied for.

[21] Further, Rule 56.1 (4) purported to empower the Judicial Review Court, in addition or instead of the three traditional remedies of the prerogative orders,

without the issue of further proceedings, to grant the following remedies previously available only in private civil suits, viz.;

(a) an injunction

(b) restitution or damages, or

(c) an order for the return of any property real or personal

[22] Notable is the fact that a declaration is not included even though Rules 56 (1) and (2) mention an application for a declaration as one of the applications which, along with an application for judicial review, and others, make up the definition of application for an "administrative order." Clearly an application for a declaration is not to be included in relief sought by way of judicial review, but must be applied for separately.

[23] In respect of private civil remedies sought to be included by Rule 56.1 (4) in relief which may be sought by Judicial Review, such inclusion is, by Rule 56.10 (1) expressly made subject to the proviso that it is "not prohibited by substantive law."

[24] In the Court of Appeal Judgment in **O'Reilly v MACKMAN (1982) 3 All ER 680 at page 692-693 Lord Denning MR** (as he then was) described the limitations of the prerogative writs as tools to effect justice. The Rules of the Supreme Court (U.K.) in 1977 (like those of our Supreme Court in 2003) introduced Judicial Review and enabled the High Court not only to quash decisions of inferior courts, but to award damages and grant declarations.

[25] On page 693 of the judgment at letters c-f, about these developments and the subsequent enactment of section 31 of the **Supreme Court Act 1981,** Lord Denning had this to say:-

> *"But now we have witnessed a break-through in our public law. It is done by Section 31 of the Supreme Court Act*

1981, which came into force on 1st January 1982. This is, to my mind, of much higher force than RSC Order 53. That order came into force in 1977, but it had to be construed in a limited sense, because it could not affect the substance of the law: ***see IRC v National Federation of Self-Employed and Small Business Ltd., [1981] 2 ALL ER 93 at 111****,* ***[1982] AC 617 at 650 per Lord Scarman.*** *Rules of Court can only affect procedure: whereas an Act of Parliament comes in like a lion. It can affect both procedure and substance alike.*

I always thought that this great reform should be done by statute as the law Commission recommended. When the Rule Committee mad Order 53, some of us on the committee had doubts about whether some of it was not ultra vires, but we took the risk because it was so desirable. Now that the statute has been passed, I may say that it has in several respects altered the substance of the law for the better. For instance, section 31 (2) of the 1981 Act uses the significant words 'having regard to', thus expanding the kind of bodies against whom relief can be obtained. It includes all public authorities and public officers, and indeed anyone acting in exercise of a public duty, including a university, ***(see R v Senate of the University of Aston, ex p Roffey [1969 2 All ER 964, [1969] 2 QB 538)****. It also enlarges the scope of a declaration and injunction so as to apply wherever it is 'just and convenient.' And section 31 (3) gives the remedy to anyone who has a sufficient interest, which is very wide in its scope. Those provisions rid us of a whole mass of technical limitations which were thought previously to exist."*

[26] In our jurisdiction we find ourselves in the same position as obtained in the United Kingdom between 1977and 1981. Unlike Trinidad and Tobago and Barbados which have specific judicial review acts, we rely on the authority of the Common Law (as modified by section 52 (1) of the Judicature (Supreme Court) Act, regulated in its procedure by the Civil Procedure Rules. This brings into question the legal efficacy of any perceived attempt by the Civil Procedure Rules to introduce any private law remedies not previously available in public law. The proviso in Rule 56.10 (1) takes on great importance considering that the first head of relief sought by the applicant is for a declaration. It may be considered a matter of urgency for legislation to be enacted to underpin the provisions of part 56 of the Civil Procedure Rules.

[27] Before examining the Grounds on which the application is made, it must be observed that, on the one hand, the DPP has weighty and important duties assigned to her by section 94 of the constitution, which, in order to facilitate the performance of those duties, affords her certain power and protections designed to guarantee her independence.

[28] The learned R.M. on the other hand, on trial judge, has to weigh the duty of the DPP and her accompanying right, power, and protections against the legal and constitutional rights and safeguards of the accused persons. Here is an overseas task in which she must make judgments and rulings in the interest of fairness and justice.

[29] The role of this Court in the judicial review of the decisions of an inferior court, Court, is not to review the merit of the decision but rather the soundness and legality of the decision making process. Therefore we must examine the application before us to see, not whether we would have made the same decision, which is this case was not to quash the subpoena and to have the DPP remain out of hearing, but rather whether the process by which the Learned R.M. came to her decision has been shown to be procedurally and/or legally flawed.

[30] Looking first at the relief sought in the Fixed Date Claim Form for reasons already explained I do not consider that this court has jurisdiction to grant a declaration in an application for judicial review. The other heads of relief will stand or fall together.

[31] I will now examine the grounds as re-formulated and argued by Lord Gifford Q.C. to see whether they reveal a flow in the process employed by the Learned R.M in coming to her decision., such as would that require that decision be quashed.

First Ground

[32] The First Ground complains that the Learned R.M. failed to take in account relevant considerations, usually that the subpoena was obtained not to obtain relevant evidence but

(a) to fish for evidence of misconduct or corruption on the part of the DPP and

(b) to embarrass and weaken the prosecution by removing the lead prosecution from the trial

[33] Although the third ground which complained of a lack of reasons from the Learned R.M was not pursued, that lack of reasons creates difficulty in assessing the first ground.

[34] On the 16th April 2010, the Learned R.M. in ruling on an application made to her by the Defence, ordered that the DPP disclose to the Defence "the substance of the interview or the notes taken" at her interview of Mr. Chin. The reasons for this ruling were clearly set out in the written ruling.

[35] The obedience to this ruling the DPP wrote in the 19th April 010 to Mr. Patrick Atkinson, Counsel for Kern Spencer detailing her recollection of what took place at the interview and indicating that no notes were taken.

[36] On the 9th November 2010 in ruling on an application by the Defence for a permanent stay of proceedings, the Learned R.M refused the application, again giving detailed reasons for her decision.

[37] However the Formal Orders which are challenged in these proceedings signed by the Learned R.M. on the 12th and 13th of April 2011 respectively, contained no reasons.

[38] The absence of such reasons for decision has not yet been held, in itself, to be sufficient ground for quashing a decision. However it must be observed that if not given at the time of the decision it is desirable that reasons be supplied to the review court to assist with its assessment of the process by which the decision was reached.

[39] In an attempt to gain some insight into that process I have examined the reasons given by the Learned R.M. for her two earlier rulings. Interestingly, in her reasons for the decision rendered on the 16th April 2010, the Learned R.M wrote:

> "The decision to proceed or not against an accused person is constitutionally the province of the D.P.P. and a review of that decision can only be done in prescribed circumstances e.g. for improper motive or wrong interpretation of the law and the likes. The court is incompetent to entertain such applications for want of jurisdiction"

And further (in relation to the D.P.P.'s interview with Rodney Chin)

> "If the interview concerned the decision to proceed or not to proceed against Mr. Chin, production of what transpired would offend public interest by potentially transferring the D.P.P. in the future by potentially creating a precedent for disclosure of her actions in the exercise of her constitutional functions."

[40] The Learned R.M. then observed that on the other hand information gathered from the witness by questioning the witness on his statement must be disclosed. It is clear that at the time of the decision in April 2010 the Learned R.M. addressed her mind to the constitutional position of the D.P.P.

[41] On the 9th November 2010, in her ruling on the subsequent application by the defence to permanently stay the trial proceedings because oif an alleged failure to give disclosure; the Learned R.M. made it clear that she did not regard the compliance with her earlier order for disclosure as having been satisfactory. Nevertheless she considered that having regard to the early stage of the trial, with some twenty-five to thirty prosecution witnesses yet to be called, the trial should continue. She left open to the defence the option to renew their application at a later stage of the trial.

[42] There is nothing in the reasons looked at in those two earlier rulings in 2010 which could safely be assumed to provide an indication of the factors considered by the Learned R.M. for her refusal, the following year, to quash the subpoena. In the absence of reasons the court is left with a real challenge to determine her answer to the charge that she failed to consider the matters outlined in the grounds on which this application rests. In the circumstance the court is forced to examine whether there is material which could have provided the Learned R.M. with a reasonable basis for arriving at her decision.

[43] Given the Learned R.M.'s own understanding as to the limits to which her jurisdiction would allow her to go in enquiring into the exercise by the D.P.P of

her constitutional function, what could she reasonably have expected to have transpired out of an appearance of the D.P.P on the witness box? If both Chin and the D.P.P have already indicated that no discussion took place at the interview regarding Mr. Chin giving evidence or of the case being discontinued against him, and if the D.P.P. cannot be examined about the reasons for her decision to discontinue the prosecution, what is the relevant evidence which she is being called to give.

[44] Did the Learned R.M. consider that having ordered the D.P.P. to "adopt the usual behaviour adopted by subpoenaed witnesses' which is to stay out of court until called to give evidence, the leading counsel for the prosecution would be removed from the courtroom while the remaining 25 to 30 witnesses for the prosecution were called and not allowed to re-enter until called by the Defence if at all.

[45] Did the Learned R.M. properly weigh this disadvantage to the prosecution against the very limited if any value of the evidence which the D.P.P. could give? There is nothing to indicate that such considerations were addressed by the Learned R.M. before coming to her decision. Even if the Learned R.M. were to disallow all questions directed at the exercise by the D.P.P. regarding the exercise of her power, considering the absence of a statement by the D.P.P. on which to persuade the court to treat her as a hostile witness, what could usefully be obtained from her by the defence in examination-in-chief.

[46] I do not consider in the circumstances that the Learned R.M. could have properly considered the factors relevant to the proper exercise of her judgment in disallowing the application to quash the subpoena.

[47] As a consequence I would grant the relief sought at paragraphs 3 (b) (c) and (d) of the Fixed Date Claim Form.

In the result the majority decision of the Court, with Justice Sinclair-Haynes dissenting, is that the following orders are granted.

(b) An order of Certiorari to quash the decision of the Senior Resident Magistrate for the Corporate Area refusing to set aside the subpoena dated the 12th day of April 2011 and issued by the Clerk of about for the Corporate Area, to Paula Llewellyn the Director of Public Prosecutions, and returnable on the 19th April 2011 in the Resident Magistrate's Court for the Corporate Area.

(c) An Order of Certiorari to quash the subpoena; and

(d) An Order of Certiorari to quash the order of the Senior Resident Magistrate for the Corporate Area, that Paula Llewellyn, the Director of Public Prosecutions should remain out of hearing for the remainder of the evidence of the testimony of the witness Rodney Chin.

E. BROWN, J.

[48] This application for judicial review arose out of an extant, but now quiescent, criminal trial in the Corporate Area Resident Magistrate's Court, namely, **Regina v Kern Spencer and Coleen Wright** for breaches of the Corruption Prevention Act and the Proceeds of Crime Act. The chief witness for the prosecution, Rodney Chin was a co-accused up until the day the trial commenced. The Director of Public Prosecutions (DPP) has conduct of this prosecution. During the cross examination of Mr. Chin, the fact of an antecedent meeting between the DPP, Mr. Chin and others, was disclosed for the first time. If there was a snowball of disclosure issues before, that revelation transformed it into an avalanche, culminating in the DPP being subpoenaed to testify on behalf of the defence. The context appears below.

BACKGROUND

[49] On the 27th February, 2008, Rodney Chin, Kern Spencer and Coleen Wright were charged for several breaches of the Corruption Prevention Act and the Proceeds of Crime Act. The charges arose from their conduct in the execution of what is known as the Cuban Light Bulb Programme (CLBP). Mr. Kern Spencer was the Minister of State in the Ministry of Industry, Technology and Commerce, with special responsibility for the implementation of the CLBP. Miss Wright was Mr. Spencer's personal assistant. Mr. Rodney Chin and/or his company were contractually concerned with the CLBP.

[50] They made their first appearance in the Resident Magistrate's Court for the Corporate Area on the 26th March, 2008. The accused appeared before the court a number of times and a trial date of 15th September, 2008 was fixed. Up to this point Chin was represented by counsel, Mrs. Valerie Neita Robertson. On that date it was announced that Mr. Richard Small had been retained in place of her. Mr. Richard Small was then off the island. The case was adjourned to the 18th September, 2008. On that date, the case was set down for trial on the 12th January, 2009.

[51] There was much out of court activity during this interim period. Mr. Small approached the DPP with a proposal for Chin to give evidence for the prosecution. That proposal was duly considered and accepted after a meeting with Chin, his attorneys-at-law: Mr. Small and Mr. Heron Dale, the two police investigators, the DPP and one of her deputies. The DPP communicated her decision to discontinue the prosecution against Chin and that he would thereafter become a witness for the Crown to the defence, by letter of the 22nd December, 2008, without alluding to this meeting. Two statements from Chin were disclosed to the defence in the same letter.

[52] That correspondence was met by a request for disclosure which merits quotation in full:

> ***Please furnish us forthwith with disclosure of all statements or conversations between [the DPP's] office and/or agents on the one hand, and Defendant Chin and/or his Attorneys or agents on the other hand, concerning him becoming a Crown witness and your withdrawing the case against him.***
>
> ***Please use your best efforts to ensure and furnish all information and discussions concerning the granting of Government or Public contracts to Mr. Chin since September 2008.***
>
> ***If there has been any discussions concerning the status of the case against Mr. Chin, between your office and/or agents and any Government Politician in the Executive or Parliament, please furnish us with statements concerning same.***

[53] That letter attracted a sharp response from the learned DPP. At this point the stage was set for the vitriol and invectives that came to characterize the correspondence between the parties. Amidst all of this, "in accordance with the usual courtesies between Counsel," it was suggested that the office of the DPP recuse itself and the Attorney-General be allowed to prosecute the case. That

suggestion was grounded in the likelihood of both the DPP and Mr. Richard Small being called as witnesses. The issue to which their testimony would possibly be germane was 'any bargain, inducement, or interest to serve' in relation to Mr. Chin. This was met with the curt response, 'I will see you in court', from the DPP.

[54] And so they did on the 12th January, 2009. An adjournment was granted to the defence on the ground of the prosecution's failure to give the requested disclosure. When the parties next returned to court on the 21st January, 2009, the issue of disclosure was again raised. The DPP entered a nolle prosecui in respect of Chin and the case adjourned to 22nd June, 2009. Before that date the defence sought an order of mandamus to compel the DPP to give the desired disclosure. The application was dismissed. An appeal from that decision is pending.

[55] That notwithstanding, the parties returned to court on the date fixed for trial. An application for disclosure did not find favour with the learned Senior Resident Magistrate (Snr RM) and the case stood down to commence in the afternoon session. The trial did not commence however, as the defence secured a stay of the proceedings in the Court of Appeal until the 24th June, 2009. The stay was considered and refused on the 23rd June, 2009.

[56] The trial finally commenced on the 7th September, 2009. During the cross-examination of Mr. Chin he testified of the interview between himself, the DPP and others. Mr. Chin said he thought the DPP made notes during this interview. This led to an application for disclosure of the notes of the interview and, if no notes, then a written account of the DPP's recollection. The DPP maintained that she made no note of the details of the interview. While she may have recorded the names of those present, that record could not be located.

[57] The learned Snr RM heard submissions on the application for disclosure from both sides. The DPP contended there that disclosure of the substance of the interview would compel her to disclose her reasons to discontinue the prosecution against Chin. That, it was argued below, would be in breach of section 94(6) of the Constitution of Jamaica. The RM ruled that a written account should be presented.

[58] The DPP sought to comply with this ruling in a letter dated 9th April, 2010 addressed to counsel for Mr. Spencer and copied to counsel for Miss Wright. Neither the method nor the contents satisfied the ruling in the opinion of the learned Snr RM. As a result, the DPP was told to write a statement with more details, using Chin's statement to refresh her memory. The DPP resisted writing a statement, seeing it as an attempt to have her withdrawn from the case.

[59] The DPP took the issue of writing a statement to the Full Court. Before that court, counsel for the learned Snr RM submitted that the Snr RM had only invited the DPP to write the statement. With no order to adjudicate upon, the Full Court ordered the matter returned from whence it came. The DPP wrote another letter seeking to give disclosure of the interview on the advice of counsel she invited into the matter. The defence remained unhappy but the learned Snr RM ruled that the trial should continue and refused to permanently stay the proceedings.

[60] The trial continued with the cross-examination of Mr. Chin. During the cross-examination, counsel for Miss Wright applied to the Snr RM to have the DPP wait out of hearing for the remainder of the taking of Mr. Chin's evidence. His co-counsel joined in the application. This application was predicated upon the intention to call the DPP as a witness on behalf of accused Wright. The learned Snr RM ruled accordingly on the following day.

[61] The learned DPP felt unable to comply with this ruling, and made submissions before the Snr RM to that end. The intention to subpoena the DPP was disclosed to the Snr RM and she rose to await the arrival of Miss Wright's counsel. Upon the arrival of counsel, he indicated that the Clerk of the Courts had been asked to prepare a subpoena for the DPP. The case was then adjourned.

[62] At the adjourned hearing the DPP was duly served with a subpoena to attend court on the 19th April, 2011. The prosecution applied to the Snr RM to set aside the subpoena. The application was refused and the DPP again ordered to adopt the usual behavior of subpoenaed witnesses. The DPP was bound over to attend on the next date fixed for trial.

[63] So, by Fixed Date Claim Form filed on the 6th June, 2011, the learned DPP seeks to impugn these interlocutory orders. First, the refusal of the learned Snr RM to set aside a subpoena served upon the learned DPP. Secondly, what appears to be collateral and a corollary of the first, that the learned DPP should remain outside of court during the taking of the evidence of Mr. Rodney Chin.

[64 Therefore, the learned DPP seeks the following reliefs:

(a) A declaration that the issuing of the subpoena dated the 12th day of April, 2011 by the Clerk of the Courts for the Resident Magistrate's Court for the Corporate Area at the instance of the accused, Coleen Wright, to Paula Llewellyn, the Director of Public Prosecutions, and returnable on the 19th day of April, 2011 in the Resident Magistrate's Court for the Corporate Area is an abuse of the process of the court.

(b) An order of certiorari to quash the decision of the Senior Resident Magistrate for the Corporate Area refusing to set aside the subpoena dated the 12th April, 2011 and issued by the Clerk of the Courts for the Resident Magistrate's Court for the Corporate Area to Paula Llewellyn, the Director of Public Prosecutions, and returnable on the

19th April, 2011 in the Resident Magistrate's Court for the Corporate Area.

(c) An order of certiorari to quash the subpoena.

(d) An order of certiorari to quash the order of the Senior Resident Magistrate for the Corporate Area, that Paula Llewellyn, the Director of Public Prosecutions, should remain out of hearing for the remainder of the testimony of the witness, Rodney Chin.

CLAIMANT'S SUBMISSIONS

[65] The grounds argued before us were:

1. The object of the issuing of the subpoena to compel the DPP to attend as a witness for the accused in a matter in which she is the prosecutor was not bona fide to obtain relevant evidence. The issuing of the subpoena was an abuse of the process of the court and was therefore unlawful, ultra vires and void.
2. In refusing to set aside the subpoena the Magistrate misinterpreted the law and failed to have regard to her power as sitting Magistrate, to prevent an abuse of the process of the court.
3. The subpoena was issued at the instance of the accused for an improper or ulterior purpose.
4. The Magistrate failed to take into account relevant considerations, in particular, the DPP could not continue to officiate as a prosecutor in trial proceedings in which she has been called as a witness for the defence.
5. The Magistrate failed to take into account relevant considerations, namely, that if the DPP were to continue as a prosecutor in trial proceedings in which she has been called as a witness for the defence it would render the trial process unfair and constitute an infringement of the rules of natural justice.
6. The Magistrate's decision not to set aside the subpoena requiring Paula Llewellyn, the DPP, to participate in the trial of R v Kern Spencer and

Coleen Wright as a witness before the Snr RM is tainted with illegality in that the Magistrate exceeded her statutory powers by assuming the role of a review tribunal to review and pronounce upon the manner of the exercise of the constitutionally vested prosecutorial discretion by the DPP to discontinue the criminal proceedings against Rodney Chin and to call him as a witness for the prosecution.

[66] Grounds 1, 2 and 3 were argued together as a single ground 1, while 4 and 5 were argued together as a separate ground 2. The sixth ground was argued as ground three. An additional ground was filed alleging procedural irregularity. That is, the Magistrate acted unlawfully and in excess of her jurisdiction when she failed to give any or any adequate reasons for her decision to refuse to set aside the subpoena. This ground was not pursued. Learned Queen's Counsel conceded that the failure by the Snr RM to give reasons is insufficient by itself to quash the decision.

[67] Under the first ground, as grouped, it was submitted that it was entirely proper and consistent with her duty for the DPP to speak to an accused after being informed that he wished to give evidence for the Crown, and in order to assess his credibility. Secondly, it was not incumbent on her to make disclosure of this conversation. The foundation for this submission was the following two premises. In the first place, no document was created. The second premise is that the DPP must be free to take steps to verify credibility and other steps she thinks necessary in order to act under section 94 of the Constitution. That independence, the argument continued, would be undermined if she were obliged to render an account of conversations or steps that she took in exercise thereof.

[68] Counsel then posed the following question for the court's consideration: how far is it permissible for the defence to have disclosure of steps taken in the exercise of this function? It was contended that the correspondence from the trial lawyers to the DPP contained a suggestion that later became an assertion that

the DPP was involved in some bargain with the politicians for Chin to receive government contracts. Learned Queen's Counsel placed stress on the use of words and phrases such as 'inducement', 'quid pro quo', 'lucrative government contracts' and 'interest to serve'. Learned Queen's Counsel argued that a distinction has to be made between issues of credibility of Mr Chin and speculation about any, or any corrupt bargain or inducement involving the prosecutor.

[69] It was submitted that the reason for Mr Chin's cooperation is to be gleaned from his evidence. Compendiously stated, Chin's decision to testify on behalf of the prosecution was born of a desire to tell the truth, from as early as the day of his arrest. Therefore, he was not "threatened … offered … any rewards or any inducement of any kind." Neither did Chin "derive … personal benefits from anybody in order to make [him] give these statements."

[70] To allow the subpoena to stand would be allowing the defence to fish for evidence to support their theory of prosecutorial misconduct. In support of this submission the court's attention was directed to the submissions before the learned Snr RM. Learned Queen's Counsel appearing for accused Wright submitted, among other things, that:

> ***Without rehearsing the past, the court will recall that submissions were made on prosecutorial misconduct. The defence said the misconduct led to Chin becoming the chief witness for the prosecution. Beyond the issue of whether or not Chin is an accomplice is the issue as to whether his evidence was corruptly obtained. That determination is necessary having regard to the whole tenure (sic) of Chin's evidence and an important aspect as to whether it was corruptly obtained or not relates to the emersion of the DPP into the investigative process.***

Having perused the various bits of disclosure coming from the DPP – the view has been formed and the decision has been made that the DPP can assist in the fairness of the trial because with respect, prosecutorial misconduct does not cease at the end of the Crown's case, it carries through to the end of the trial. And as we have submitted, that depending on the gravity of the prosecutorial misconduct, there can be denial a fair trial- a matter which a trial judge takes into account at various stages including at the completion of the trial.

[71] Learned Counsel appearing for accused Spencer joined co-counsel in the arguments that the subpoena should be allowed to stand. His arguments too are worthy of being quoted in full:

Even though it is Knight who applied, depending on how she answers she can be treated as hostile. I intend to cross-examine her and for this court to see her demeanor etc. and decide what it makes of it. And importantly to decide what weight if any can be placed on Chin's testimony. We hear that if the court feels that Chin was an accomplice, then you just view the evidence with caution, but what is it that this court will have to balance against Chin's testimony if Ms Llewellyn or someone does not tell us what happened.

In this case we are subpoenaing the questioner. The authorities say if they have information that may be relevant to the charge. Disclosure applies to any and everything that may discredit the evidence. In this case the defense is saying Chin is here to save his skin and his opportunity to earn billions of dollars. He has several interests to serve. The first two statements Chin gave were taken at his lawyer's office and the DPP leave (sic) her office downtown to drive to Cross Roads to Mr Small's office to interview Chin. Something told me that

something was wrong. Big interview no notes. Something must have gone on that everyone seem (sic) afraid to make a record of it.

[72] Reliance was placed on **R v Baines** [1908-1910] All ER 328, in which it was asserted that the potential witnesses had relevant evidence to give but the court found that it was speculative, the witnesses themselves having said they had no such evidence to give. Also cited was **Senior and others v Holdsworth** [1975] 2 All ER 1009, which affirmed Baines. Emphasis was placed on the dictum of Denning MR, "if the judge considers that the request is irrelevant, or fishing, or speculative, or oppressive, he should refuse it." Similar weight was attached to the dictum of Scarman LJ who said, "if it is clear … that the subpoena has been issued not to obtain relevant evidence but for some other purpose (e.g. to embarrass politically the person served) and that the intended witness had no relevant evidence to give, it will be set aside."

[73] Learned counsel for the DPP then argued that from the submissions as a whole, and the quoted passage in particular, it is plain that the intent of the defence is to fish for evidence of prosecutorial misconduct on the part of the DPP, specifically the corrupt obtaining of evidence. The argument continued, the intent is not to discover the precise details of the interview. Rather, it is to build a platform on which allegations of corruption can be thrown at the DPP. It is intended that if she does not accept the allegations she can be treated as hostile. The DPP's counsel continued, even if the judge disallows questions about misconduct and corruption (as she should) the intent is to embarrass the DPP and divert to fair trial of the charges against the accused.

[74] Learned Queen's Counsel postulated that these motives are improper as there is no basis for the allegations. This he grounded in the fact that Chin has denied the offer of inducement or promises as his motivation to testify. Further, the DPP has given full disclosure of her recollection of the interview, such as it is. In the submission of counsel, the 'gravity' of what the defence wish to put to the

DPP is “that she was a party to a corrupt arrangement whereby Mr Chin was bribed to give false evidence by the promise of Government contracts.” It was counsel’s contention that the interviewing of a potential witness for the Crown, in the presence of his attorney-at-law, is a perfectly proper element in the due diligence process which may lead to a decision to discontinue a prosecution. Having done that, the DPP “should not be exposed to attempts to denigrate her in the witness box and to impugn her integrity, in the absence of any evidence to support unprofessional conduct.”

GROUND TWO (GROUNDS 4 & 5)

[75] Under the second major ground of challenge, it was advanced that it can be inferred that a further motive was to embarrass and weaken the prosecution by the removing of the DPP from her role as lead prosecutor. This inference, it was argued, is a fair one from the acrimonious correspondence exchanged. It was said that the removal of the DPP would undermine the fairness of the trial, since fairness is required towards both the prosecution and defence. While not claiming immunity for the DPP from being subpoenaed, counsel asserted that there would have to be a compelling reason to force a prosecuting, or defence counsel to enter the witness box. In the case at bar, he submitted, no such reason had been shown.

GROUND THREE (GROUND 6)

[76] Finally, learned counsel for the DPP argued that the intent and, or, consequence of requiring the DPP to testify is that she will be exposed, directly or indirectly, to questions about the reasons for her decision to discontinue the prosecution of Mr. Chin, thereby undermining her constitutionally guaranteed independence. While conceding the reviewability of the DPP’s decisions, it was urged that there must be a reasonable basis to do so. For this proposition, **Marshall (Leonie) v Director of Public Prosecutions** (2007) 70 WIR 193 was cited.

[77 The compendium of instances in which the DPP's decision is subject to review, distilled in **Jeewan Mohit v Director of Public Prosecutions of Mauritius** PC Appeal # 31/2005 delivered 25th April, 2006, was brought to the court's notice. Counsel contended that none of those categories applies. Therefore, he concluded, any attempt to elucidate the DPP's reason not to prosecute would be illegitimate. What is envisaged by the defence is, among other things, an enquiry into the reasons undergirding the decision not to prosecute. This he sought to demonstrate by reference to submission of Mr. Patrick Atkinson, learned Queen's Counsel appearing for Spencer in the court below. Mr. Atkinson submitted, "What we knew was that something happened that took Chin from accused to witness. We needed to know and thought it material, what was it that caused that transition?" Counsel for the DPP maintained that any such question would be an infringement of the constitutional position of the DPP, in a way that is impermissible.

STANDING

[78] Although this was not filed as a ground, in anticipation of submissions from opposing counsel that certiorari is not available to the DPP in her public capacity, swords were crossed at this juncture. It was argued that Civil Procedure Rule (CPR) 56.2 (1) is wide enough to encompass the DPP. That position it was said is similar to the one obtaining under the English Supreme Court Act, 1981. Stress was placed on section 31(3), "the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[79] Counsel submitted that the DPP is a person with a sufficiency of interest in the subject matter of the application. First, she is the person to whom the subpoena was personally directed. Secondly, she is, through her office, the prosecutor in the criminal trial. If the subpoena was applied for from an improper motive as she contends, and is an abuse of the process of the court, her

interests are affected both as a witness and as representative of the prosecution, it was urged.

[80] Additionally, the decision in **Ministry of Foreign Affairs and Industry v Vehicles and Supplies Ltd.** (1989) 39 WIR 270, is distinguishable as the question there was whether the Attorney-General was the proper party to an action and not the Minister, having regard to the Crown Proceedings Act, section 13. Secondly, the quotation extracted by opposing counsel from that case, came from **O'Reilly v Mackman** [1982] 3 All ER 680, a case of an entirely different context. That quotation, "public law regulates the affairs of subjects vis-à-vis public authorities," is part of a general description of the difference between private and public law, and no authority for the proposition that a public officer may not apply for judicial review, the submission went.

[81] The following English decisions were cited, it appears, to show that this kind of application is common place there: **R (on the application of the DPP) v Havering Magistrates Court** [2001] 3 All ER 997; **R (on the application of the DPP) v Redbridge Youth Court** [2001] 4 All ER 411; **R (on the application of the DPP) v Camberwell Youth Court** [2004] 4 All ER 699; **R (on the application of the DPP) v East Surrey Youth Court** [2006] 2 All ER 444; **R (on the application of the DPP) v North and East Hertfordshire Justices** [2008] EWHC 103.

RESPONDENT'S SUBMISSIONS

STANDING

[82] Predictably, learned Queen's Counsel for the respondent commenced her arguments where the claimant's counsel ended. In essence, Mrs. Samuels-Brown said the DPP as a member of the executive has no right to apply for judicial review in her official capacity, because judicial review was developed to assist private citizens. While there are bodies set up specifically by statute that

can bring applications for judicial review, the learning is they can do so as a relator action, not in their own behalf.

[83] The DPP, it was said, has two choices. One, if she is personally affected, she has a right to go to the court. The other is to proceed through the Attorney-General by way of a relator action if she wants judicial review. Counsel opined that the relator action is possibly inhered by an inhibiting factor. That is, where two agencies are involved that could place the Attorney-General on the horns of a dilemma, and the Attorney-General may decide not to proceed with judicial review.

[84] The respective positions of the DPP in Jamaica and England were contrasted. It was argued that under the Prosecution of Offenders Act, 1985, the DPP in England is subordinate to the Attorney-General, in contradistinction to the DPP in Jamaica. The latter is a member of the executive. The distinction lies in the differing statutory arrangements.

[85] In this vein, and in response to the claimant's reliance on the Civil Procedure Rules 2002, the following submission was made. That is, rules of procedure developed to regulate the manner in which persons may enforce pre-existing substantive rights, cannot properly be used to extend those substantive rights, or give rise to any where none existed before. In fact, it is because of the Attorney-General's special position that he can bring a relator action but the DPP is in no such position. Counsel based this submission on an extract from Administrative Law, H.W.R. Wade Fifth edition pages 531-538.

WHETHER THE RM'S ACTION INVITES JUDICIAL REVIEW

[86] In the event that the court does not accept the submissions on standing, the respondent's counsel maintained that the DPP is not entitled to the reliefs sought. First, all persons who, to a probability, can assist the court with relevant evidence, are susceptible to being called as witnesses, barring statutory

exceptions which are inapplicable to this case. As a matter of general law, the DPP is both competent and compellable. Additionally, there is a sufficiency of evidence to show that she can assist the trial process.

[87] Secondly, the DPP cannot give evidence from the bar. Reference was made to the submissions before the learned Snr RM concerning the issue of disclosure of the contents of the contentious conference or meeting with the accused turned witness. It was contended before us that below it was made clear that there is an issue of credibility. Chin said notes were taken and the DPP, from the bar, sought to contradict this. This was something the learned Snr RM took into consideration in her ruling ordering the DPP to make disclosure of the meeting.

[88] Learned Queen's Counsel submitted that there can be no doubt that the learned Snr RM judiciously and with judicial propriety embarked upon the balancing act required of her. In particular but without attempting to be exhaustive:

(a) The learned RM considered the potential impact of the material
(b) The disadvantage at which the defence would be placed if the DPP did not give sworn evidence.
(c) The DPP's constitutional independence in deciding whether to prosecute.
(d) The application of public interest immunity to the DPP's actions.
(e) The significance of the DPP's self-confessed 'information gathering' relative to the witness.
(f) The potential evidential significance on the case as a whole of the information gathered.
(g) The advisability and/or, requirement for there to be a note of such meetings.

[89] Thirdly, if things were revealed in that meeting on the path the prosecution could take, they could equally have a bearing on the path the defence may wish

to travel. Counsel continued, the Snr RM would be obliged to bear this in mind in responding to the request for disclosure and to set aside the subpoena. Reference was made to the learned Snr RM's reasoning on disclosure where she said, among other things, "What transpired at the interview is in evidence minus the details. Mr. Chin said he was subjected to what can only be described as cross-examination on his statement…..Questions asked and answers given by Mr. Chin on his statement may be relevant to the issues in this case whether for the defence or the prosecution."

[90] The judge, it was said, has an overarching duty to ensure fairness in the trial process. Consequently, the constitutional protection for the DPP does not obviate the duty of the judge to take charge of the court to ensure fairness. Learned Queen's Counsel pressed home the point in this way, the strong language of a particular advocate cannot be allowed to obfuscate the real issues of fairness with which the presiding judge has to grapple. That, she said, is for another arena. Statements made by the judge must not be considered in isolation from the whole fabric of the case and her adjudication process. "Significant if not peculiar features of the proceedings" before the RM were then brought to the court's attention. These touched and concerned the DPP's appreciation of her disclosure obligations, the incremental disclosure, descriptions of the meeting and critique of the DPP's disclosure of what took place at the meeting.

[91] Fourthly, it was submitted that as a prelude to adjudicating on the application to set aside the subpoena, the learned Snr RM was seized of the following which, "operated and/or ought to have figured in her deliberations":

(i) The DPP had initially omitted to provide disclosure of the interview with the witness by herself despite requests from the defence.

(ii) The DPP at first said she spoke to the witness after he had given a statement.

(iii) The DPP later corrected this to say no statement had been collected when she spoke to him.

(iv) The DPP said she took no notes during the interview while this former defendant now witness said he saw her write. The DPP further took the stance that she had no duty to reveal any notes.

(v) In her **purported** (emphasis added) compliance with the court's directive the DPP indicated a difficulty in remembering details.

(vi) The DPP considered that she was entitled to withhold disclosure in the public interest and/or in keeping with her constitutional position.

(vii) The DPP considered that it was in her purview to decide on the extent of disclosure.

(viii) The DPP considered that notes taken at the meeting were her private notes.

(ix) The DPP conducted her interview of the "potential" witness in the presence of other witnesses in the case.

(x) The DPP did not consider that she was obliged to disclose plea negotiations, or agreement discussions with the co-accused to the defence.

(xi) There was a time delay between the DPP's interview with the co-accused in "late 2008" and her decision to call him as a witness late December, 2008 on the one hand and when the nolle prosequi was entered on the other.

(xii) There was a time delay between December 22, 2008, when the Director informed the defence that Mr. Chin was to be a prosecution witness and when partial disclosure was afforded April 2010.

(xiii) There was a conflict in, or at the very least, a difference between the account given by the cooperating witness via his testimony and that provided by the DPP through her submissions and disclosure as revealed to the judge, relative to the note-taking.

(xiv) There was to a probability a loss of evidence as a consequence of the delay in disclosure.

[92] Some emphasis was placed on the fact that Chin's interview took place in the presence of other witnesses, namely the two police investigators. It was submitted that the interview of one witness in the presence of another is a matter to be disclosed. In this vein, it was submitted that the Snr RM had material before her concerning other witnesses who could not recall what took place. Therefore, the court was only left with the DPP. The submission continued, it was open to the court to consider that in any event, disclosure was partial. The foregoing fourteen points all related to what the Snr RM was entitled to consider in relation to the DPP's concept and conduct in respect of disclosure, counsel urged.

[93] Further, the diligent trier of fact ought to have taken into account that a cooperating witness is a person with an interest of his own to serve, and the tribunal must warn itself before accepting such a witness' evidence. Consequently, the submission continued, in assessing the credibility or reliability otherwise of such a special category witness, the circumstances in which he came to cooperate are relevant. In the instant case there is evidence of the cooperating witness receiving monetary gains from the state after his transition.

[94] Mr. Chin testified to having received approximately $371m in government contracts "since I have been involved in this case." There was also the possibility of the loss of these contracts if Mr. Chin was convicted. So, the submission went, it was more than mere coincidence that Chin had a conversion on the road to Damascus. Even in cases where there has been no benefit or inducement, the discussions (for example, demands made or concerns expressed) may impact on credibility and therefore be relevant.

DUTY OF DISCLOSURE

[95] It was submitted that there is a duty to disclose the fact of a pre-trial witness interview. **R v Carter and Douglas** [2006 CIRL 421] was cited in support. While bearing in mind the slight difference where the interview is exploratory to decide if the accused should become a witness, counsel argued

that the guidance offered represents best practice to ensure fairness. Counsel continued, the requirement for procedural care is stronger when dealing with witnesses with interests to serve. Such a person would be more vulnerable so more care and rigour should be engaged.

[96] Counsel made reference to the submission before the learned Snr RM, that the circumstances under which Chin became a witness is a fundamental issue to the defence. Highlighted too was this observation, "here it is that an accused man is being interviewed by the Prosecution and thereafter becomes a witness for the Crown. An accused man gives a statement that is not under caution. What is (sic) that he knew that has not been disclosed and who is it (sic) that put him in that comfort zone." Following on that, the submission was that the Snr RM would have been alerted to this transitional status as she considered the question of fairness.

EVIDENCE OF CHIN MERITING THE ISSUING OF THE SUBPOENA

[97] Learned Queen's Counsel marshalled the following arguments under this head. It is beyond doubt from the DPP's letter of 7th October, 2010, (disclosure of what took place at the meeting) that the DPP undertook what was in the nature of cross-examination. A simple interview would not have necessitated the repetition of questions such as the DPP engaged in, counsel contended. The legal consequence of this is that the defence would have been entitled to enquire of the DPP why she embarked on a course of cross-examination of the proposed witness, learned Queen's Counsel postulated. This is particularly so in circumstances where pre-trial interviews are to be conducted with neutrality.

[98] Therefore, counsel concluded, the learned Snr RM had material before her which indicated, first, prima facie, that the learned DPP could be of assistance to the court in its assessment of the credibility of the witness. Secondly, its obligation to ensure that any pre-trial impropriety which had, or could have had, an impact on the fairness of the proceedings, was taken into

account by the Snr RM as the trial proceeded. This, it was said, was a matter for the learned Snr RM and no one else, not even the learned DPP.

[99] It was further submitted that, to the extent that the questions which constituted the 'mock cross-examination' could not be precisely recalled, and to the extent that the learned DPP went on to say in the next paragraph of the letter, "I don't remember the exact details of his responses, his answers accord with what I previously described;" to those extent, the learned trial judge was entitled to say these are matters which could properly form the basis of sworn testimony. This would enable the trial judge to take them into consideration as she assessed issues of fairness throughout the process of the trial.

MOTIVE TO SUBPOENA THE DPP

[100] Learned Queen's Counsel posited that the gloss put on the facts in this case as it relates to the subpoena of the DPP is, with respect, misleading to the extent that the assertion is that the only purpose to be gleaned from the record is the embarrassment of the DPP. Counsel argued that even if the intention was to 'traduce' the DPP, the court has to look beyond that. Even so, there was other material before the Snr. RM.

[101] The other material was: the DPP was in contact with the witness Rodney Chin; she personally interviewed him, questioning him about his written statement (singular) to the police; the DPP's exercise related to the credibility of the witness; the DPP's exercise also related to Mr. Chin's motive for giving evidence; the witness probably gave two statements to the police; the witness' credibility is a live issue in the case; improper motive on the part of the witness arises as a matter of law, he being a witness with an interest of his own to serve; the interview of the witness would have provided him with an opportunity to refresh his memory; regardless of the DPP's intention the meeting objectively afforded an opportunity to the witness to refresh his memory.

[102] In the circumstances, the evidence of the DPP is prima facie materially relevant, counsel submitted. For example, counsel continued, on the issue of credibility, even though a witness' answers as to credibility are final, the other party still has a right to confront him with inconsistent statements or give him an opportunity to retract by way of contradictory evidence. **Milton (Audley) v R** (1996) 49 WIR 306 was relied on.

[103] In assessing all these matters the learned RM carried out a delicate balancing exercise and, it was submitted, in the instant case, in deciding whether to set aside the subpoena the RM had to be mindful of the principles relative to the prosecution's duty of disclosure. Several principles concerning disclosure were extracted from **Regina v Ward** [1993] 1 W.L.R. 619.

[104] Counsel continued, the trial judge has a duty to ensure not only fairness but also procedural irregularity. Where it is procedural irregularity that is material, the trial judge has a duty to take all proper steps to first of all, seek to have it corrected, and if that can't be done, to ultimately consider whether the trial should proceed. It was further submitted that to the extent that disclosure is logically preliminary to the adduction of evidence, the trial judge must bear that duty in mind when asked to pronounce upon the right to subpoena a witness and, whether any such subpoena ought to be set aside.

[105] Further, in considering whether evidence should be adduced before her, the trial judge's concern is with competence and compellability, the relevance of the evidence and its materiality, counsel said. All other considerations, such as a person's status or extrajudicial powers are irrelevant, including section 94 of the Constitution. There may be aspects of section 94 that maybe relevant to compellability and relevance, but section 94 does not provide sweeping immunity which would entitle the office holder to have a subpoena set aside by virtue of that office. This, counsel said, is predicated on the learning in **Regina v Ward** (*supra*).

[106] Special reliance was placed on the following dictum, “non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence,” **Ward**, page 642. Building on that, counsel propounded, when a presiding judge has to consider whether a subpoena ought to stand, the judge has to be mindful whether material being produced in its fullness; it is difficult to say whether the produced material might have shifted the balance or opened a new line of defence.

[107] The argument continued, where the judge has to decide between public interest on the one hand and the interest of justice on the other, the unerring approach has to be to favour the latter. So where there is the smallest likelihood that the material is relevant, that ought to be the approach. The Snr RM was carrying out a basic judicial function, that is, she wanted to ensure that material which had come about would be adduced, the submission went.

[108] **Ward**, *supra*, it was said, represents or sets out the prosecution’s duty of disclosure at common law. It follows, that where such disclosure reveals the existence of witnesses who are in a position to give evidence material to the defence, a subpoena properly issued, it cannot be said to be illegal or an excess of jurisdiction to refuse to set it aside. It was further advanced, regardless of the rubric or the authority or the basis on which the material evidence was obtained, once it is shown to be relevant to an issue in the case, the subpoena relative to that issue ought to stand. The only other alternative is for the DPP to withdraw the prosecution.

[109] Once the DPP neglects or declines to do so, counsel contended, and leaves it in the ambit of the judicial tribunal, then the presiding judge must operate on the basis of fairness and not allow herself to be constrained or overwhelmed by the high office of the DPP. That, counsel claimed, is the meaning of equality before the law.

ISSUES

[110] These are the issues which arise for resolution. First, is the DPP a person with sufficient interest in the subject matter of the application, that is, the order of the Snr RM refusing to set aside the subpoena and the consequential order that the DPP remain out of court during the taking of the evidence of the chief prosecution witness, to clothe her with standing in these judicial review proceedings, or is the DPP obliged to seek the consent of the Attorney-General to proceed by relator action? Secondly, if the answer to the first question is in the affirmative, was the subpoena issued to the DPP to obtain bona fide relevant and material evidence, or for an improper or ulterior purpose, thereby making its issue an abuse of the court's process? Thirdly, was the fact that the DPP could not continue to act as prosecutor in trial proceedings in which she had been called as a witness a relevant consideration in the Snr RM's deliberation to set aside the subpoena, and if it was, was a failure to consider it likely to render the trial process unfair? Lastly, was the Snr RM's refusal to set aside the subpoena served upon the DPP an unlawful assumption of jurisdiction to enquire into the exercise of the DPP's constitutional discretion to enter a nolle prosequi against Rodney Chin and thereafter call him as a witness?

LAW AND REASONING

[111] Attention is now turned to the first issue. Can the DPP approach the judgment seat in her personal capacity or must the DPP resort to being the handmaiden of the Attorney-General as he litigates by relator action? In the court's understanding of the respondent's argument, the Attorney-General who is generally described as the "guardian of the public interest" is the only competent person to seek judicial review in the circumstances of this case. The Attorney-General is cast in the role of a sort of high priest through whom the seat of justice must be approached for judicial review. This raises the ancient question of standing. That is, "a party's right to make a legal claim or seek judicial enforcement of a duty or right." What then, is the law in respect of standing?

[112] The jurisdiction of the Supreme Court to make an order of certiorari, and other prerogative orders, is contained in the Judicature (Supreme Court) Act section 52, hereafter, the Act. This was a jurisdiction previously exercised by the predecessor of the present court and bequeathed to the successor court by section 27 of the Act. These prerogative orders came to coexist with the declaration. Legal history tells us that they operated like trains on separate tracks, with their own rules as to how a litigant could approach the court.

[113] That was a situation which was most unsatisfactory and, at times resulted in the injustice of a claim failing merely for the unwisdom in selection of the appropriate remedy. (H.W.R. Wade & Forsythe Administrative Law 7th edition)That state of affairs came to be impacted by a wave of reforms which swept the Commonwealth jurisdictions, the crest of which Jamaica rode while the light was still dawning on the present millennium.

[114] The Civil Procedure Rules, 2002, (CPR) came into force on the 1st January, 2003. The CPR inaugurated a new, unified procedure for applications for judicial review and the ancient rules of standing have passed away, interred in the catacomb of spent procedures, practices and precedents. The CPR was promulgated by the Rules Committee of the Supreme Court, acting under section 53 of the Act. In the words of the Interpretation Act, "'rules of court,' when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of the court." Accordingly, the CPR has the force of law insofar as practice and procedure is concerned.

[115] By virtue of section 28 of the Act, the Court's jurisdiction is exercised in matters of procedure and practice in the manner stipulated by the Act and, for present purposes, the CPR. The Act does not address the question of standing. Indeed, the received judicial wisdom is that standing is a matter of practice in the exercise of the court's discretion: **R v Inland Revenue Comrs ex p. National**

Federation of Self-employed and Small Businesses Ltd. [1982] AC 617, 638B. That was the case in England when the present judicial review procedures were instituted. According to Wade & Forsythe, supra p.673, the Law Commissions' proposals came "into effect without an Act of Parliament, since changes in 'practice and procedure' can be made by the Rule Committee of the Supreme Court." Subsequently, by the passage of the Supreme Court Act 1981, some of those provisions now have statutory force.

[116] Under the rules, any person, group or body having "sufficient interest in the subject matter of the application" may apply for judicial review: Rule 56.2 (1). By virtue of Rule 56.2 (2), this "includes"-

(a) any person who has been adversely affected by the decision which is the subject of the application;

(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) any statutory body where the subject matters falls within its statutory remit;

(e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or

(f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution.

[117] It will be observed at a glance that the list of eligible applicants under r. 56.2 (2) is not exhaustive. So, the applicant may be a constitutional personality as well. That is the clear intention of the draftsman by the use of the open ended "includes" instead of "means". Further, the threshold question to consider is the sufficiency of the interest of the applicant in the impugned matter. This is ventilated at the point of the application for leave, the unavoidable and precedent

sifting mechanism for judicial review. At this stage the court can dismiss 'simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest,' per Lord Wilberforce in **Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed And Small Businesses Ltd.** [1982] AC 617,630.

[118] The question of the sufficiency of the interest of the applicant in the subject matter of the application is not an esoteric one to be considered in the abstract. In any case which is more than frivolous, "it will be necessary to consider the powers or duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed," per Lord Wilberforce, **Ex parte National Federation of Self-Employed And Small Businesses Ltd.** *supra*.

[119] In the view of the learned authors of Administrative Law, supra pp. 708-709, "the rule as enacted suggests that the test is to be a broad one, designed to turn away futile or frivolous applications only." Equally poignant is the learning that, "by requiring the interest to be 'in the matter to which the application relates' the rule suggests … that standing is to be related to the facts of the case rather than (as previously) to the particular remedy."

RELATOR ACTION

[120] The new regime stands in contrast to that which obtained previously, particularly in respect of the relator action. A relator action is one commenced by the Attorney-General at the relation, that is, the instance of another person seeking an injunction, and, or, a declaration, for the purpose of preventing a breach of the law: Wade & Forsythe, supra, p.601. The efficacy of the Attorney-General lending his name in this way was the conversion of those two private law remedies into public law remedies for the protection of the public interest.

[121] In essence, the public-spirited citizen who could not demonstrate that he had any more interest in the subject of the review than any other member of the public, had no standing to bring an action to, for example, compel a local authority to revise discriminatory practices. However, the Attorney-General, acting on behalf of the Crown, which always had standing, could lend his name to the private citizen. In so doing, it was within the sole discretion of the Attorney-General to decide whether and when to lend his name: **London County Council v A-G** [1902] 165,169.

[122] It has been observed that, "the use of the relator action has … been an impediment to the development of satisfactory rules of law as to the ability of citizens to litigate in the general public interest," Wade & Forsythe, supra, p.607. That impediment has been swept away by the new r. 56 procedure. It would not be stating the position too wide, to say the previously sacrosanct position of the Attorney-General to sue on behalf of the public has been rendered inoperative by the r.56 requirement of sufficient interest.

CERTIORARI

[123] The difficulties of standing affecting the declaration and injunction did not attach to the prerogative remedies, of which certiorari is but one. It suffices to say, that this has been the position since time immemorial. The following quotation from the judgment of Parker LJ puts it beyond contention:

> ***Anybody can apply for it ------ a member of the public who has been inconvenienced, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies ex debito justitiae [by reason of an obligation of justice] R. v. Thames Magistrates' Court ex p. Greenbaum (1957) 55 LGR 129.***

According to Wade & Forsyth, the rationale is that prerogative remedies are granted at the suit of the Crown, and the Crown always has standing to proceed against public authorities.

DPP'S INTEREST IN THE APPLICATION

[124] That having been said, what is the interest of the DPP in the present proceedings? The summons to the DPP was not issued at the instance of the Snr RM. It appears that counsel applied for the subpoena under section 156 of the Judicature (Resident Magistrates) Act. That section entitles any party to a criminal proceeding to "obtain at the office of the Clerk of the Courts summonses to witnesses." It s the duty of the Clerk of the Courts to issue all such process: section 33 of the same Act. Once the subpoena has been served, the Snr RM's coercive powers are activated to give effect to it.

[125] If the person served with the subpoena neglects or refuses to attend, without "just excuse", the Snr RM may issue a warrant to enforce her attendance. (Justices of the Peace Jurisdiction Act section 47). If, having appeared in obedience to the subpoena, the DPP refuses either to be "examined upon oath or affirmation", or to take the oath or affirmation or "to answer such questions concerning the premises" without any just excuse, she stands in peril of incarceration. The Snr RM is empowered to commit the DPP to a correctional institution for up to seven days. (Justice of the Peace Jurisdiction Act, ibid.)

[126] The DPP attended court in obedience to the subpoena and was bound over to reappear. Therefore, while there can be issue concerning the DPP's initial attendance, what if she defaults on any subsequent occasion? The Snr RM could still enforce her attendance by the issue of a warrant. Further, if the DPP is to be treated as a hostile witness in the pursuit of evidence to support allegations of prosecutorial misconduct, it is highly probable that the DPP will refuse to answer such questions. If the Snr RM does not agree that the DPP has just excuse for so doing, the DPP will again be exposed to the ignominy of incarceration.

[127] That the DPP stands personally imperiled by any possible enforcement action flowing from the magistrate bench is beyond question. The subpoena served upon the incumbent of the office, DPP, is addressed simply to Paula Vanessa Llewellyn without reference to her office, save for the address. Similarly, the order of the Snr RM to remain out of hearing for the remainder of Mr. Chin's evidence, is directed to "Miss Llewellyn". So, although the DPP appeared before the Snr RM in her official capacity, she has been called as a witness in personam, rather than ex officio.

[128] This separation of office from office holder appears to be the driving force behind the submission that the DPP ought to have made this application in her personal capacity, which she is admittedly competent to do. However, where one is dealing with a subpoena to give oral testimony, as opposed to a subpoena to produce documents, the distinction between office and incumbent is one without meaning. When Paula Vanessa Llewellyn takes the witness stand and does, or omits to do, anything to cause the Snr RM to invoke her powers, the consequences will be borne personally and by the constitutional personality. In this regard, the incumbent and office are indivisible.

[129] Therefore, on any consideration of the material before us, it is clear that the DPP is, both personally and by reason of her incumbency, adversely affected by the orders of the learned Snr. R.M. Being so affected, she has a sufficient interest in the subject matter of the application. Since standing is now to be decided by reference to the facts of the case, rather than the remedy sought, the DPP does have standing to bring the application.

[130] Under the new regime it appears to be quite irrelevant whether the DPP comes before the judgment seat in her personal capacity or her official capacity. To require the DPP to, as it were, apply by proxy, would be to disinter the now inoperative relator action and breathe the breath of judicial life into its nostrils. Further, even if that retrograde position were to be adopted, it would only affect

the declaration. The prerogative remedy of certiorari would have been available to the DPP in any event. However, the CPR allows for a single application seeking both remedies.

[131] It is therefore beyond doubt that under the CPR the DPP has the standing to bring this application. The submission that the rules cannot be used to extend or give substantive right where none existed, is premised on an assumption that standing is a substantive right to be endowed by primary legislation. That is an unsound argument as it rests on a false premise. Standing is not a substantive right but a matter of practice and procedure. In any event, as has been shown, the rules on standing were developed by the judges at common law. Consequently, all the CPR did was to codify the pre-existing common law rules on standing. Accordingly, the CPR has lawfully given the right to the DPP to come before the throne of mercy without resort to a procedure which has long fallen into disuse.

THE PURPOSE OF THE SUBPOENA

[132] Having decided the first issue in the affirmative, attention is turned to the second issue. Was the subpoena issued to obtain bona fide relevant and material evidence, or for an improper or ulterior purpose? The courts have in the past set aside subpoenas issued for purposes found to be other than to obtain relevant evidence. Six categories have been identified as circumstances in which the courts have set aside a subpoena, or witness summons, the modern nomenclature in England. First, where a document was concerned, for lack of particularity. A witness summons must specify the document or thing to be produced with reasonable particularity, and it must be admissible. The requirement of particularity, it appears, is to prevent an abuse of process through the use of a document "designed to trawl through the files": **R v Miller** (unreported) 5th July, 1993, cited in Archbold 1998.

[133] Secondly, a subpoena may be set aside where the material that it requires to be produced is prima facie inadmissible: **R v Cheltenham JJ ex parte Secretary of State for Trade** [1977] 1 WLR 95. Thirdly, a subpoena is liable to be set aside if the proposed document or evidence it requires is adjudged to be immaterial. The test of what is material, is that adopted by the court in **Stephen John Keane** [1994] Cr. App. R 1, 6:

> ***I would judge to be material in the realm of disclosure that which can be seen on a sensible approach by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2).***

[134] After a review of the authorities, Simon Brown L.J. extracted what he called the central principles touching and concerning the production of documents. These he listed as:

(i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings, but also documents admissible as such in evidence;

(ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and, thus, are not material for the purpose of section 97;

(iii) whoever seeks production of documents must satisfy the Justices with some material that the documents are “likely to be material” in the sense indicated, likelihood for this purpose involving a real possibility, although not necessarily a probability;

(iv) it is not sufficient that the applicant merely wants to find out whether or not the third party has such material documents. This procedure must not be used as a disguised attempt to obtain discovery. **R v**

Reading Justices ex parte Berkshire County Council [1996] 1 Cr. App. R. 239,246.

[135] Fourthly, a subpoena may be set aside on the basis that public interest immunity attaches. Where this claim is made it is the duty of the trial judge to inspect the matter and pronounce upon it: **R v K (Trevor Douglas)** 97 Cr. App. R. 342. This, it has been said, is a two step procedure. The initial step is to determine if public interest immunity in principle attaches. Lastly, if it does, should the claim be disregarded in the interest of justice.

[136] Fifthly, a witness summons whose purport touches and concerns questions of confidentiality may be set aside. For example, a witness summons directed to a hospital seeking the production of a patient's medical records. This affects the patient's right to privacy: **R (T.B.) v Stafford Crown Court** [2006] 2 Cr. App. R. 34. Similar rights would be engaged under section 13 of The Charter of Fundamental Rights and Freedoms of the Jamaican Constitution.

[137] Sixthly, a subpoena issued for vexatious reasons may be set aside. The classic statement of principle is to be found in **The King v. Baines and Another** [1909] 1 K.B. 258. The head note encapsules the principle:

> ***A witness served with a subpoena cannot get it set aside by merely swearing that he can give no material evidence. But the Court, being satisfied that writs of subpoena ad testificandum had been issued not bona fide for the purpose of obtaining relevant evidence, set the subpoena aside.***

[138] However, it is remarkable that there was also a finding that the subpoenaed witnesses could give no relevant evidence. That finding, along with the holding that the subpoena was not issued for the "simple and proper purpose of obtaining evidence, but for a different and ulterior purpose," resulted in its setting aside.

[139] The question as to whether the subpoena would have been set aside if, although motivated by mala fides, nevertheless seeks relevant evidence, was not consider in **Baines**. That question received some consideration in the pronouncement of Scarman L.J. in **Senior and Others v Holdsworth**, *supra*. Scarman L.J. said:

> ***If it is clear to the court that the subpoena has been issued not to obtain relevant evidence but for some other purpose (e.g. to embarrass politically the person served), and (emphasis added) that the intended witness has no relevant evidence to give, it will be set aside.***

[140] Interestingly, Scarman L.J. relied on **Baines** for this proposition. It is to be noted that the conjunctive 'and' is used; suggesting that mala fides is insufficient to quash the subpoena in the face of relevant evidence.

[141] It seems then, that the first hurdle to cross on an application of this nature is to demonstrate that the proposed evidence lacks specificity. That is, it cannot be identified with reasonable particularity. If it passes the particularity threshold, then the task is to show that it bears no relevance to the facts in issue. If the evidence is relevant, it must be shown that it is inadmissible. If it is both relevant and admissible, then is it material according to **ex p. Berkshire County Council**, *supra*. Although the evidence that is being sought is material, the subpoena may yet be set aside because public interest immunity attaches or there is a breach of confidentiality. It is arguable that a subpoena which seeks material evidence is liable to be set aside also if it was issued for a "different and ulterior purpose": **Baines**, *supra*.

POTENTIAL EVIDENCE FROM THE DPP

[142] The answer to the question as to whether the subpoena should be allowed to stand is to be found after a consideration of the evidence which the learned DPP is likely to give at the trial, and its probable impact upon the pertinent

deliberations of the learned Snr RM. A perusal of the matters disclosed by the DPP reveals that the focal points of the interview were an assessment of the probity of Mr. Chin's proposed evidence and his veracity as a potential witness. Two consequences flow from that. In the first place, what was said to the DPP by Mr. Chin concerning his involvement in the crime amounts to a previous statement, insofar as its possible use in a subsequent trial is concerned. Secondly, in the judgment of the DPP, Mr. Chin was capable of being adjudged a credible witness by a tribunal of fact.

[143] The credit of Mr. Chin will be of paramount importance in the trial before the learned RM. How is that evaluation of Mr. Chin to be assisted by the evidence of the DPP? One area of possible inconsistency between the two is whether the interview was noted by the DPP. Mr. Chin said in cross-examination in one breath, that he thought she was taking notes and in the next, that he didn't know if she was taking notes. The DPP maintains that no notes were taken.

[144] That contradiction of Mr. Chin, it is said, must be by way of sworn testimony. In other words, for the Snr RM to assess Mr. Chin's credit, there must be sworn testimony from the DPP traversing and contradicting Mr. Chin on the point. Respectfully, this appears to be an argument in reductionism. Whether or not the witness was mistaken or untruthful on this microscopic minutia, cannot conceivably have a real bearing on the witness' general credibility.

[145] This witness will speak to matters forming the substratum of the prosecution's case. The assessment of his credibility will encompass, among other things, his means of knowledge of the facts, the quality of his memory, mistakes, omissions and inconsistencies in his evidence. While it will be a matter for the presiding judge to gather all the indicia impacting credibility from the four corners of the evidence, that will not be unaffected by a duty to disregard those inconsistencies considered immaterial. It is trite that the trier of fact may

disbelieve a witness on some aspects of the evidence but nevertheless find that the truth was spoken concerning facts in issue.

[146] What then of the previous statements made to the DPP? As has been judicially observed elsewhere, these may prove to be a powerful weapon in the hands of the defence to attack the credibility of the witness Chin. That is, if they were previous inconsistent statements. However, there is no such claim. On the contrary, the undisputed evidence before us is that the evidence given so far is consistent with the statements given by Mr. Chin before the commencement of the trial. Therefore, the evidence of the DPP, as imprecise as that may be from the disclosure given, would not be of assistance in the trial.

ALLEGATION OF BARGAIN

[147] That however, does not bring the matter to a close. It appears the defence is of the view that the DPP is able to give evidence concerning a bargain, suspected to have been struck with the witness Chin as an incentive for him to testify. Although the court in **ex parte Berkshire County Council**, *supra* considered the witness summons under an English statute which is without equivalence locally, the learning distilled by Simon Brown L.J. is quite apposite. The principle may be adapted as follows, whoever seeks to assert that testimony is likely to be material must satisfy the court with some evidence that the proposed evidence is relevant to the issues arising in the criminal proceedings.

[148] The learned DPP in giving disclosure said neither she nor her agents coerced, induced or made “any promise of any reward or favour to Mr. Chin to give a statement or to give evidence for the Crown.” Mr. Chin himself testified that he neither came under any such pressure, nor received any enticement. So, on the one hand, there is no evidence of a bargain and on the other, the word of the DPP, an officer of the court, is that there was no bargain. In the finest traditions of the Bar, the word of an officer of the court is considered to be her bond, without more.

[149] Is there other material from which the fact of a bargain may be inferred? Chin admitted under cross-examination to the receipt of contracts from the Government of Jamaica (GOJ) worth approximately $371,000,000.00, during his transition from accused to Crown witness. From the submissions before the learned Snr RM, that fact appears to have been made the major premise supporting the claim of a bargain. Before us, learned counsel for the respondent drew attention to the possibility of the loss of these contracts if Mr. Chin was convicted. From those premises Mrs. Samuels-Brown concluded that Chin's conversion on the road to Damascus was no mere coincidence.

[150] But was it a mere coincidence that Chin received these contracts at the time he did? The evidence is that between 1987 and September, 2007, Mr. Chin entered into over one hundred contracts with the GOJ. That period spanned the life of administrations formed by both the Jamaica Labour Party (JLP) and People's National Party (PNP). From September, 2007 to the time of testifying, Mr. Chin entered into approximately ten contracts with the GOJ. So, for twenty years before Mr. Chin met with the learned DPP in the latter part of 2008, he had been contracting with the GOJ.

[151] Therefore, the fact of the receipt of GOJ contracts after he became an accused person is not an isolated one. It appears to be no more than a coincidence, an unhappy one perhaps, but a coincidence nonetheless. To cherry-pick the evidence and tar these latter contracts with the stench of a rodent, without more, does not transform a suspicion into material evidence. In essence, the premises upon which it if felt the DPP can give material evidence amounts to no more than, 'I smell a rat'.

[152] Since it has not been made out that the DPP can give any material evidence, was the subpoena issued bona fide to obtain relevant evidence? The submissions made before the learned Snr RM by both learned Queen's Counsel for the accused, reveal the motive for seeking to put the DPP on the stand with

crystalline clarity. The defence charged that there was prosecutorial misconduct that led to Chin becoming a witness; that is, his evidence was corruptly obtained. In the submissions, it seemed particularly egregious and alarmingly telling that the DPP would leave the comfort of her office, traverse the congested streets of Kingston for a 'big interview' which goes unrecorded. That led to the conclusion that something so sinister transpired, the enormity of which awed everyone into refraining from making a record.

[153] Nothing has been placed before us resembling the pale shadow of prosecutorial misconduct. The charge of prosecutorial misconduct remains a theory with a superstructure which awaits the excavation for its foundation. That foundation, it appears, will come from trawling through the deep recesses of the mind and memory of the DPP by some process of divination. As counsel for the DPP submitted, to allow this subpoena to stand would be permitting the defence to fish for evidence to support their theory of prosecutorial misconduct.

[154] On the state of what is before this court, it is not apparent that the DPP can give any evidence that is possibly relevant to any issue in the case. The precise details of the interview with Mr. Chin are lost to the memory of the participants and the DPP has given what she describes as her best recollection. This appears to be the crux of the matter in the arguments before us to uphold the learned Snr RM's decision.

RELEVANCE OF DISCLOSURE PRINCIPLES

[155] Learned Queen's Counsel for the respondent, with admirable clarity and eloquence, submitted that in deciding whether to set aside the subpoena, the learned Snr RM had to be mindful of the principles relative to the prosecution's duty of disclosure. However, the DPP had already given disclosure and what was before the learned Snr RM was to consider whether, having regard to the matters disclosed, the DPP could give any evidence relevant to the issues in the case. With all due deference to learned Queen's Counsel, arguing that the magistrate

had to bear disclosure principles in mind at this stage is a conflation of two separate procedures, resulting in a marriage of obfuscation.

[156] This conflation betrays a stubborn refusal to accept the limits of the matters disclosed by the DPP. Hence, the DPP's disclosure was pejoratively characterized as 'purported', in counsel's catalogue of matters of which the RM was seized as a prelude to adjudicating on the application to set the subpoena aside. There was much criticism of the DPP's approach to disclosure, the fairness or otherwise of which need not be enquired into. Although learned Queen's Counsel submitted that the RM's concern was with competence and compellability and the relevance and materiality of the proposed evidence, this was overlaid by disclosure. Consequently, much learning on the impact of non-disclosure on the ability of a tribunal to do justice was laid bare before the court.

[157] As elegant as the submissions were on the law of disclosure, they failed to conceal the real purpose of the subpoena. That is, to satisfy the curiosity, or more precisely the suspicion of the defence, that there is more to be disclosed by the learned DPP. To adapt the learning in **ex p. Berkshire County Council**, *supra*, it is not sufficient that the applicant for the subpoena merely wants to find out whether the DPP has material evidence. To allow the subpoena to stand would be permitting the defence to use the subpoena as a disguised attempt to obtain discovery.

[158] Some support for the dichotomous approach advanced is found in the first instance case cited before us from Cayman. In **R. v. Carter and Douglas** [2006 CILR 421] June 10, 2005, there was a similar application for the prosecuting counsel to take the witness stand. However, unlike here, the prosecutor was not served with a subpoena. That application arose out of the fact of a pre-trial interview conducted by the prosecutor.

[159] Henderson, J. concluded it would have been inappropriate to expect the prosecutor to prepare a witness statement, and refused to so order. That decision seems to rest on a number of factors. One, it was permissible to conduct pre-trial interviews. Consequently, the prosecutor had not acted inappropriately. Two, the prosecutor gave full disclosure of what the witness said to him and the circumstances of the interview. Three, the prosecutor is an officer of the court and, it appears as a consequence of this, an acceptance that the prosecutor's disclosure had been accurate and complete.

[160] While Henderson, J. made no reference to the principles of disclosure, the fact of disclosure apparently struck a responsive chord. Disclosure of the Chin interview came after a garrulous witness blurted it out and after some legal maneuverings in the court below. Disclosure of the interview with the transitioning witness was therefore anything but prompt. And, coming some time after the event, fading memory cannot be refreshed with contemporaneous notes, as none was taken. So, the completeness and accuracy of disclosure is unhappily reduced to the learned DPP's best recollection. Against this background, the submission of learned counsel for the respondent that the requirement for procedural care is stronger when dealing with a witness with an interest to serve resonates with the court. The rationale being, such a person would be more vulnerable, so more care and rigour should be engaged.

[161] Be that as it may, it is an unassailable fact that disclosure was made. From what has been disclosed, there was no variance between what was said and the proposed evidence. So, only the fact of the meeting need have been disclosed. Further, if being an officer of the court is to be given due weight, it ought to be accepted that the disclosure is as accurate and complete as it can be in the circumstances. That being the case, it would be inappropriate to require the DPP to give a witness statement and be forced to give evidence.

[162] It is therefore palpable that the DPP can give no material evidence relevant to any issue in the case. From all that transpired in the court below and the correspondence between the prosecution and the defence, the object of the subpoena is equally clear. That is, the subpoena is to be the surreptitious vehicle of discovery to be artfully manoeuvred through the labyrinth of the DPP's memory, to an uncertain destination where suspicion may metamorphose into fact. Compendiously put, the subpoena was not issued for the purpose of obtaining bona fide material and relevant evidence but for an improper and ulterior purpose. Consequently, the issue of the subpoena to the DPP is an abuse of process.

IMPACT OF SUBPOENA UPON THE TRIAL

[163] Although it has been decided that the issue of the subpoena to the DPP is an abuse of process, the third issue is worthy of consideration. That is, was the fact that the DPP could not continue as prosecutor in trial proceedings in which she had been subpoenaed, a relevant consideration for the Snr RM, and if so, was her failure to consider it likely to render the trial process unfair? The learned Snr RM gave no reasons for her decision not to set aside the subpoena served on the DPP. The absence of reasons is mentioned to say it cannot be definitively said what she ruminated upon but what she ought to have considered.

[164] What may be said without contradiction is this, in ruling that the DPP remain out of hearing, the Snr RM had the fairness of the trial in mind. To quote from the record, what weighed on the mind of the Snr RM was the need "to safeguard the integrity of the proceedings, any potential evidence and the fairness of the trial." So expressed, it seems that the concerns were for the possible impact on the defence. Nothing was said about the possible effect of ousting the DPP from the proceedings on the conduct of the prosecution. Indeed, on the contrary, the exclusion of the DPP was made an imperative, an indispensable conditionality of guaranteeing the integrity of the proceedings and

insuring fairness of the trial. So the question becomes, was the inverse position a matter which the Snr RM ought to have borne in mind?

[165] It was also submitted that a further motive for issuing the subpoena was to embarrass and weaken the prosecution through the removal of the DPP as lead prosecutor. This is an inference counsel asked the court to draw from the acrimonious correspondence passing between the adversaries. To say there was acrimony is merely to repeat a self evident truth. The acrimony gushed like bile from a ruptured liver from some of the correspondence.

[166] In one such letter, dated 9th January, 2009, learned Queen's Counsel for accused Spencer suggested that the office of the DPP recuse itself and hand over the case to the Attorney-General. There is the clear intent to remove the DPP and her subordinates from the case. The office of the DPP specializes in criminal prosecutions. On the other hand, the specialty of the Attorney-General's Chambers is civil litigation. Unless there are no competency advantages to be gained from this specialization, then there is no practical disadvantage in giving conduct of the case to the Attorney-General.

[167] If, however, the converse is true, and is such that it would adversely affect the proper presentation of the prosecution's case, then the submission that the removal of the DPP would undermine the fairness of the trial is irresistible. With such a probable consequence, the court finds harmony with the view that there should be compelling reasons to force counsel on the record to enter the witness box. Although no authority was cited for this proposition, in the context of an adversarial system, it could never be desirable, save where the ends of justice absolutely demand, to uproot counsel from her brief and catapult her to the witness box.

[168] As a general proposition, as the respondent's counsel submitted, it would be wrong and unfair to allow the prosecution to deprive the court of evidence by

putting that evidence in the hands of a particular individual and then claim a special exemption for that person on the basis that he or she is counsel. The flaw in this submission is that it assumes that what arises from the pre-trial interview is necessarily evidence. The learning in **R. v. Carter and Dougla**s, *supra*, is to the contrary. What transpires in the pre-trial interview is to be the subject of disclosure, and where there are contradictions, so that "each side can alter his approach to the trial accordingly".

[169] So, the need to secure 'any potential evidence' ought properly to have been juxtaposed with the likely impact on the trial by the removal of the DPP. At the making of the order for the DPP to remain out of court, the DPP had already given disclosure. So there was a platform from which to make that delicate balancing act. It does not appear that the Snr RM proceeded in that way. That was a relevant consideration which the Snr RM ought to have taken into consideration.

[170] Before going onto the next issue, a brief word on the desirability of giving reasons for a decision is necessary. While it is accepted that the Snr RM was not bound to give reasons for her decision declining to set aside the subpoena. It was highly desirable in this case. Oral submissions were made before the Snr RM and authorities cited. After the ruling was made, a written request was made of the learned Snr RM for her reasons to be put in writing for the specific purpose of coming before this court. The dictum of Griffiths, L.J. in **Regina v. Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd.** [1982] 1 Q.B. 304,314-315, is very instructive:

> **It is the function of professional judges to give reasons for their decisions and decisions to which they are party. This court would look askance at the refusal by a judge to give reasons for a decision particularly if requested to do so by one of the parties.**

UNLAWFUL ASSUMPTION OF JURISDICTION

[171] The court's attention is now adverted to the fourth issue. That is, was the Snr RM's refusal to set aside the subpoena served upon the DPP an unlawful assumption of jurisdiction to enquire into the exercise of the DPP's constitutional discretion to enter a nolle prosequi against Rodney Chin and thereafter call him as a witness? The DPP is a constitutional creature, created by section 94 of the Constitution of Jamaica. By virtue of this section, the DPP has the power to institute and undertake, take over and continue, as well as discontinue at any stage, any criminal proceedings. In her exercise of these powers, the DPP "shall not be subject to the direction or control of any person or authority." (Section 94(6)). Therefore, the DPP's powers are exercisable and exercised in her discretion.

[172] However, section 94 has to be read in light of section 1(9). Section 1(9) reads:

> **No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.**

So, although the DPP exercises the powers conferred by the Constitution in her sole discretion, judicial inquiry into the constitutionality, or lawfulness of that exercise is not proscribed.

[173] The essence of the argument is that permitting the DPP to testify will result in an unlawful inquiry into the reasons the prosecution was discontinued

against Chin. It is beyond credible denial that the stated intention is to inquire into the reasons Chin transitioned from an accused to Crown witness. That is, to conduct a review of the exercise of the DPP's power to enter the nolle prosecui in respect of Chin. This inquiry or review is, of course, consonant with the conviction of the defence that Chin's evidence was corruptly obtained, and or, that there was prosecutorial misconduct. Is such an enquiry permissible, having regard to the DPP's constitutional position?

[174] It has been some time now since the courts have declared the law on the reviewability of the exercise of the powers of the DPP. In **Jeewan Mohit**, *supra*, the Privy Council listed five categories in which the exercise of power by the DPP would be the subject of review. According to **Mohit**, the exercise of the powers of the DPP is subject to review "if it were made":

1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by disciplinary law (see s 96(4)(a)).
2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.
3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
5. Where the DPP has fettered his or her discretion by a rigid policy- e.g. one that precludes the prosecution of a specific class of offences.

[175] The breadth of the considerations to which the DPP may properly have regard in deciding to institute or discontinue proceedings, renders allegations of impropriety less than bad faith almost non-justiciable.

[176] The Privy Council pointed out that the five categories did not represent an exhaustive list. If the allegations of the defence had any evidential foundation, they would fit squarely into the category of bad faith and, perhaps less so in the class of having acted under the direction or control of another person or authority. Those are the only known categories which could accommodate allegations of corruption on the part of the DPP, and having had discussions with 'Government Politician in the Executive or Parliament'.

[177] However, there is no evidence of any wrongdoing on the part of the learned DPP, much less evidence amounting to bad faith. Neither is there any evidence warranting a discussion concerning discussions 'between … [the DPP's] office and or agents and any Government Politician in the Executive or Parliament.' So, as counsel for the DPP submitted, none of the excised categories are applicable. On the authority of **Mohit**, there can be no questioning of the exercise of the DPP's power which has as its foundation supposition and suspicion.

[178] So, the respondent's counsel is correct that section 94 of the Constitution does not provide sweeping immunity entitling the office holder to have a subpoena set aside, by virtue of that office. Implicit in that submission is what is in fact the law; that is, some immunity is provided by the section. The courts have drawn the boundaries of the immunity provided, as inexhaustive as the categories might be: **Mohit**, *supra*.

[179] It is therefore going too far to say that the learned Snr RM's only concern was competence and compellability when considering whether evidence should be adduced. And, that all other considerations, such as the person's status or

extra-judicial powers are irrelevant, including section 94 of the Constitution, as was submitted. Where the subpoenaed witness is a constitutional figure, and the inquiry will trespass upon constitutionally guaranteed protection, that is a powerful argument to set aside the subpoena. In other words, if the precedent conditions for challenging the exercise of the power are absent, it would not be permissible to expose the office holder to what would then become an unlawful enquiry.

[180] Fundamentally, even if there was a basis to enquire into the exercise of the DPP's discretion, the Resident Magistrate's Court is not the proper forum, for want of jurisdiction. The stated motives for summoning the DPP, if pursued in either examination or cross-examination of the DPP, would be tantamount to such an enquiry through the back door. Therein lies the gravamen of the indictment of an unlawful assumption of jurisdiction.

[181] Having resolved the issues in favour of the DPP, I would therefore grant the reliefs sought.

SINCLAIR-HAYNES J.

[182 This is an application by the Director of Public Prosecutions (DPP) for judicial review of the decision of the Senior Resident Magistrate's (RM) not to set aside a subpoena issued by the defence for her to attend court as a witness (for the defence) on the April 19, 2011 and to remain out of court during the testimony of Mr Chin, the Crown's principal witness. The DPP seeks the following orders:

(a) A declaration that the issuing of the subpoena dated 12th day of April, 2011, by the Clerk of Courts for the Resident Magistrate's Court for the Corporate Area at the instance of the accused, Coleen Wright to Paula Llewellyn, the Director of Public Prosecutions, and returnable on the 19th day of April, 2011, in the Resident Magistrate's Court is an abuse of the process of the Court.

(b) An order of certiorari to quash the decision of the Senior Resident Magistrate for the Corporate Area refusing to set aside the subpoena dated the 12th April, 2011 and issued by the Clerk of Courts for the Resident Magistrate's Court for the Corporate Area to Paula Llewellyn, the Director of Public Prosecutions, and returnable on the 19th of April, 2011 in the Resident Magistrate's Court for the Corporate Area.

(c) An order of certiorari to quash the subpoena.

(d) An order of certiorari to quash the order of the Senior Resident Magistrate for the Corporate Area that Paula Llewellyn, the Director of Public Prosecutions, should remain out of hearing for the remainder of the testimony of the witness, Rodney Chin.

[183] The grounds advanced in support of the reliefs sought were:

Illegality

1. The Magistrate failed to take into account relevant considerations, namely,

that:

(a) The relevant evidence which the defence is seeking to elicit from the Director of Public Prosecutions as a witness can be obtained from other witnesses who are competent and compellable, who are available and are willing to attend to testify and for whom subpoenas were issued.

(b) The reasons for discontinuing criminal proceedings against Rodney Chin is the only evidence that other witnesses are unable to give, but the Director of Public Prosecutions is not obliged to disclose the reasons for the exercise of her discretion under Section 94 of the Constitution of Jamaica.

(c) The Director of Public Prosecutions could not continue to officiate as a prosecutor in trial proceedings in which she has been called as a witness for the defence.

(d) If the Director of Public Prosecutions were to continue as prosecutor in trial proceedings in which she has been called as a witness for the defence it would render the trial process unfair and constitute an infringement of the rules of natural justice.

(e) The issuing of the subpoena is oppressive and an abuse of the process of the court.

2. The Magistrate's decision not to set aside the subpoena requiring Paula Llewellyn, the Director of Public Prosecutions, to participate in the trial of **R v Kern Spencer and Coleen Wright** as a witness before the Senior Magistrate, is tainted with illegality in that the Magistrate exceeded her statutory powers by assuming the role of a review tribunal and pronounced upon the manner of the exercise of a constitutionally vested prosecutorial discretion by the Director of Public Prosecutions, to discontinue the criminal proceedings against Rodney Chin and to call him as a witness for the prosecution. The object of the issuing of the subpoena to compel the Director of Public Prosecutions to attend as a witness for the accused in a

matter in which she is the prosecutor and in circumstances, in which other witnesses are available and willing to attend to testify regarding the same issues, was not bona fide to obtain relevant evidence. The issuing of the subpoena was an abuse of the process of the court and was therefore unlawful, ultra vires and void.

3. In refusing to set aside the subpoena the Magistrate misinterpreted the law and failed to have regard to her power, as sitting Magistrate, to prevent an abuse of the process of the court.

4. The subpoena was issued at the instance of the accused for an improper or ulterior purpose.

Irrationality

The Magistrate's decision in refusing to set aside the subpoena on the facts and in the circumstances of the case is 'Wednesbury' unreasonableness.

PROCEDURAL IRREGULARITY/IMPROPRIETY

[184] The Magistrate acted unlawfully and in excess of her jurisdiction when she failed to give any or any adequate reasons for her decision to refuse to set aside the subpoena.

1. No alternative form of redress is available to the applicant.

2. To the knowledge of the applicant, other than binding her over as a witness, the Senior Resident Magistrate has not given any further consideration to the matters in question in response to the applicant's objection to being ordered to keep out of hearing for the remainder of Rodney Chin's testimony or the issue of the subpoena against her.

3. The applicant is personally and directly affected by the decisions about which the complaint is made.

[185] The applicant abandoned grounds 1a and 1b regarding the availability of other witnesses to give evidence which the DPP could give and concedes that if a subpoena is obtained in good faith for the eliciting of relevant evidence it could not be set aside merely on the ground that other witnesses are available.

SUBMISSIONS BY LORD GIFFORD QC ON BEHALF OF THE DPP

Mala fide motive for the issuance of the subpoena

[186] At the heart of the complaint is that the subpoena was issued for an improper or ulterior purpose or purposes. It was not sought for the bona fide purpose of obtaining relevant evidence. Its issuance amounts to an abuse of the process of the Court. According to Lord Gifford, the purpose of the subpoena, as revealed from the words of the defendants' counsel, is to embark on a fishing expedition in order to seek support for baseless allegations of misconduct and corruption on the part of the DPP. Further, it is their intention to embarrass and weaken the prosecution by removing the DPP from her role as lead prosecutor.

[187] Lord Gifford contends further that the intent and/or the consequence of requiring the DPP's testimony is that she will be exposed directly or indirectly to questions about the reasons for her decision to discontinue the prosecution of Mr. Chin, thus undermining her independence which the Constitution guarantees.

[188] Lord Gifford submits that the following statements of defence counsel KD Knight QC and Patrick Atkinson QC, which were made in opposition to the DPP's application before the RM to set aside the *subpoena duces tecum,* make plain the motive for the issuance of the subpoena.

[189] KD Knight QC, (RM notes pages 28-29):

> *"Without rehearsing the past, the court will recall that submissions were made on prosecutorial misconduct. The defence said the misconduct led to Mr. Chin becoming the chief witness for the prosecution. Beyond the issue of whether or not Mr. Chin is an accomplice is the issue as to whether the evidence was corruptly obtained. That determination is necessary having regard to the whole tenure of Chin's evidence and an important aspect as to whether or not it was corruptly obtained or not*

relates to the emersion of the DPP in the investigative process."

At page 29:

> *"Having perused the various bits of disclosure coming from the DPP – the view has been formed and the decision has been made that the DPP can assist in the fairness of the trial because with respect, prosecutorial misconduct does not cease at the end of the Crown's case it carries through to the end of the trial. And as we have already submitted, that depending on the gravity of the prosecutorial misconduct there can be denial of a fair trial- a matter which a trial judge takes into account at various stages and including at the completion of the trial."*

At page 34 Mr Atkinson QC, said:

> "Even though it is Knight who applied, depending on how she answers she can be treated as hostile. I intend to cross examine her and for this court to see her demeanour etc. and decide what it makes of it… In this case the defence is saying Chin is there to save his skin and his opportunity to earn billions of dollars."

[190] Lord Gifford submits that the allegations against the DPP and the questioning of her integrity and honesty are baseless. The interviewing of a potential witness for the Crown, in the presence of his attorney-at-law, is a proper element in the due diligence process which may lead to a decision only the DPP can make: whether to continue the prosecution.

[191] Mr. Chin's evidence is that no inducements were offered to him or any promise made. The DPP gave full disclosure of her recollection of the interview.

[192] The intent is to denigrate the DPP in the witness box and impugn her integrity in the absence of evidence. It is not the intention to discover the details of the interview but to build a platform on which allegations of corruption can be thrown at the DPP. If she refutes the allegations she can be deemed hostile. Even if she is not questioned about corruption and misconduct, the intention is to embarrass the DPP and divert the fair trial of the charges against the Defendants.

[193] Also, the intent is that although called on behalf of one defendant she will

be subject to cross-examination by the other defendant. He further submits that, the intention is to put to her that she was a party to a corrupt arrangement whereby Mr. Chin was bribed to give evidence by promise of Government contracts.

NO RELEVANT EVIDENCE

[194 He further submits that the DPP is unable to provide any relevant evidence. There is no evidence of contradiction in Mr. Chin's evidence and his later statements. The DPP asserts that she was consistent. The DPP is therefore unable to assist in that regard as she found him to be credible. The DPP cannot provide in examination- in- chief any material which can assist the defence. The objective is to subject her to speculative and oppressive cross-examination. He relies on the cases of **R v Baines** [1908-10] All ER 328 and **Senior v Holdsworth** [1975] 2 All ER 1009.

SUBMISSIONS BY MRS. JACQUELINE SAMUELS-BROWN QC

[195] Mrs. Jacqueline Samuels-Brown QC submits that except for statutory exceptions which are not applicable to the instant case, **all persons to a probability**, who can assist the court with relevant evidence, are susceptible to being called as witnesses. The notes of evidence as well as the DPP's affidavit which are relevant material to the trial process provide assistance.

[196] Strong language of a particular advocate cannot be allowed to obfuscate the real issues of fairness with which the presiding Judge has to grapple. It is clear on the evidence before the court, that defence counsel wish to pursue issues of credibility and motive. There is also concern as to the loss of evidence as a result of the delay in disclosure.

[197] The learned Resident Magistrate's refusal to set aside the subpoena cannot be viewed in isolation from her written ruling in relation to the application for disclosure. On a reading of her ruling, the learned Resident Magistrate

judiciously and with judicial propriety embarked upon the balancing act required of her.

[198] There are significant features of the proceedings before the RM which are relevant:

(a) The prosecution seems to have proceeded on the basis that its duty is limited to material in its possession.

(b) Apparently the DPP does not recognize that the responsibility for disclosure rests primarily on the Governmental authority and not the lay person or private attorney.

(c) Disclosure in this case was incremental and in stages.

(d) Examination of Rodney Chin revealed that:

i) the DPP met with Mr. Chin;

ii) meeting lasted forty-five minutes;

iii) the DPP gathered material relevant to Mr. Chin's evidence in the course of what was revealed to be an interview;

iv) At that stage the DPP asserted that Mr. Chin assumed she was taking notes but there were no such notes.

(e) Further to the order of the RM for disclosure, the DPP, by way of letter dated 19 April 2011, stated:

i) There was in fact a meeting.

ii). At the meeting she was already *au fait* with Mr. Chin's statement and asked him questions relative "to all information in his statement."

iii) She spoke to him relative "to all information in his statement."

iv) She "did not make any notes of the interview."

v) She was vague or unspecific and/noncommittal about the date of the conversation with Mr. Chin's attorney.

vi) She was unspecific about the date of the interview meeting with Mr. Chin.

(f) Her letter of 7 October 2010 varied somewhat and was further incremental in disclosing;

i) The DPP did not see any statement by Mr. Chin before the meeting.

ii) For the first time she adverts substantially to what transpired in terms of subject matter relative to the narrative that was covered but states that it is as far as she can recall.

THE DPP'S RELUCTANCE TO DISCLOSE

[198] Mrs. Samuels-Brown QC complains that the DPP's disclosure was incremental.

In her letter dated 8 January 2009 she (DPP) stated, "We can only serve documents we have in our possession."

In her letter of 20 January 2009 she advised Mr. Atkinson as follows:

> *"If there are any further requests of a nature outlined in your correspondence relating to Mr. Chin, I would advise that they be redirected to his attorney, Mr. Small."*

[199] The DPP failed to disclose her meeting with Mr. Chin, Mr. Chin's attorneys and certain prosecution witnesses. Upon request by the defence for disclosure, she failed to disclose the meeting in spite of the request for disclosure. She did not specify what material was in her possession nor did she reveal the date she was approached.

[200] In responding to the Resident Magistrate's directive to disclose, the DPP, by way of letter dated 19 April 2009 disclosed the fact of a meeting but failed to provide the Court with the specific date of the conversation with Mr. Chin's attorney. In that letter she stated that she was conversant with the contents of the statement and her questions pertained to her ascertaining the truth of his statement. She stated also that she spoke to him regarding "All the information

in the statement," and stated that she did not take any notes of the interview.

[201] Some months later, by letter dated 7 October 2010, she acknowledged that elucidation of the material disclosed in her letter of 19 April 2010 would be useful. Consequently, she provided **further information**. It is to be noted that further information was provided after the request for disclosure was made and after the announcement that Mr. Chin had become a co-operating witness. However, she again expressed that the passage of time had affected her ability to recall.

[202] She stated that she was not provided with any statement before the meeting with Mr. Chin. She stated that Mr. Chin narrated how his involvement with the accused persons came about. He repeatedly emphasized that he was speaking the truth and that no one offered him any reward or promise. She stated that she repeatedly asked him questions which included whether he was speaking the truth. She provided statements from Ms. Smith, Superintendent Fitz Bailey and Detective Inspector Carl Berry. This letter was written in compliance with the court's directives. That statement was repeated by her before the Magistrate in her response to defence counsel's application for disclosure.

RESIDENT MAGISTRATE'S REASONS

[203] The Resident Magistrate's refusal to set aside the subpoena cannot be viewed in isolation from her written ruling regarding the application for disclosure. At the point the application to set aside the subpoena was made, the RM was aware of the following:

i) The DPP had initially declined to provide disclosure of the interview despite requests from the defence.

ii) She first stated that she spoke to the witness after he had given the statement.

iii) She later made a correction to the effect that prior to speaking to him no statement had been collected.

iv) She said that she took no notes during the interview while Mr. Chin testified that he saw her write.

v) Her stance was that she had no duty to reveal any notes

vi) In her purported compliance with the court's directive, she indicated difficulty remembering details.

vii) She considered that she was entitled to withhold disclosure in the public interest and/or in keeping with her Constitutional position.

viii) She considered it her purview to decide on the extent of disclosure.

ix) She considered that the notes taken at the meeting were her private notes.

x) She conducted her interview of the potential witness in the presence of other witnesses in the case.

xi) She did not consider that she was obliged to disclose plea negotiations/agreement with the co-accused to the defence.

xii) Delay between the DPP's interview with the co-accused, her decision to call him as a witness and when the *nolle prosequi* was entered.

xiii) Delay between 22 December 2008 when the DPP informed the defence that Mr. Chin was to be a prosecution witness and partial disclosure was afforded in April 2010.

xiv) There is a conflict or at least a difference in the account given by the co-operating witness via his testimony and that provided by the DPP via her submissions and disclosure as revealed to the Judge.

xv) The probability of loss of evidence as a consequence of the delay in disclosure.

[204] Further, a co-operating witness is a person with an interest of his own to serve and the tribunal of fact must warn itself before accepting such a witness' evidence. The circumstances in which he came to co-operate are relevant in assessing credibility or reliability. There is evidence of Mr. Chin receiving

monetary gains from the State after becoming a cooperating witness. Even in cases where there has been no benefit or inducement, the discussions, for example, whether demands were made or concerns expressed, may impact on credibility and are therefore relevant. As the defence had indicated, that was one of the reasons it desired disclosure. The witness also gave a multiplicity of statements which raises issues of credibility to be considered as a matter of law. This was expressed by both KD Knight QC and Patrick Atkinson QC. The defence also raised issues pertinent to abuse of process which included the delay and accompanying dulled memory.

[205] There is a sacred rule that in order to preserve the integrity of the investigative process, the dichotomy between the roles of counsel and the investigator should be preserved. When there is blurring of the lines, however unintentional or however noble the motive, the counsel who has taken on the investigative role becomes susceptible to being called as a witness. On the DPP's own admission she had two purposes in carrying out the interview with Mr. Chin. One was information gathering and the other, the exercise of her constitutional powers.

[206] It is therefore inappropriate and misleading to assert that the only purpose of the subpoena to be gleaned from the record is the embarrassment of the DPP. On the evidence, the DPP was in contact with Mr. Chin. She personally interviewed him by repeatedly questioning him about his written statement to the police. That exercise related to the credibility of the witness. The exercise raises the issue of his motive for giving evidence. There is lack of knowledge as to how many statements he gave before he spoke to the DPP.

[207] The credibility of the witness is a live issue in the case. Improper motive on the part of the witness would have provided him with an opportunity to refresh his memory, regardless of the DPP's intention. In the circumstances, the evidence of the DPP is prima facie materially relevant. For example, on the issue of credibility, even though a witness' answers as to credibility are final, the

other party still has a right to confront him with inconsistent statements or give him an opportunity to retract by way of contradictory evidence. In support of this proposition, Mrs. Samuels- Brown relies on **R v Milton (1996) 46 WIR 306.**

[208] In assessing these matters the Resident Magistrate carries out a delicate balancing exercise. In the instant case, in deciding whether to set aside the subpoena, the Resident Magistrate had to be mindful of the principles relative to the prosecution's duty of disclosure. The principles extracted from **R v Ward (**1993) 1 WLR 619, are applicable. The cases make it clear that even material damaging to the defence ought to be disclosed and that duty is not confined to any particular branch of prosecution but to the prosecutorial authorities.

Whether DPP can move Court for judicial Review

[209] Mrs. Samuels-Brown also postulates that an order for Certiorari redounds exclusively in public law. The pleadings having been filed in the claimant's capacity as DPP, relates to the exercise of her Constitutional powers as a member of the Executive. Public law remedies are therefore not available to her as such remedies are reserved for private citizens. It is her contention that public law regulates the affairs of subjects vis-à-vis public authorities. She relies on the statement of Lord Denning MR which was quoted by Rowe P in **Ministry of Foreign Affairs, Trade and Industry v Vehicle and Supplies Ltd. and Anor** [1989] 39 WIR 270. She submits that her position is, in the circumstances, distinguishable from a private citizen who is able to institute private prosecution.

[210] Lord Gifford however relies on Rule 56.2 of the CPR which on the face of it entitles any person, group or body with sufficient interest, who has been adversely affected to apply for Judicial Review. He cites and relies on the English cases of **R (On the application of the DPP) v Havering Magistrates Court** [2001] 3 All ER 997, **R (On the application of the DPP) v East Surrey Youth Court** [2004] 4 All ER 699, **R (On the application of the DPP) v Redbridge Youth Court** [2001] 4 All ER 411, **R (On the application of the DPP) v**

Camberwell Youth Court [2004] 4 All ER 699 and **R (On the application of th**e **DPP) v North & East Hertfordshire Justices** [2008] EWHC 103 in which the DPP sought Judicial Review to quash decisions of the court. He also relies on the Supreme Court Act 1981.

DECISION
DOES THE DPP HAVE THE REQUISITE STANDING?

[211] In **Ministry of Foreign Affairs v Vehicles and Supplies Ltd,** by virtue of the Motor Vehicle (Sale and Distribution) Order 1985, which was promulgated by the Minister of Foreign Affairs, certain motor cars could only be imported into the Island by JCTC, which was a government- owned company. JCTC collected payment from and delivered vehicles to the dealer. **Vehicles and Supplies** was dissatisfied with the allocation of vehicles and sought prerogative orders *inter alia* in relation to the allocation. The Minister, who was served with the orders, applied to have them set aside on the ground that the Attorney General was the proper party.

[212] The unanimous finding of the Court of Appeal, with which the Privy Council concurred, was that the proceedings were not 'civil proceedings' within sections 13 and 18 of the **Crown Proceedings Act** 1959. The result was that the Minister and not the Attorney-General was the proper party to proceedings 'reviewing the exercise of his statutory powers.'

[213] In the instant case, the DPP is seeking a review of the Senior Resident Magistrate's decision not to quash the subpoena. The action therefore falls under the Crown side, and is not 'civil proceedings'.

[214] Section 2 (2) **Crown Proceedings Act** states:

> *"…civil proceedings" do not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division…officer, in relation to the Crown, includes any servant of her Majesty, and*

accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown.

Section 13 provides that 'civil proceedings' against the Crown must be instituted against the Attorney-General.

[215] In **Ministry of Foreign Affairs v Vehicles and Supplies**, Rowe P, traced the history and development of the prerogative remedies of *mandamus,* prohibition and *certiorari* and opined that they were clearly remedies to which the subject was not entitled as of right, but only at the discretion of the court. He relied on the work of Professor de Smith, **Judicial Review of Administrative Action**, and Lord Denning's speech in **O'Reilly v Mackman** [1982] 3 All ER 680.

[216] Professor de Smith at Chapter 8 page 269 said:

"*Certiorari had other good qualifications for membership of a prerogative group of writs: e.g. it had originated as the King's personal command for information; it was often used to remove indictment into the King's Bench, and upon their removal the King would proceed to prosecute in his own court; it was a writ of grace for the subject. Mandamus, too was a writ of grace; it alleged a contempt of the Crown consisting in the neglect of a public duty; it was at once of high governmental importance and a valuable remedy of last resort for the subject. All four writs were awarded primarily by the Court of King's Bench, a court which had always performed quasi-governmental functions and which was historically the court held coram ipso rege. In short, all four writs could be described, by those who were so minded, as the King's prerogative writs. The King could be conceived as superintending the due course of justice and administering through the medium of his own court: as prosecuting indictments, preventing usurpation of jurisdiction and upholding public rights and the personal freedom of his subjects."*

[217] At page 690, in **O'Reilly v Mackman**, speaking of the prerogative *writs,* Lord Denning MR said*:*

"It was for the King to call on a Judge of an inferior court and ask him to account for his actions. The King did it by the prerogative writ of certiorari … The very words 'prerogative writ' show that it was issued by the royal authority of the King. No subject could issue it on its own. He had no right to issue it as of course, as he could for trespass or trover. All that the subject could do was to inform the King's Judges of the complaint. He could not tell them about the unjust Judge of any inferior court. The King's Judges would then authorize the issue of the writ in the King's name."

[218] Rowe P observed that Lord Denning MR said in the same case that in modern law *certiorari* was also available against a public authority.

[219] The following statement of Lord Denning in the said case has sparked the controversy in this case. It is Mrs Samuels-Brown's view that the words "*Public law regulates the affairs of the subject vis-à-vis public authorities"* make it pellucid that the public law remedy of *certiorari* is not available to the DPP, she (herself) being a public authority*:*

"*In modern times, we have come to recognize two separate fields of law; one of private law, the other of public law. Private law regulates the affairs of the subject as between themselves. Public law regulates the affairs of the subject vis-à-vis public authorities. For centuries there were special remedies available in public law. They were the prerogative writ of certiorari, mandamus and prohibition. As I have shown, they were taken in the name of the Sovereign against a public authority which had failed to perform its duty to the public at large or had performed it wrongfully. Any subject could complain to the Sovereign; and then the King's Court at their discretion, would give him leave to issue such one of the prerogative writ as was appropriate to meet his case. But these writs, as their names show, only gave the remedies of quashing, commanding or prohibiting; they did not enable a subject to recover damages against a public authority nor a declaration nor an injunction."*

[220] The learned President also examined the work of the learned authors **Short and Mellor**. They expressed the view that although there were radical procedural changes in ordinary actions, the Crown side of the King's Bench Division remains an exceptional procedure, governed by its own rules and dealing with 'its appropriate subject matter'. The authors pointed out that in spite of the changes on the plea side of the Court of King's Bench the jurisdiction on the Crown side is preserved intact. Rowe P pointed out
that the Jamaican Crown Proceedings Act 1959 was substantially similar to the English Crown Proceedings Act.

[221] In light of the relatively strict adherence by the Crown side, (under which this matter falls), to its original procedure and rules and Lord Denning's MR pronouncement, *Prima facie,* there is logic to Mrs Samuels-Brown's contention.

[222] Section 94 of the Constitution regards the office of the DPP as a public office. She is therefore a public officer. If Public law regulates the affairs of subjects vis-à-vis public authorities and if Mrs Samuel-Brown is correct, it would follow that the DPP, being a public authority, is not permitted by law to institute proceedings under the Crown side.

[223] Mrs. Samuels-Brown QC submits that she is. She contends that the office of DPP is a special species created by the Constitution. The DPP is an arm of government which falls within the category of the Executive. Consequently, she has no standing to move the court for Judicial Review as in so doing it would be tantamount to Caesar appealing to Caesar. According to Mrs Samuels-Brown, the English DPP does not enjoy the same status and is therefore able to move the court for Judicial Review.

[224] Section 94 (6) of the Jamaican Constitution provides that the DPP, in the exercise of the powers conferred upon her by the Constitution is not subject to the control or direction of any person or authority. She is, in the exercise of her

duties, independent.

[225] Her English counterpart is different. The English Prosecution of Offences Act 1985, provides for the establishment of a Crown Prosecution Service for England and Wales of which the DPP is the head. The English DPP is not independent. Section 2 of the said Act provides that the DPP shall be appointed by the Attorney General. He is subject to the control of the Attorney General. By virtue of Section 9 of the said Act, the Director reports to the Attorney General. The remuneration of the English DPP is determined by the Attorney General.

IS THE DPP A MEMBER OF THE EXECUTIVE?

[226] Section 2(2) of the **Crown Proceedings Act** states:

> "*Officer" in relation to the Crown, includes any servant of her majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown."*

Section 2 (1) of the Public Service Regulations 1961 makes a distinction between a public officer, the Attorney General and members of the Judiciary. Both the Attorney General and the Judiciary are arms of Government albeit separate.

[227] Mrs. Samuel-Brown's submission that the DPP is an arm of government, in particular, a member of the Executive is, unsustainable. Although the independence of the DPP is constitutionally protected, she is, like the English DPP, a public officer. Applications for Judicial Review have been made without objection, by the English DPP in the Court of Queen's Bench.

THE EFFECT OF RULE 56.2

[228] Section 81 of the Constitution states:

31-(1) an application to the High Court for one or more of the following forms of relief, namely –

(a) an order of mandamus, a prohibition or certiorari;

(b) a declaration or injunction under subsection (2); or

(c) an injunction under Section 30 restraining a person not entitled to do so from acting in an office to which that section applies, shall be made in accordance with the rules of court by a procedure to be known as an application for Judicial Review.

(2) a declaration may be made or an injunction granted under this subsection in any case where an application for Judicial Review, seeking that relief, has been made and the court considers that, having regard to –

(a) the nature of the matters in respect of which relief may be granted by orders of *mandamus,* prohibition or *certiorari;*

(b) the nature of the persons and bodies against whom may be granted by such orders; and

(c) all the circumstances of the cases, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

(3) no application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with Rules of Court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[229] By virtue of section 81 of the Constitution, the Rules (CPR) procedure involved in approaching the court is governed by the Civil Procedure**)**.

The existence of Judicial Review is assumed by the Constitution but the mechanics of its operation are rooted in the case law coming out of the Kings Bench Division and in the Crown Proceedings Act. Part 56.2 of the CPR therefore derives its **'**jurisdictional basis' from the Constitution, the Crown Proceedings Act and case law.

[230] For clarity, it is necessary to state the Rule. Rule 56.2 provides:

(1) An application for Judicial Review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes –

a. any person who has been adversely affected by the decision which is the subject of the application;

b. anybody or group at the request of a person or persons who would be entitled to apply under paragraph (a);

c. anybody or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

d. any statutory body where the subject matter falls within its statutory remit;

e. anybody or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application or;

f. any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution.

[231] Rule 52 (6) of the CPR, as worded, captures the DPP axiomatically as she has an interest in the matter. Failure to comply with the subpoena, could affect her liberty.

HAS THE DPP AN ALTERNATE FORM OF REDRESS?

[232] De Smith, Woolf and Jowell in their work on **Judicial Review of Administration Action** fifth edition at para. 23-013 said:

> "*Assuming the High Court has jurisdiction to hear an application for judicial review, unless there are good or "exceptional reasons for not appealing the Court will as a matter of discretion invariably refuse relief in judicial review proceedings if the point could have been just as satisfactorily disposed of by way of an appeal*."

[233] If the matter could have proceeded by way of an appeal such proceeding would have been 'civil proceedings' within the Crown Proceedings Act. The Attorney General would then have been the proper party to the proceedings.

The Attorney General would have found himself in the invidious position of deciding whom to represent: the Senior RM or the DPP. In such circumstances, he might have had to decline to act. The dilemma which would have confronted the DPP could have provided the "good or exceptional reason." However, she has no right of appeal at this stage.

[234] In any event, what is material and of grave importance is whether in these circumstances; the Magistrate has a right, if not a duty, to command the appearance of the DPP as a witness who can give material evidence on an issue or issues which she considers vital to the just disposal of the case before her.

CAN THE DPP PROVIDE RELEVANT TESTIMONY OR IS THE PROCESS OF THE COURT BEING USED FOR IMPROPER MOTIVE?

[235] The issue is whether the issuance of the subpoena is mired in improper or ulterior purpose or purposes and is an abuse of the process of the court or whether it is *bona fide.*

CIRCUMSTANCES UNDER WHICH IT WAS REVEALED THAT MR. CHIN WAS INTERVIEWED BY THE DPP

The defence was informed at the start of the case that the Crown intended to offer no evidence against Mr. Chin. Subsequent to and in spite of the announcement by the DPP that Mr. Chin would become a Crown witness, he continued to be seated as an accused. The fact that he remained seated as an accused elicited enquiries from the defence.

[236] It is Mr. Chin's evidence that based on the statement he gave, he was asked to be a witness for the prosecution. He is not aware of any document which indicates that the charges have been dropped. He was not shown any document called a *nolle prosequi.* It was his understanding that once he gave the statement he became a potential witness (See page 154 of witnesses' cross-examination by Mr. Atkinson). . According to him, he was not told that before he testified for the Crown, the charges had to be dropped. At the time he gave his

statement he did not know that the matters against him would be withdrawn.

[237] He told the court that he asked the lawyer the meaning *of nolle prosequi* and they explained the difference between *nolle prosequi* and an indictment; however, he 'googled' the meaning. Two of the four charges were dropped and a *nolle prosequi* was entered for two. From his consultation with 'Google' and from what he 'heard" and what was "explained,' he learnt that the two charges which were dropped could be brought back.

[238] He testified that since his involvement in the case he received government contracts valued at approximately 12.7 million dollars. Since the discontinuation of the matter against him, he successfully bid for between six to eight contracts including one from a foreign company which the Government of Jamaica assisted him in obtaining. It is also his evidence that if he is convicted he will forfeit his ability to obtain government contracts.

[239] The circumstances under which Mr. Chin was transformed from the accused to the Crown's 'star witness' has been challenged by the defence and is regarded as integral to the defence. The defence's mission is to discover whether any promise was made to Mr. Chin. Consequently, upon request by the defence for information regarding the circumstances which led to his changed status, the DPP responded by way of letter dated 8 January, 2009. She informed that she was approached by Mr. Small who informed her that Mr. Chin wished to give evidence for the prosecution. The nature of the evidence was outlined to her. She did due diligence with the police along with documents she had in her possession and decided that the interest of justice would be better served by accepting the offer.

[240] She did not disclose that she conducted an interview with Mr. Chin. The fact of the interview with the DPP was only revealed during the cross-examination of Mr. Chin by KD Knight QC. Under cross-examination by Patrick Atkinson QC, the revelation that the interview lasted thirty to forty-five minutes

was made.

[241] Strident language was indeed used by KD Knight QC and Patrick Atkinson QC, however, the reasons advanced in the statements cited by Lord Gifford were not the sole reasons. Both counsel proffered other reasons for requesting the subpoena. Credibility and motive are at the heart of the request. Initially, the request for disclosure was not couched in such acidic language. The DPP's resistance to disclosure and the passage of time unfortunately seemed to have evoked strong language. At page 33 'RMC1' in the early days of the trial, Mr. KD Knight objected on the grounds of non-disclosure, he said:

> *"We were told that there is nothing further to disclose. The authorities established that disclosure relates to anything said or written by the prosecuting witness. The only thing to disclose was that Mr. Small telephoned the DPP and made an offer which she accepted after doing due diligence."*

[242] At page 164, Patrick Atkinson said:

> *"In evidence it was revealed that Mr. Chin had half an hour to forty five minutes interview with the DPP and notes were taken."*

He continued:

> *"Simply because a written record was not made at the time, is relevant to the prosecution's duty to give us disclosure of the thirty to forty minutes interview. If it were so, then no one would write and give disclosure. We are entitled to know what that discussion was about from the officer of the Crown conducting it. If they did not write it they would still have to use their recollection of what transpired. At the outset we kept asking for all discussions between the prosecution and its agent and Mr. Chin and or his attorney."*

[243] At page 172 KD Knight said:

> "*The defence has challenged the circumstances under which Mr. Chin became a witness for the prosecution and so this is an integral part of the case for the defence…The phrase " we did due diligence " could not reasonably be understood by us to be an interview of forty-five minutes*

with Mr. Chin."

At page 174 he continued:

> *"The DPP said from the bar that Mr. Chin may have assumed that she was taking notes. This is a tacit denial that either herself or her agent took notes but it puts into focus Mr. Chin's credibility as he said she did and therefore to challenge his credibility which so far is at the foundation of this case, the learned Director is at the foundation of this case because; she would have to say Mr. Chin lied when he said I took notes or my agent did. This would shape or destroy if not obliterate the credibility of Mr. Chin that he lied in the face of the court. It is either he lied or someone else lied. Whatever the lie is the case for the accused; will be affected… is this pertinent to the case for the defence as has already submitted – it is a fundamental issue which is being pursued by the defence, as to the circumstances under which Mr. Chin gave evidence for the Crown. Here it is that an accused man is being interviewed by the prosecution and thereafter becomes a witness for the Crown. An accused man gives a statement that is not under caution. What is it that he knew that has not been disclosed and who it is that put him in that comfort zone… So this is not a trivial matter. This is no light request that has arisen simply out of Mr. Chin's evidence."*

[244] Mr. Atkinson at page 177 said:

> *"Bearing in mind the state of our law, it is trite law that where any reward is offered to witness to testify, that is fundamental to a trial in which his credibility is the basis of the whole of the prosecution's case. So, where are we, having regard to what Mr. Chin testified to in court and the state of the evidence so far, that the DPP interviewed him and took notes. That is the only information available. Notwithstanding her office, the DPP cannot stand at the Bar and testify or contradict Mr. Chin that no notes were taken. What is she going rely on to contradict the evidence and say there were no notes?"*

At page 81 he continued:

> *"So there are these vague statements which have to be taken in context with the DPP's assertion in response to the submission on the last court date that she was going to disclose any notes. Then there is Mr. Chin who said she was taking notes. We have a problem that can only be resolved if the DPP testifies… and now we must be left with what Chin says from the witness box. In fact, the Crown's response did not go far enough- they*

want me to seek disclosure from a witness whose very reliability is in question. The law is clear that disclosure must be given before the trial starts and however, if during the course things arise, the moment it comes to them it must be disclosed. What makes this so outrageous is that the prosecutor cannot say she was not asked. Everybody was present at the interview except this defence team. I don't know how anybody could think that this meeting was not to be reduced to writing and furnished to the defence within a reasonable time… memories have faded – what is needed is for the actual statement / responses / questions so that the court can decide whether what happened amounted to a promise.

[x]

[245] In letter to the DPP dated 9 January 2009, Mr. Atkinson said:

"Having regard to all the circumstances… and particularly the course you have stated that the Crown will take, it is clear that the issue of any bargain, inducement, or interest to serve on behalf of the proposed witness Rodney Chin, is going to be material and fundamental to his credibility. In accordance with the usual courtesies between counsel, I wish to suggest to you that your office should recuse itself…as both yourself…may become witnesses to this important issue. This of course, would obviate any necessity to move any motion in open court on this issue."

From the above statements, it is manifest that there was no intention to embarrass the DPP; the focus was on obtaining evidence. The purpose was to impeach Mr. Chin's credibility.

[246] On the 11 April 2011, at the continuation of Mr. Chin's cross-examination by Mr. Atkinson, Mr. Chin, when asked about the contents of the discussion, he remembered that he was asked his name but stated that he did not recall specific details. He testified that many things were discussed including how he met Mr. Spencer but could not recall much else. He then altered his original statement by stating that he did not know if the DPP was writing. He was also unhelpful as to

when he gave the statement to the police. His evidence is that it might have been before he spoke with the DPP or the day he spoke with her but, he was unsure as to when he signed it, nor could he recall the date.

At that point KD Knight QC made known his intention to call the DPP as a witness.

[247] Mr. Atkinson at page 317 said:

> "…*it seems it may be justified, particularly since there is some controversy as to what stage Mr. Chin was interviewed. If it was before he gave his statement to the police, then it certainly would be part of the investigation of the case and certainly could influence the content of the witness' subsequent statement to the police. If it was after and a written statement was in existence, there could be some argument that it was case preparation. In those circumstances I submit that Ms. Llewellyn is a clear witness on facts material to this case, particularly when we are left in a situation where the only specifics that the witness can give concerning the substance of the interview is that he was asked about his name and how he came to meet Mr. Spencer and bearing in mind that it was Ms. Llewellyn herself, according to this witness, who was asking the questions. In these circumstances I will support Mr. Knight in his application."*

At page 321 Mr. Atkinson said:

> *"To clear the record – Ms. Smith says in her statement she cannot recall with any specificity what happened. Mr. Bailey said I cannot recall. Mr. Berry said I cannot recall the exact questions and answers. With regard to Mr. Small although he has suggested at the relevant time, he was counsel for Mr. Chin and therefore can assert counsel/client privilege. So really, the defence is in a position that we have no alternative but to call Ms.*

Llewellyn. Mr. Chin cannot recall. If Mr. Knight had not indicated his intention to call the witness, I would. It is also Ms. Llewellyn who questioned the witness. So she is the best person."

At Page 324 Mr. Atkinson continued:

"At the time of subpoenaing Mr. Small we did not know of the meeting with Chin/Llewellyn. What we knew is that something happened that Chin… from accused to witness. We needed to know and we thought it material, what was it that caused that transition? We had asked for disclosure and felt we were being stonewalled but subsequent to that, we knew that a meeting took place. We know that notwithstanding several statements from Chin and the disclosure, this meeting was not disclosed to us, the Court of Appeal or Full Court. One thing no one can dispute is that what took place in the meeting is material to this to Chin's credibility, fundamental to fairness in trial. The interviewer is the only person from whom we do not have a statement. No one else can recall. We need to know what the questions were etc.etera so we can put it before the court for the finder of fact to decide if there was any inducement etcetera. The interviewer is the best witness."

At pages 329-331 Mr. Atkinson stated:

"The evidence is clear that Ms. Llewellyn interviewed Mr. Chin whilst he was an accused person in this very matter; there is some evidence that this interview took place before Chin wrote a statement, …, and it is beyond dispute that subsequent to that interview by Ms. Llewellyn, Mr. Chin who had been on $10,000,000.00 bail awaiting trial for nearly one year had the charges withdrawn by Ms. Llewellyn and he transitioned to being a witness instead of an accused person. By document, the DPP provided this court, sometime between when he was an accused and when he became a witness Chin was awarded in the region of

$300,000,000.00 worth of government contracts. It is without question that this interview was concealed from the defence for over a year either deliberately or otherwise but despite written requests for information of what transpired to cause Chin to change in that fashion and despite motions before this court and the Supreme Court and the Court of Appeal when the prosecutor took the position that there was nothing to disclose and despite the fact that Chin wrote four statements none of which mentioned this meeting and despite the fact that senior police officers who were at the meeting wrote statements and failed to state that they were at this meeting and despite the fact that Chin gave evidence over several days and had his evidence adduced by Ms. Llewellyn herself- no mention was made by Chin of the meeting and neither was adduced… and despite the fact that he was cross- examined…it was only when Chin was being cross- examined by Mr. Spencer's Attorney… that this interview was mentioned for the first time. Because of the lapse of time the witnesses present say that they cannot recall and can offer no assistance. It is clear that what transpired in this interview is material and relevant to this case. It is clear that Ms. Llewellyn has personal knowledge of what happened as she asked the questions… whether a person is a witness… It depends on whether they have material information of their own knowledge concerning the cause at issue and nothing so far that this court has heard in this case could indicate that anything is of more importance than Chin's credibility. It is not that we would wish Ms. Llewellyn to, it is what the justice of the case requires and fairness."

Mr. Atkinson further said at page 347:

"…*this meeting in Mr. Small's chamber's where Miss Llewellyn asked Chin questions. This took place last year more than a year after the commencement of the trial. The court properly made an order for disclosure of what happened. We got statements from Smith, Bailey, Berry and we heard submissions from Ms. Llewellyn. To date we cannot even*

find out exactly when the meeting took place. To this day we cannot find out if anybody took a note. Apart from Mr. Chin, nobody can tell us one question or answer that was asked. I challenge anybody to say the Court was in error when it said the substance of the interview was relevant. So why is it vexatious to ask questions of the person who asked. The statement from the prosecutor and Senior Superintendent is that they can't recall. So we must rush these accused through a trial and pretend it never occurred. To ask this witness to decide whether the accused turned witness was improperly motivated."

[248] According to Mr. Chin, he was willing to speak the truth even before he was charged. He was not given any undertaking or promise that the case against him would be dropped. His sole desire was to tell the truth (page 162). The defence, however, contends that he was induced and calls into question the award of government contracts valuing millions awarded to Mr. Chin subsequent to his transformation to Crown witness. The circumstances under which this transformation occurred must be vital to the defence.

DUTY TO DISCLOSE

[249] Mr. Chin falls into a special category of witnesses, that is, one with an interest to serve. Apart from protecting himself from prosecution, he stands, if convicted, to lose millions in contract from the government. The question of whether any inducement or promise was held out to Mr. Chin is fundamental to the defence. His motive for providing the DPP with the statement and interview which led to his transformation is material. Statements made which can assist the court in determining the witness' reliability or undermine his credibility are material and disclosable.

[250] The statement of the DPP in her letter to Patrick Atkinson QC that, "I indicated that I would make no promises but that it was a matter entirely for them to advise their client on what he wished to do" is certainly pertinent to the defence's desire to discover what motivated his transformation to 'star witness'

for the Crown. Indeed Patrick Atkinson QC in his submission to the RM said:

"…then there is this phrase, "I indicated that I would make no promises."

[251] It is patent that the defence regarded this statement as relevant and would wish to explore in cross-examination. It is of importance to Mr. Chin's credibility as it is his evidence that his sole motivation was to speak the truth. He never knew the charges had been dropped and there was no promise or undertaking. It is his further evidence that 'the issue of whether the charges would be dropped did not come up". Also the issue of whether he was required to testify did not arise. "… I did not tell her I was willing to testify she did not ask me". It is material to Mr. Chin's credibility to discover what 'promise' the DPP referred to and who raised the issue of 'promise.' In the circumstances, the DPP is under a duty to disclose statements made at the interview. In ensuring obedience to that duty, the subpoena was issued.

[252] Upon resumption of cross-examination, Mr. Chin stated that the DPP interviewed him to see if he was speaking the truth. It is Mr. Chin's testimony that after he gave the statement which resulted in his metamorphosis, he met with the DPP at his attorney's, (Mr. Small) office in the presence of his attorneys, Ms. Opal Smith, then Deputy DPP, now acting RM, Superintendent Fitz Bailey and Inspector Carl Berry. He was questioned by the DPP for between thirty to forty-five minutes. It is his evidence that he thought that Mr. Dale (one of his attorneys) and the DPP were taking notes because as he spoke he saw them writing.

[253] After the revelation that the DPP cross-examined him and he saw her writing as she did, Mr. Atkinson requested disclosure of the notes. The DPP stated that she had no such notes and that it was the witness' assumption that she was taking notes but there were no such notes. Her posture was that she could not disclose that which did not exist and argued that had notes existed, they would have been her private notes and a request for them would have bordered on being out of order.

[254] Applications made by the defence for disclosure were trenchantly resisted by the DPP. When ordered by the Senior Resident Magistrate to provide a

written account, the DPP asserted that she was unable to fully recall as a result of the passage of time (letter of 20 April 2010).

[255] In her submissions to the RM, she said:

> *"If there are no notes then I would have to depend on my recollection. I don't believe that I have to indicate that this matter is one of hundreds that my office deals with island wide in the course of my duties, who is ultimately responsible by section 94 for the prosecution of matters island-wide…The prosecution believes that by virtue of letter dated 20 April 2010, that the order has been complied with…In respect of notes taken by anyone under the prosecution's control it is trite law that the prosecution cannot disclose what it does not have. If the prosecution does not have these notes because they were not taken or have been discarded, we cannot produce what we do not have."*

[256] In her affidavit in support of her application for Judicial Review, the DPP criticized Mr. Atkinson's cross-examination of Mr. Chin by stating that he failed to ascertain the duration of time she was seen writing and "whether he was actually in a position to clearly see what was being written if anything at all." After the application for disclosure was made, she indicated to the Magistrate that she had made no notes. It is her evidence that she did not record the details of the interview but may have 'etched' reminders to herself "as to what areas she needed to cover next" and 'things' she needed to address in light of Mr. Chin's responses. It is her evidence that that is her usual mode of operation. It is also her evidence that she is unable to locate the paper on which she 'may have written.'

[257] Mr. Chin stated that as he spoke he saw her write. The DPP's criticism of Mr. Atkinson's failure to ascertain the duration of time he saw her write and whether he was actually in a position to see clearly what was written, if anything

at all, appears to be impugning Mr. Chin's reliability and/ or veracity. Her evidence that she 'may' have 'etched' reminders as to what areas she needed to address together with her inability to locate the paper on which she 'may' have written, is nebulous.

[258] In light of the uncertainty of her evidence together with her categorical denial to the court that she made notes of the interview, it is not unreasonable that the defence would desire to examine her in the face of Mr. Chin's clear evidence that as she questioned him he saw her write.

[259] *En passant*, it is worthy of note, in light of the DPP's statement that her office deals with hundreds of matters, the casual manner in which 'etching' 'might have been made' and the 'paper discarded' begs the question as to why the interview was treated so cursorily by her, especially since this is a matter of national interest involving a former minister of government as one of the defendants.

[260] The witness did testify that he thought that she and Mr. Dale took notes. There might be uncertainty as to whether notes were taken but his statement that they (Mr. Dale and the DPP) wrote was categorical in the face of her uncertain evidence as to whether she actually wrote. The Senior Magistrate could rightly have formed the view that because of Mr. Chin's peculiar status as a witness with an interest to serve, fairness required not only an official record of her answers but an opportunity to be examined by the defence.

[261] Further there is the issue of whether his statement was taken at the interview or whether it was given before. The DPP asserts in her letter to Patrick Atkinson QC, in which she purported to make disclosure of the interview between her and Mr. Chin that (see page 274):

> *"I was already au fait with the nature and content of Mr. Chin's statement from my dialogue with the lawyers and the police and in order to assess his credibility I proceeded to have him again outline what was the truth he wished to tell. As he spoke I asked him questions relating to the content of*

his statement contents."

In her letter dated 7 October 2010, she stated that she had not seen Mr. Chin's statement prior to the meeting. She later stated that no statement had been collected when she spoke to him. It is also her statement that she spoke to him after he had given his statement.

[262] Mr. Chin's memory became faint as to when his statement was given. He said:

> *"Basically, I might have given a statement to the police before I spoke with Miss Llewellyn but as to when I signed it. The statement might have been the same day I spoke to Miss Llewellyn. I met with the police more than once at Mr. Small's office."*

He was unable to recall the date of the interview with Miss Llewellyn. He further testified that he gave the statement at Mr. Small's office. He said:

> *I mightn't be clear on it but I think it was before I spoke with Miss Llewellyn."*

[263] At that juncture the defence felt it necessary to have Miss Llewellyn testify. Clearly, the evidence regarding the circumstances under which the statement was taken and when it was taken is material. The statements which emanated from Mr. Chin and Miss Llewellyn are material. Having heard all that was said, including the submissions, the learned Resident Magistrate agreed with the defence that it was necessary to hear the DPP.

[264] In the DPP's written submissions against the Senior Resident Magistrate's order for disclosure, she maintained that she categorically stated that she took no notes of the interview with Mr. Chin. She stated that he saw her writing but he cannot say what exactly she wrote and whether what she wrote was relative to the case.

[265] The head note of the case of **R v Baines and Anor** [1908]-10] All ER Rep 328 states the law:

> *"The court has jurisdiction to set aside a subpoena where it is satisfied that the process of the court is being used for improper purposes. A*

subpoena will be set aside if the witness cannot give any relevant evidence and the process was issued, not to obtain relevant evidence, but for some improper purpose.

Per Walton J "This case, however, must not be taken as a precedent for establishing a rule that persons summoned on subpoena can, by simply swearing that they can give no relevant evidence, get the subpoena set aside.`

Per Walton J "Our decision will in no way interfere with the power of the judge at the assizes to make an order for the applicants to attend if anything arises at the trial to lead him to think that their attendance is necessary…"

[266] The circumstances of the instant case are distinguishable from that of **R v Baines and Anor.** In **Baines** the Prime Minister and the Home Secretary were at a meeting and were seated approximately sixty feet from two doors which were closed. The doors measured about four to five feet wide. Each door had two glass panels, which measured approximately one foot in width. There was, on the prosecution's case, evidence that hundreds of people rushed from the street to the front door. The defendants were charged for causing riot and breach of the peace during a meeting. The applicants (Prime Minister and the Home Secretary) were summoned to testify as to what they saw and heard. The men informed the defendants' solicitors that they were unable to see anything that happened in the street from the platform on which they sat. Subpoenas were issued for the men. The court found that the motive behind the issuance of the subpoenas was improper. Bingham J. opined that the men could neither have seen nor heard anything which would have been relevant to any issue at the trial.

[267] Similarly in **Senior v Holdsworth** [1975] 2 All ER 1009, the plaintiff instituted proceedings against the Chief Constable in which he claimed he was assaulted by a Police Constable. One of the plaintiffs issued a summons to a television station requiring the production at the trial of all films and videos which

were taken when the festival broke up, and the equipment to show the video. The producer had no knowledge of the festival and was not authorized to show the film. As a result the summons was set aside but another summons was issued for the production of all film negatives of the 1974 Festival. The television station showed the films which were transmitted on television but appealed against the order to show all the films. The English Court of Appeal held that the court had a discretion to set aside the summons on the ground that 'what was sought was irrelevant, oppressive or an abuse of the process of the court.'

[268] In the aforementioned cases, the requests to subpoena the witnesses were entirely baseless. However in the instant case, sufficient basis has been established for requiring the DPP's testimony. There is ample evidence which could have led the RM to her decision to accede to the request of the defence to summon the DPP. What transpired to cause Mr. Chin's metamorphosis from 'accused' to 'star witness' is of utmost importance. There is a difference in the accounts given by Mr. Chin and the DPP in an important area, that is, whether notes were taken of the interview.
Of relevance is her categorical denial that she took notes, her initial position that any note taken by her would have been private and her evidence that she "may have etched reminders to herself as to what areas she needed to cover".

[269] The DPP's statement that she 'would make no promise' juxtaposed to Mr. Chin's evidence that there was no mention or discussion to drop the charges or whether he would testify for the prosecution is relevant. The uncertainty as to when the DPP obtained his statement together with the delay between the interview with Mr. Chin and the DPP's decision to call him as a witness are relevant matters which led the Resident Magistrate to her decision. There is therefore sufficient basis to require her testimony.

[270] The common law duty of fair disclosure by the Crown as enunciated in the English Court of Appeal case of **R v Ward** 1993 1 WLR 619 is applicable to the instant case. With the advent of **Ward**, the prosecution is under a 'stricter

regime' regarding disclosure. At page 642 of **Ward**, the court enunciated:

> "*…that nondisclosure is a potent source of injustice and even with the benefit of hindsight; it will often be difficult to say whether or not a disclosed item of evidence might have shifted the balance or opened up a new line of defence*."

At page 449 the court continued:

"The decision to disclose or not to disclose the statement or other material to the defence was and remains a matter for the solicitor or counsel. In cases conducted by the DPP a report, documents and statements would be referred to his office without being edited by the force solicitors. Again, it was force policy to disclose to the Director all statements and other material taken during the course of the investigation."

[271] In **R v Rasheed** 1994 Times Law Reports 288 Lord Steyn, said:

"*In their Lordship's judgment the duty to disclose extended to any material casting doubt upon the reliability of a witness in the proceedings. The classic examples of material tending to undermine the credibility of a witness were other statements… of the witness…The duty to disclose it was a continuing one and failure to disclose it was, therefore, an irregularity in the trial…On the issue of the materiality of the irregularity, the positive duty to give fair disclosure was not contingent upon a request for disclosure and it did not neutralize the irregularity to say that the information could have been obtained in other ways."*

THE SUMMONING OF THE DPP

[272] The Resident Magistrate is the final arbiter hence it is for her to determine credibility. It is the DPP's statement that the Senior Resident Magistrate referred to her as being disingenuous. The Magistrate has conduct of the matter. Various letters were exchanged and statements would have been made in her presence which she would have considered relevant to her deliberations which are of no value if not captured on oath.

[273] In the DPP's submissions against an order for disclosure she made the following statements at pages 265-268 of the bundle:

> *"If DPP had taken notes, (which she did not) then those notes would be her private notations and matters affecting her brief in deciding how to exercise her constitutional discretion pursuant to section 94(6) of the Constitution of Jamaica."*

At page 268 she said:

> "*The contents of the interview formed part of the preparation of the DPP for trial as also due diligence in her decision making process.* "

[274] The question can be asked, if the contents of the interview formed part of her preparation for trial and the trial is still in progress, would not 'the contents' of the interview be still relevant; so why discard those notes or etchings when the risk of faded memory is real?

[275] The purpose of cross-examination is to ferret out the truth. It is the Resident Magistrate who has had the advantage of seeing and hearing the DPP's various submissions. She has the responsibility of 'monitoring and assessing' the importance of her evidence at a juncture where "new issues were emerging,' (for example, the discovery of lucrative contracts with the government). Examination of the DPP might possibly seriously undermine the credibility of Mr. Chin. At this stage, the case 'is still open to take a number of different directions or emphases' (See **Michael George Davis and Ors, R v** [2000] EWCA Crim 109 (17 July 2000)).

[276] Although language was later resorted to by the defence, which was more strident than used in earlier and other later statements, it is no indication that the motive for summoning the DPP is 'intended or calculated only to vilify, insult or annoy' the DPP, on the face of it. Rather, it is to ensure that the defendants

receive a fair trial.

[277] It is of importance that Mr. Chin was an accused man when she interviewed him. Mr. Chin's evidence is that when he gave the statement he never knew that the case against him would have to be withdrawn. In the DPP's submissions against disclosure, the learned Resident Magistrate stated (page 265 of transcript):

> *"She was at the time making an assessment of Mr. Chin in light of his statement to the police. This was with a view to making a determination as to whether a nolle prosequi should be entered to discontinue proceedings against him or whether she should proceed against him as an accused."*

[278] It is plain that when Mr. Chin was "cross-examined" by the DPP, he was not the Crown's witness, he was an accused man. According to the DPP, she had not yet even formed the intent to use him as a witness. The determination would have been made after the interview.

[279] At that point, if she had a statement, its contents were not sufficient, she needed more to convince her. The defence has a right to know, especially in light of his special status, what 'the more' was and how it was achieved. In light of the resistance by the DPP to disclosure, perhaps ignorantly of the view that the notes were personal, what was said at the interview is relevant. The, Magistrate has formed the view that it has become necessary to examine her. It is for the Senior Resident Magistrate to assess the evidence and determine the credibility of the parties.

[280] In the DPP's written submission to the Senior Resident Magistrate resisting disclosure of the contents of the interview on the ground of privilege, she cites conduct which may affect credibility and whether the witness has been granted immunity from prosecution to give evidence, as matters to which disclosure extends. Mr. Chin has been granted immunity from prosecution and matters of credibility have arisen.

[281] The DPP has, by 'cross-examining' an accused, descended into the investigatory arena. She has removed the separation between prosecutor and investigator. If the DPP were an inspector of police who had 'cross-examined' an accused (whilst he was still an accused) who gave a "transforming statement', the request by the defence to examine the inspector would not be considered irrelevant but would be viewed as necessary in the quest to ferret out the truth especially where there are variances between statements made by the officer and this 'peculiar witness'. It is unlikely that there would be any contention that the officer's evidence would be relevant. The DPP's, role in the obtaining of further evidence from Mr. Chin is material. The defence is still in the dark as to when, in relation to her 'cross-examination' of Mr. Chin, the statement was actually taken.

[282] There can be no tenable challenge to the fact that the DPP is obliged to disclose not only her interview with Mr. Chin but the contents of the interview. She was also under a duty to make a written note of the interview. At page 643 of **Ward** the court said**:**

> **"***In terms of quantity the most substantial failures were those of the West Yorkshire Police and The Director of Public Prosecution to give information about (1) witnesses from whom statements had been taken but who were not called to give evidence and (2) police interviews of the appellants." (*Emphasis added)

[283] In light of the clear statement in **Ward,** the Crown is obliged to provide the defence with all information regarding the interview. It is entirely the prerogative of the Resident Magistrate to assess each witness and determine where the truth lies. It is settled law that defendants are entitled to disclosure and the effect of failure to disclose has been recognised by the Privy Council. Indeed in **Milton (Audley) v R,** a Privy Council decision from Jamaica, the prosecution failed to

disclose a statement from a witness Gayle, which was at variance with his evidence. The Board noted that although the defence did not challenge evidence given by witnesses Anderson and Gayle, if the statement had been disclosed the defence might have run differently. The desire to examine the DPP in order to have disclosed the contents of the interview by the DPP with Mr. Chin is not a mere fishing expedition, it is fundamental to the defendants' right to a fair trial.

[284] Regarding the issue of materiality, in **R v Keane** 1994 WLR 746, 752, Lord Taylor of Gosforth CJ who gave the judgment of the court said:

> *"As to what documents are "material" we would adopt the test suggested by Jowit J in **Reg. v Melvin** (unreported), 20 December **1993**. The judge said*:
> "*I judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."*
>
> *"As was pointed out later in that judgment, it is open to the defence to indicate to the prosecution, a defence or an issue they propose to raise as to which material in the possession of the prosecution may be of assistance, and if that is done the prosecution may need to reconsider what should be disclosed."*

[285] The defence indicated by way of several letters and submissions the areas in which they required disclosure. Incrementally some information was provided. The manner in which the information was provided together with the actual information,(for example, the DPP told them, 'she could make no promise') and the conflict in the evidence raise issues pertinent to the case. Her answers can "provide a lead on evidence" which goes to Mr. Chin's credibility and his motive.

[286] The long process of eking out information (indeed in excess of three years) from the DPP, which she has a duty to disclose, has delayed the trial and dulled the memories of the other persons who were present. Examination of the DPP, who herself conducted the interview, should serve to speed up the trial.

FAILURE TO GIVE REASONS

[287] It is Lord Gifford's submission that the decision of the learned Resident Magistrate is flawed because she has given no reasons for it. She has failed to state on what issues she considered the evidence of the DPP could be relevant. Nor did she make any determination as to the motive of the defence in issuing the subpoena.

[288] Notwithstanding the RM's failure to provide lengthy reasons for her refusal to set aside the subpoena, the court is not bereft of her reasons. Her reasons are quite evident from her various rulings, including her ruling on the application for a permanent stay of the proceedings as a result of the DPP's failure/refusal to disclose, and statements made by her during the trial which are contained in the transcript. They clearly demonstrate that issues of credibility *inter alia* were considerations.

[289] On the April 16 2010, the learned Senior Resident Magistrate in her written ruling which was entitled 'Ruling re. Disclosure of notes of or substance of interviews conducted by the Director of Public Prosecutions with Rodney Chin', stated:

> ***"****The defence posits that they have taken issue with the credibility of Mr. Chin and with the process whereby he stopped being an accused person and became the 'star' Crown witness. They emphasize that this interview was conducted while he was still an accused person for whom a trial date had been set (before the nolle prosequi was entered in his favour), and*

have made bold that this action by the DPP is tantamount to prosecutorial misconduct. They argue that if disclosure is not made by her, information that can be used to challenge Mr. Chin's credibility will be lost to the defence. Mr. Atkinson, … went further to suggest that the charges ought to be dismissed against his client if disclosure is not possible, as he would not be allowed material to properly meet the case against him and the fairness of the proceedings would be impugned.

[290] *In open court, the DPP indicated that she did not make any notes during the interview and what the witness said is that, "I think she was making notes." She further stated that the defence ought to have gone further to enquire of the witness whether he read what she was writing. She further said that any note she made are her personal/private notes."*

[291] *Whatever the exercise may have been the learned Director could only have acted as she did in her capacity as Director of Public Prosecutions and a Minister of Justice and ultimately an officer of the Court in contemplation of a trial. The upshot of all this is, - how is Mr. Chin's evidence to be tested? Is it enough for the Director to rise and deny making any notes against evidence given from the witness box? The defence opines that this cannot be done and the contradiction of Mr. Chin must be by evidence. If this is correct, then what would be the source of the information* used *to challenge Mr. Chin? The DPP has submitted that she made no notes and outlined the purpose of the interview. To quote from her written submissions:'*

> ***"****The contents of this interview formed part of the communication between the police and the DPP in terms of the preparation of the Director for trial as also due diligence in her decision- making process… this interview could also be seen in the context of the police also presenting a source of information and Mr. Chin's statement which could have a bearing on the path the prosecution could take."*

[292] *The DPP went on to say such an occasion is immune from disclosure as*:

"It is clear that professional privilege or public interest immunity would apply to the notes if they existed or the content of any interview between the DPP and Mr. Chin."

The Learned Resident Magistrate continued:

She did not go on to explain in what regard 'due diligence' was being conducted or what decision was to be made. Prima facie there is nothing unprofessional in an accused person meeting with the Prosecutor in the presence of his attorneys. However, this meeting seemed multi-purposed as it concerned information gathering (the police representing a source of information), as well as being connected to an exercise in 'due diligence in her decision-making.' The Director agrees with Mr. Chin that nothing was discussed regarding Mr. Chin giving evidence or the case being discontinued against him. It begs the question then what information was gathered in the interview? The decision to proceed or not to proceed against an accused person is constitutionally the province of the DPP and review of that decision can only be done in prescribed circumstances for example, for improper motive or wrong interpretation of the law and the like. This court is incompetent to entertain such application for want of jurisdiction. The application before this court is for disclosure of what transpired at the interview with Mr. Chin. If information was gathered it is it to be disclosed? Public interest immunity is a factor in determining that.

Is the public interest in the detection of crime and the prosecution of offenders according to law being vitiated by compliance with this application?

What transpired at the interview is in evidence minus the details. Mr. Chin said he was subjected to what can only be described as cross-examination on this statement. The purpose for proceeding in this matter was explained by the DPP in her submission. If all that transpired was questioning the witness on his disclosed statement as in 'terms of the preparation of the Director for trial as also due diligence in her decision-making process …' what public

policy interest is being impugned that warrants immunity? Questions asked and answers given by Mr. Chin on his statement may be relevant to the issues in this case whether for the defence or the prosecution. Nothing else was discussed. If the interview concerned the decision to proceed or not to proceed against Mr. Chin, production of what transpired would offend public interest by potentially hampering the DPP in the future by potentially creating a precedent for disclosure of her action in the exercise of her constitutional function. The insistence that it was an information gathering exercise on the witness' statement is a completely different matter. The information was gathered in preparation of the case by questioning the witness on his statement. Whatever information he gave is discoverable as information in the possession of the prosecutor relevant to these proceedings. Mr. Knight in his submission adverted to correspondence ...upon reading the first paragraph of the letter of 7th January, it is clear that what was there being asked for concerned the exercise by the DPP of her constitutional function and is therefore somewhat different from the application before the court at this time and as adverted to, is outside the jurisdiction of this court. It is trite law that information in the possession of the prosecutor which advances the prosecution's case and can assist the defence must be disclosed on the principle of fairness of a trial, the principle of natural justice and the fact that the accused should know the case he is to meet. The authorities from other jurisdiction which are persuasive suggest that if no note or memorandum in writing was created, then a written account should be presented. In light of the decision that the substance of the interview or the notes taken must be disclosed, it is not necessary to deal with the question raised by Mr. Atkinson regarding dismissing this matter at this juncture on the basis of unfairness."

[293] The DPP maintained that she made no notes of the interview. The defence renewed their application.

On the 9 November 2010, in her ruling on the application for permanent stay of proceedings the Resident Magistrate stated *inter alia*:

"…after much manoeuvres, disclosure was finally made which was affected by lapse of memory with the passage of time by all the persons who attended the meeting as well as the introduction of the fact that at the time the interview was conducted Mr. Chin's statement had not yet been taken. Applications in similar terms had been made in this matter before the commencement of the trial and repeated several times during the trial, culminating in the application in April 20, 2010 and based on material revealed by Mr. Chin in evidence. The complaint is that their cross-examination had been predicated on the material disclosed to them and the assertion that there was nothing else to disclose as well as their instructions.

Loss of information from passage of time, contradicting of witness from the bar and submissions, correction/recollection of the existence or non-existence of witness statement of Mr. Chin at the time of her interview, repeated assertions that everything had been disclosed surrounding Chin becoming a Crown witness - all of these factors surround and impact any assessment of Chin's evidence in the overall assessment of the case.

The manner in which this situation arose is the kernel of the defence's application. Denial of the existence of information that could advance

Chin's credibility or harm it, inability to recall by everybody present at the meeting except Chin resulting in loss of information and impossibility of having this information presented to the jury's mind cannot escape attention.

However, does it render the trial unfair and its continuation an abuse of the process of the court? The submission by the defence in this application is very compelling. The situation in the case has been described as having 'insurmountable obstacle' for the case for the prosecution. These obstacles, if they exist, will continue to be arguable throughout this trial. The discretion must be exercised responsibly and judicially. It is arguable that if the insurmountable obstacles cannot wither away, it is pointless to continue the matter. The prosecution has submitted that all difficulties in a trial can be cured by 'trial process' and therefore the trial should continue. The early

stage of the proceedings, (although there is authority to stay permanently proceedings even before trial in a proper case), beckons as it is the credibility of one, albeit an important, witness whose credibility on an issue, which though important to his evidence, is not cemented in the facts in issue. In addition, considerations of the interest of justice propel the court to consider that the totality of the Crown's case could be examined to see crystal clear if the trial of these two accused persons has been affected by unfair practices by anyone."

[294] Although at that juncture the Senior Resident Magistrate did not accede to the defence's application to permanently stay the proceedings, she said:

"*I believe the unusual state of affairs in this trial could be difficult to alter and the defence could renew its application at other stages of this matter so whilst no subpoena has been served on her we are following in the tradition where a lawyer who is to be called as a witness is not usually subpoenaed unless he is the subject matter of the charge. This is not so here. Here she is on the subject matter of a complaint and so properly she ought to be out of hearing. At least certainly while Mr. Chin is giving evidence."*

The learned Senior Resident Magistrate acceded to the request of the defence and invited the DPP to remain out of court. She said:

"In the peculiar circumstances of this matter and to safeguard the integrity of the proceedings, any potential evidence and the fairness of the trial Miss Llewellyn is to keep out of hearing for the remainder of Mr. Chin's evidence"

The application was indeed renewed in another form: to have the DPP testify.

[295] Miss Llewellyn resisted the ruling of the learned Senior Resident Magistrate. She said among other things:

"…if there is any sincerity to call me as a witness, then my friend should

serve me with a subpoena. I would be taking it elsewhere to have it set aside…"

Copious submissions were made by KD Knight QC, Patrick Atkinson QC, Mrs. Hay (Senior Deputy Director of Public Prosecution) and the DPP herself.

Having heard those submissions the learned Senior Resident Magistrate said:

"Having listened to the arguments and examined the authorities cited and having regard to the peculiar circumstances of this matter, it is the court's ruling that the subpoena will not be set aside and the usual behaviour adopted by subpoenaed witnesses be adopted by Miss Llewellyn".

[296] Although her ruling was brief, she had regard to the submissions of Counsel before her and has clearly accepted the submissions of the defence. The contention that the court is without the Learned Senior Resident Magistrate's reasons, cannot be sustained. The Resident Magistrate has outlined in her earlier rulings the need for disclosure and the attendant concerns consequent on the non-disclosure of certain information and has now deemed it necessary to have the DPP testify.

THE DPP'S ABSENCE FROM THE COURT

[297] Lord Gifford submits that a subsidiary motive for the subpoena is to embarrass and weaken the prosecution by removing the DPP from the role of lead prosecutor for a large part of the trial. According to Lord Gifford, if the subpoena and related order were to stand, the fairness of the trial (since fairness is required towards the prosecution as well as the defence) would be undermined. The DPP would be forced to relinquish the role which she ought to play. He argues that no compelling reason to force the DPP to testify has been advanced.

RULING

[298] The Senior Resident Magistrate is presiding over the matter and therefore has had the advantage of not only hearing Mr. Chin, but listening to the various arguments and has determined that the DPP's evidence is necessary. This is a criminal trial, which concerns the liberty of the defendants. Where there is a possibility of miscarriage of justice as a result of non–disclosure, the interest of justice demand that any 'inconvenience' that might result to the DPP having to testify should not outweigh the interests of the accused. Her evidence is necessary to ensure that there is no miscarriage of justice. The matter has unnecessarily spanned a number of years as a result of her reluctance to disclose relevant evidence. Moreover, Mrs. Hay is a Senior Deputy DPP and she has been actively participating in the matter if not from the inception, for quite some time. Surely as a Deputy DPP she is capable of carrying on the matter for the relatively brief period of the DPP's absence.

EFFECT OF SECTION 94(6) OF THE CONSTITUTION OF JAMAICA

[299] Section 94(3) (a) of the Constitution of Jamaica confers upon the DPP the power:

> *"In any case where he considers it desirable so to do to institute and undertake criminal proceedings against any person in respect of any offence against the law of Jamaica*."

Section 94 (6) provides:

> "*In the exercise of the powers conferred upon him by*" *this section the DPP shall not be subject to the direction or control of any other person or authority*.

[300] The Privy Council in the matter of **Attorney General of Fiji v Director of Public Prosecutions** [1983] 2 AC 672, 679 which was followed in **Jeewan Mohit v The DPP of Mauritius,** a decision delivered the 25 April 2006, construed language used in the Constitutions of those countries which were

identical in both countries to ours, as amounting to a “Constitutional guarantee of independence from the direction or control of any other person.”

[301] Lord Gifford contends that the independence of the DPP, which the Constitution guarantees, would be subverted if the exercise of her powers could be subject to cross-examination or judicial determination. He submits that she may not be asked how and why she came to exercise her power of discontinuing Mr. Chin’s prosecution. To ask the DPP how and why Mr. Chin turned from being accused to Crown witness cannot be separated from the obviously impermissible question of how and why she came to exercise her power of discontinuing Mr. Chin’s prosecution. The DPP should not be liable to answer questions about the circumstances which led to the exercise of her power. He urges the court not to allow the DPP to be questioned about the circumstances which led to the exercise of her power to discontinue proceedings against Mr. Chin.

[302] It is true that the DPP is not ‘an ‘ordinary’ witness. Indeed she rightly enjoys the protection of Section 96(4) of the Constitution. However, by assuming the role of investigator, she has eroded the division between prosecutor and investigator. By so doing, she has opened herself to be examined as an investigator. Whereas it might be inappropriate for her to be questioned as to why she exercised her power to discontinue the prosecution against Mr. Chin, she certainly can be questioned about the questions she asked him, his responses and whatever else that might be relevant in the context of the issues presented before the magistrate.

[303] The Privy Council in **Jeewan Mohit v The DPP of Mauritius** Privy Council Appeal No 31 of 2005 recognized that the Mauritian, Barbadian and Guyanese provisions were similar to ours, Lord Bingham of Cornhill, who delivered the judgment of the court enunciated at page 6 of the decision:

> *“Finally, reference should be made to the saving for the jurisdiction of the*

courts contained in section 119 of the Constitution, which has reference to section 72(6) already quoted:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any function under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

"Provisions to the same or very similar effect as those quoted were included in a number of constitutions of the Commonwealth states. They have been the subject of judicial consideration in Guyana … Barbados, Jamaica and Fiji … as well as Mauritius. While the reasoning in these judgments varies, in none (save in Mauritius) has the DPP's statutory power to discontinue proceedings been held to be immune from judicial review …

In ***Lagesse****, above the plaintiff claimed the damages against the DPP for malicious prosecution and the question arose whether a plaintiff could, through an action in tort or otherwise, in effect ask* a *court to determine whether the DPP had acted in breach of the Constitution or any other law. Addressing this issue, the court said: with reference to section 119 of the Constitution quoted above at p 200:*

'Section 119 is not a substantive provision of the Constitution which confers, or rather creates, jurisdiction upon or for the courts. It is, in our judgment a clause inserted ex abundanti cautela to spell out that the various provisions of the Constitution which protect various public officers and authorities from other kinds of interference should not be taken to mean that the courts are thereby precluded from exercising such jurisdiction as is or may be conferred on them by the constitution or any other law.'

[304] "W*ith this observation the Board respectfully and wholly agrees, and it was accepted by the parties."*

[305] Lord Gifford's submission that the DPP cannot be subject to cross-examination or judicial determination is in the circumstances unsustainable. Section 94 (6) of the Constitution is not a cloak which shields the DPP's actions and decisions from the scrutiny of the court. The section rightly protects her 'from other kinds of interference'. However, the court has the ultimate responsibility of protecting the Constitutional rights of persons and of ensuring that the laws of the land are observed by all, including the DPP.

[306] Lord Gifford's fear that improper questions might be put to the DPP should be allayed as the Resident Magistrate has the responsibility of ensuring that impermissible questions are not asked. However, it would be fundamentally unfair to disallow a relevant question which arises because of the DPP's obliteration of the division between the roles as the dilemma would have been of her creation.

[307] The Magistrate is the ultimate judge of where the balance of public interest lies, not the DPP. The law on the issue as enunciated in **Ward** is settled. Indeed it has been followed in **Dowsett v The United Kingdom** [2003] ECHR 314 (24 June 2003) **(citation)**. By virtue of the Constitution of Jamaica and of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2001, the defendants are entitled to a fair trial. Section 16(5) (d) of the Charter entitles the defendants to the right "to examine or have examined witnesses against him." The European Court of Human Rights (Second Section), in the **Case of Dowsett v The United Kingdom** (Application no. 39482/98) delivered on the 24 September 1998. The court stated:

"*In conclusion therefore, the court reiterates the importance that material relevant to the defence be placed before the trial judge for ruling on the questions of disclosure at the time when it can serve most effectively to protect the rights of*

the defence."

[308] In **Hallett** [1986] Crim. LR, 462 Lord Lane CJ, in delivering the judgment of the court said:

> *"…if the judge does come to the conclusion that the lack of information as to the identity of the informer is going to cause a miscarriage of justice, then he is under a duty to admit the evidence. We would respectfully agree with that view."*

The aforesaid statement was cited with approval by the English Court of Appeal in **Peter Clowes, Guy von Cremer, Peter John Naylor and Christopher Newman (**1992) 95 Cr. App. R 440.

[309] Lord Taylor of Gosforth CJ in **R v Keane** 1994 1 (WLR) 746 stated that carrying out the balancing exercise to determine whether disclosure ought to be made, where the prosecution rely on public interest immunity or sensitivity the preservation of the public interest:

> *"If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it. If the prosecution is unwilling to disclose in those circumstances then the only option is to discontinue."*

The head notes of **Ward** at 620 reads:

> "*If in a criminal case the prosecution wish to claim public interest immunity for documents helpful to the defence, the prosecution are in law obliged to give notice to the defence of the asserted right to withhold the document so that... if necessary, the court can be asked to rule on the legitimacy of the prosecution's claim. If the prosecution, in an exceptional case, are not prepared to have the issue determined by a court, the prosecution must be abandoned."*

[310] If the DPP is disinclined to disclose relevant information, (particularly that

which has come about as a result of her 'cross-examination' of the witness), she might have no choice but to abandon the prosecution. Such is the pronouncement of the courts in **Ward** and **Keane.**

In the instant case, of importance, is that Mr. Chin is a special category witness.

At page 645 of **Ward** the court continued:

> *"It should be borne in mind, however, that an inflexible approach in these circumstances can work an injustice. For example the witness's memory may have faded when the defence eventually seeks to interview him or he may refuse to make any further statement. The better practice is to allow the defence to see such statements unless there is good reasons for not doing so … We would adopt the words of Lawton LJ in* ***Reg v Hennessey*** *(Timothy) (1978) 68 Cr. App. R 419, 426, where he said that the courts must:*
>
> *"Keep in mind that those who prepare and conduct prosecution owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reasons to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution."*
>
> ***"****That statement reflects the position in 1974, no less than today. We would emphasize that "all relevant evidence of help to the accused," is not limited to evidence which will obviously advance the accused case. It is of help to the accused to have all the opportunity of considering all the material evidence which the prosecution has gathered, and from which the prosecution have made their own selection of evidence to be led."*

[311] The DPP not only failed to disclose the fact of the interview. She also never saw it fit to make a record. Further, other witnesses were present at the

interview. With the passage of time, her memory and the memories of the other persons present have faded**.** It is possible that examination may jolt her memory.

[312] Prompt disclosure should have been made to the defendants of the fact of the interview. Leading questions and cross-examination are not permissible. Although the Pre-Trial rules in Jamaica are not codified as the English rules, these are standard rules of ethics.

[313] In recognition of the danger of serious miscarriage of justice resulting as a consequence of failure to disclose, the development of the law in this area in England ensures that interviews are disclosed to the defence as a matter of course. 'The Pre-Trial Review: Legal Guidance for Prosecutors on conducting interviews' requires that a note of the interview and that the tapes be made for disclosure purposes. Annex B of 'The Pre-Trial Witness Interviews – Guidance' requires that all interviews be taped and in appropriate cases, video recorded. The interviewer is required to confirm that the evidence was not discussed with the witness prior to the recording of the interview.

[314] Our criminal justice system is not yet so advanced. However, the principles enunciated in **Ward** impose the duty on the prosecution to provide the defence with the opportunity to be able to consider all 'material evidence' which they have gathered. The DPP's interview with Mr. Chin is material. His answers to her questions that led her to change his status are relevant. Moreover the passage of the Criminal Justice (Plea Negotiations and Agreements) Act 2005 indicates that we are creeping towards the English direction.

[315] The Criminal Justice (Plea Negotiations and Agreements) Act, 2005 is helpful in terms of the prevailing ethos regarding disclosure. Section 11.-(1) of the Act states:

> The Judge or Resident Magistrate shall, before accepting a plea agreement make a determination in open court, that-
>
> (a) No improper inducement was offered to encourage him to enter into

the plea agreement;

(b) Acceptance of the plea agreement would not be contrary to the interests of justice.

[316] Although both Mr. Chin and the DPP have removed the interview from the realm of a plea bargain, (Mr. Chin's testimony is that his only desire was to speak the truth), the fact is that after the interview, charges were discontinued against him and *nolle prosequi* entered in respect of two. The process then could be a '*de facto*' plea bargain or a plea bargain without the 'bargain'.

[317] Although technically, the interview might not have been a plea bargain, the result is the same. An interview with Mr. Chin, who falls in the category of 'witnesses with interests to serve', makes it even more important that the contents of the interview should be revealed to the defence and to the court. The demand by the defence for disclosure of what transpired at the interview is an entitlement. The Resident Magistrate is charged with the responsibility of ensuring that the accused persons receive a fair trial. In light of the various arguments and statements made to her in court, her decision to have the DPP testify is within the pursuit of justice.

[318] In light of the foregoing, regrettably, I have to differ from my brothers and dismiss the application.