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IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0045 OF 1998S
(High Court Judicial Review No. 0043 of 1997)

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

AND:

LIVAI LILA MATATULU
NAVITALAI EDURA RASOLOSOLO

Respondents

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Sir Ian Barker, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: **Wednesday, 3 February 1999, Suva**

Counsel: **Ms N. Shameem, Director of Public Prosecutions,**
Appellant in Person with her Mr Kini Keteca of Counsel
Mr I. Fa for the Respondent

Date of Judgment: **Friday, 12 February 1999**

JUDGMENT OF THE COURT

The Director of Public Prosecutions (DPP) appeals against a judgment of Fatiaki J. delivered in the High Court on 16th July 1998. The learned Judge gave leave to the respondents to issue judicial review proceedings against the DPP in respect of a ***nolle prosequi*** which she had filed in respect of private prosecutions for perjury brought by the respondents against three individuals. On 4th August 1998, the Judge gave leave to the DPP to appeal to this Court against his judgment.

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Background

On 30th November 1994, the Ministry for Fijian Affairs endorsed the advice of the Roko Tui Ba that Ratu Napolioni Dawai (one of those charged with perjury) be installed as the Tui Nadi. Ratu Isireli Rokomatu, a claimant to the title of Tui Nadi, then applied to the High Court at Lautoka for leave to issue judicial review proceedings in respect of this decision. The High Court, on 4th December 1995, refused leave to apply for judicial review.

An appeal from the High Court's judgment to this Court was allowed by consent. This Court ordered (Civil Appeal No. ABU0007/96S) on 6th February 1997:

"(i) that no valid decision had been made in law as to the holder of the title of the Turaga Tui Nadi;

(ii) that the decision to endorse the advice of the Roko Tui Ba was not a decision under the Native Lands Act Cap 133;

(iii) that the Permanent Secretary for Fijian Affairs take immediate steps to conduct an inquiry as to the rightful holder of the title of Turaga Tui Nadi under section 17 of the Native Lands Act Cap 133;

(iv) That nofurther money to be paid by the Native Land Trust Board to Napolioni Dawai."

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On 22nd April 1997, Navitalai Rasolosolo and Livai Matalulu (the Respondents in this appeal) filed a complaint in the Suva Magistrates' Court that affidavits sworn by Napolioni Dawai on 17th March 1995 and filed in the Judicial Review Proceedings in the High Court at Lautoka contained false statements. By 20th August 1997, those charges had been replaced with eight counts of perjury. Charges of perjury had been laid against Namia Vunimakadre Vainitoka and Tevita Maqu also in respect of affidavits made by them in the same judicial review leave application. The three accused faced a total of 29 different charges of perjury. All these charges were the subject of the DPP's ***nolle prosequi.***

The private prosecution was first called in the Magistrates' Court on 26th May, 1997. It did not advance them, because the Magistrates' Court decided to stay the prosecution pending the decision of the Native Lands Commission concerning the Tui Nadi title. The Commission was due to sit on 13th September 1997.

On 5th August 1997, Counsel for the three accused persons made representations to the DPP that the private prosecutions for perjury should be terminated by ***nolle prosequi*** or in another appropriate manner.

On 14th August 1997, the DPP's Office wrote to the Respondent's solicitors asking for the evidential basis for the perjury charges and enquiring whether the respondent's complaints against the 3 accused had been reported to the police for investigation before prosecution had been commenced.

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On 12th September 1997 the respondent's solicitors requested a copy of the representations made to the DPP's Office. This request was met on 1st October 1997.

On 23rd October 1997, the solicitors for the respondents advised the DPP's Office that the charges were unaffected by the findings of the Native Lands Commission, and urged that the DPP's Office not to intervene in the prosecutions. They claimed that the statutory enquiry to be conducted by the Commission to decide the rightful Tui Nadi and the constitutional protection for such a decision should not be used as a shield against the perjury charges.

On 24th October 1997, statements of six prosecution witnesses were forwarded to the DPP's Office by the respondent's solicitors.

On 27th October 1997, the same solicitors forwarded to the DPP a copy of ***Ame Gavidi v. The Police (1949), 4 FLR 14*** - a case which held that evidence about native custom could be relevant to the defence of charges of criminal trespass. How such an authority could have relevance to the sort of evidence needed for the prosecution of perjury charges is difficult to foresee.

On 29th October 1997, the private prosecutions were set down for mention in the Suva Magistrates' Court. On that date, Mr Naigulevu appeared for the DPP and advised the Court that the DPP's Office was considering representations from counsel for both the respondents and the accused in order to decide whether the prosecutions should proceed in the public interest.

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On 6th November and 17th November 1997, the respondents' solicitors wrote lengthy letters to the DPP which, at times in somewhat emotive language,

(a) expressed concern that the DPP was considering staying the prosecutions

(b) purported to refute some submissions made to the DPP by the solicitors acting for the 3 accused

(c) questioned whether 'public interest' could ever allow a prosecution to be stayed where ***prima facie*** evidence of criminal liability existed

(d) challenged the DPP's view that public interest could be a ground for stay and opined that such an approach was unheard of and defied logic

(e) questioned the relevance to the DPP's enquiries of the Native Lands Commission's decision which the respondents claimed not to have seen, although one would have thought that the decision would have been freely available to interested parties

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(f) alleged partiality and bias against the DPP.

On 11th November 1987, the respondents received a letter from the DPP which they chose not to exhibit to the affidavit in support of the leave application, although they exhibited their reply to the DPP's letter: that reply was dated 17th November 1997. This letter replied to some of the matters apparently raised by the DPP's letter and articulated at greater length the concerns expressed in earlier correspondence.

On 3rd December 1997, a ***nolle prosequi*** was filed in the Court. On 10th December 1997, the DPP wrote the following letter to the respondent's solicitor, offering the DPP's reasons for her action.

"211750

10th December 1997

Mr Isireli Fa
Messrs Fa & Co
Barristers & Solicitors
Level 4, FNPF Place
GPO Box 15859
SUVA

Dear Mr Fa

re: PRIVATE PROSECUTION AGAINST NAPOLIONI NAULIA DAWAI, TEVITA MAQU AND NEMIA VUNIMAKADRE VAINITOBA

After the receipt of the letter of representation made on behalf of the three accused persons by their counsel Mr Matebalavu Rabo, we wrote

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to your office on the 14th August 1994 seeking clarification on a number of matters. These included the evidential basis for which the private prosecution was being brought and whether the matter had been investigated by the police. After earlier undertaking that you would forward these materials, you wrote to us asking that we apprise you with copies of any correspondence to us that was intended to seek our intervention in the cases before the Court. We duly obliged. Your office then forwarded to us on the 23rd October, 24th October and 27th October materials that you felt pertinent and which you relied on, including a decision in the High Court. There was no indication however that the matter had been investigated by the Police.

In determing what stand the DPP's office would take in the light of the defendants' representation, we were guided by our prosecution guidelines which we referred to you. We took account of all the materials that you sent us together with the submission mady by Messrs. Essesimarm dated the 5th August 1997.

In reviewing the charges before the Court, the entire evidence before us and the law we concluded that there was no prima facie case against all the accused persons on the charges that they faced. We arrived at this decision on the basis of a number of binding decisions which were authorities for the proposition that the references, in section 117, Penal Code particularly the deeming provisions of subsection (3) to statements made for the purpose of judicial proceedings did not extend a swearing of an affidavit before a Commissioner for Oaths for the purpose of civil proceedings, that the Commissioner for Oaths was not a person authorised to record and authenticate statements contained in the affidavit; that the deponent in such circumstances was not a person lawfully sworn as a witness.

In applying these authorities to the evidence, we were left with little doubt that the charges preferred against the accused persons could not be sustained. To have continued notwithstanding, would be malicious and an abuse of the criminal process. Hence, on this ground alone it was our view that this was an appropriate case in which to enter a nolle prosequi.

However, and in addition we considered the nature of number of charges put forward to support them. It was apparent that a number of these charges were based purely on statements of opinions, as opposed to statements of facts; and an assignment consisting merely of a request to crave leave to refer to another affidavit. These in our view could hardly in law be regarded as forming a proper basis of any criminal charge. Again to continue would have been improper and may have amounted to an abuse of the criminal process.

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There were also charges which assigned averments by one of the accused person that the proper basis in which to determine the rightful titleholder was by way of senior blood lineage. These were matters that were extensively examined the Native Land Commission of Inquiry convened to determine this matter whose findings did not support the allegations and further because of the continuing litigation were matters properly before the Civil Courts. Again to continue would have constituted an abuse of criminal process.

We had accordingly in the exercise of the DPP's constitutional powers opined that the proceedings against the 3 accused persons had to be discontinued. However, we can also advise that if there are other conduct that in your opinion are worthy of investigation, we recommend that you refer your complaint to the Police for proper investigation.

We thank you.

Yours sincerely
(Sgd.)
J. Naigulevu
Assistant Director
for Director of Public Prosecutions"

Despite the entry of the ***nolle prosequi*** by the DPP, the Magistrate quite wrongly refused to discharge the accused and terminate the prosecutions. This attitude forced the DPP to apply to the High Court for a revision under s.323 of the Criminal Procedure Code. On 21 January 1998, the Chief Justice upheld the DPP's submission that the accused had to be discharged in these words:

"The long and short of this matter is that the nolle prosequi having been filed in respect of the cases in question had the effect of terminating those proceedings forthwith. This should have resulted in the discharge of the defendants from their trial without delay. The power of entering a nolle prosequi in any criminal proceedings does not require reasons to be given nor should they be sought from any quarters as this would amount to an abuse of the court process. The reasons are quite irrelevant and immaterial and could only have the effect of encumbering the criminal process with all its undesirable ramifications. The court's decision to postpone the trial and the discharge of the defendants after the nolle prosequi was filed was plainly misconceived.

> ***The DPP is empowered by the Constitution to take over any criminal proceedings however arising and discontinue them as she in her absolute discretion saw fit guided only by her perception of the public interest and her knowledge and experience of criminal law, procedure and practice. The exercise of this power cannot be questioned by any person or authority. The rationale for it is exceptional. It is designed to bring order and integrity to the criminal process.***

Whilst the decision of the Chief Justice that the Magistrate should have discharged the accused once the ***nolle prosequi*** had been filed was clearly correct, with respect we do not agree with the learned Chief Justice's ***obiter*** statements to the effect that the DPP's exercise of the power to issue a ***nolle prosequi*** can never be challenged.

As will be apparent from this judgment, decisions of the DPP are reviewable in certain exceptional and limited circumstances. To be fair to the learned Chief Justice, he was concerned with the immediate problem of the Magistrate refusing to discharge the accused when clearly they should have been. The Chief Justice did not have the benefit of any argument about the reviewability of the DPP's decisions, such as was addressed to Fatiaki J. and to this Court.

Hearing in High Court

In support of their application for leave to issue judicial review proceedings, the respondents filed a notice of application with an accompanying statement and one affidavit from one of the respondents, Livai Lila Matalulu. The documents are open to criticism for lack of precision.

The ultimate grounds for the leave application put before the Judge, after amendments from what had been originally filed, were as follows:

(a) That the decision by the 1st and 2nd Respondent to enter a Nolle Prosequi against the Private Prosecutions commenced by the Applicants is unreasonable in law and as such ultra vires as the 1st and 2nd Respondent had failed to take into account relevant considerations, took into account extraneous considerations, had failed to exercise good faith and is arbitrary (sic).

(b) That the 1st and 2nd Respondent had acted in breach of the Rules of Natural Justice as it (sic) had made a predetermination in arriving at its(sic)decision to enter a ***Nolle Prosequi*** and that its decision is tainted with bias.

(c) The 1st and 2nd Respondent in deciding to enter a ***Nolle Prosequi*** had failed to exercise a discretion in accordance to law as required under section 96(4)(c) of the Constitution of Fiji.

(d) That the decision of the 1st and 2nd Respondent to enter a ***Nolle Prosequi*** was arrived at unfairly and without good and legitimate reasons.

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The three respondents cited in the notice of application were:

(a) The Office Director (sic) of Public Prosecutions, as first respondent:

(b) Ms Shameem, the then and current holder of that office as second respondent:

(c) Mr J. Naigulevu, the Assistant Director who had been the principal member of the DPP's office involved, as third respondent.

The sole proper respondent should have been "The Director of Public Prosecutions." Individuals should not be named in judicial review proceeding as respondents just because they happen to hold a specified office, or when they are only agents of the office holder. The DPP is the only appellant before this Court and rightly so. The DPP should have been the only respondent named in the High Court application.

The principal criticism of this notice of application is that it does not articulate -

(a) the relevant considerations which allegedly were not taken into account by the DPP;

(b) the extraneous considerations that allegedly were taken into account by the DPP;

(c) any details of predetermination leading to an inference of bias;

(d) the precise manner in which a lack of good faith was alleged against the DPP.

Allegations of this sort against an officer of state with important constitutional functions are extremely serious. They therefore needed to be articulated carefully and precisely, even on a leave application, so that the Court and the respondent knew exactly what could be expected in the substantive application. Although there are rather diffuse and unspecific allegations of bias in letters attached to the affidavit in support, statements in letters are not evidence nor substitutes for an affidavit from a deponent with relevant knowledge. Nor should the Court or a respondent be expected to trawl through a shoal of letters on the off chance of discovering an allegation which should have been clearly stated "up-front" in the originating document in which relief is claimed.

The affidavit offended against Order 41 r.5 (2) in that it made statements of belief (acceptable in interlocutory proceedings) but without stating grounds and sources for the beliefs. It also offered opinions (expressed in florid terms) on legal issues. Such statements of a deponent's view on legal issues are quite inappropriate in any affidavit which must confine itself strictly to facts. Numerous letters were exhibited: although they contained some assertions of

bias and lack of impartiality on the part of the DPP, there was no evidence from which even a possibility of bias etc. could have been inferred.

From a perusal of Fatiaki J's judgment and of his notes of the hearing, it appears that much of the argument before him was devoted to whether a decision of the DPP to issue a ***nolle prosequi*** could be the subject of judicial review. However, the then counsel for the DPP did address the allegations of bias, partiality etc, but somewhat briefly and not with the comprehensiveness of the DPP's submission now before us.

Fatiaki J. reviewed carefully numerous authorities and concluded that the DPP's decision was susceptible to judicial review. He did not go on to consider whether leave should or should not be given to commence judicial review nevertheless, by assessing whether there was an arguable case shown by the affidavit on the facts. He does not appear to have been asked by counsel then appearing for the DPP whether s.117 of the Penal Code could ever apply to false statements made in affidavits which had been merely attested in the normal way by a Commissioner for Oaths.

The Judge cited with approval a case which held that a prosecutorial discretion should be reviewed, only if there were proof of misconduct bordering on corruption, violation of the law or bias for or against an individual (i.e.. Kostuch v. Attorney-General for Alberta (1995), 128 D.L.R. (4th) 440). However, the Judge did not enquire if there were ***prima facie*** evidence of this kind of allegation presented in the leave application, sufficient to pass the threshold test for a leave application.

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Because he was not addressed on the topic, the Judge did not consider whether s.117 of the Penal Code permitted the prosecution for perjury of someone who has made an affidavit in judicial proceedings which affidavit has merely been attested by a Commissioner for Oaths who has not recorded or authenticated the deponent's statement. If there exists a legal reason which will prevent the charges ever succeeding, then, in our view, that legal consideration must operate to prevent leave to issue judicial review being granted. The circumstance that such a legal issue had not been argued before the Judge in the High Court does not prevent the point being raised on appeal.

In fairness to the learned Judge, it appears that the principal issues argued before this Court were somewhat secondary before him, judging from the record of the argument and from his careful judgment. The DPP acknowledged before this Court that the DPP could be susceptible to judicial review in most exceptional circumstances. That acknowledgement could well have been but was not made by her counsel before Fatiaki, J.

Principles for Leave Applications

We accept what was said by this Court in Fiji Airline Pilots' Association v. Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU0059 of 1997S, 27th February 1998.):

> ***"The first ground of appeal, however, raised an important question on the Judicial Review procedure. It is clear that Fatiaki J. went into the merits of the Association's case in some depth. The Appellant submitted that this was inappropriate in what was merely an application under Order 53 r.3(1) of the High Court Rules for leave to issue review***

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proceedings. The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per Lord Diplock in Inland Revenue Commissioners v. National Federation of Self Employed. [1982] AC 617 at 644. This principle was applied by his Court in National Farmers' Union v. Sugar Industry Tribunal and Others (CA 8/1990; 7 June 1990). In R. v. Secretary of State for the Home Department ex p. Rukshanda Begum (1990) COD 107 (referred to in 1 Supreme Court Practice 1997 at pp.865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed where it was unclear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which would ensue if the parties were granted leave.

In the High Court the appellant, the respondent and Company were heard, although the latter did not appear in this Court. It is difficult to escape the conclusion that this was hardly a brief intermediate hearing of the kind envisaged by the Master of the Rolls, but we can appreciate the problem faced by the Judge in being presented with what on the record were extensive submissions by all 3 counsel. The area of dispute was adequately covered in the Association's affidavit, and the issues were reduced to the two main points discussed in this Judgment. They were quite straightforward. His Lordship was able to reach the firm conclusion that there was no arguable case warranting the grant of leave."

This decision was followed more recently by this Court in Nivis Motors and Machinery Co. Ltd. v. Minister for Lands and Mineral Resources - (Civil Appeal No. ABU0017 of 1998S, judgment 13 November 1998).

In the Airline Pilots' and Nivis Motors cases, a total of 6 different members of this Court were critical of the requirement for leave in Order 53, pointing out that jurisdictions other than Fiji and England had no difficulty in weeding out unmeritorious applications for judicial review at an early stage. In Nivis Motors, the Court there constituted, offered reasons why Fiji's judicial review procedure should be modelled on established practice in other South Pacific jurisdictions and recommended an appropriate rule change. However, in the absence of

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any such rule change, the Courts must continue to interpret the leave requirement in the manner stated in the Airline Pilots' case.

In Nivis Motors, this Court indicated that certain matters disclosed in the affidavit in support of the application for leave called for some evidentiary response from the respondent Ministry, before the Judge could have ruled, as he did, that the application for judicial review had no prospect of success. The Court held that unanswered matters disclosed in the applicant's affidavit pointed to an arguable case for judicial review. The Court also noted the lack of a pre-proceeding discovery procedure and of official information legislation which could have helped that particular applicant.

The situation, as presented to the High Court at the leave stage, is different in this case. The Court had before it most but not all of the relevant correspondence. Strangely enough, one letter from the DPP to the respondents' solicitors was not attached to the affidavit in support. There was a full letter stating the reasons for DPP's decision. The discretion under consideration in Nivis Motors was concerned with the compulsory acquisition of land. It was a discretion circumscribed by statute and was not an open-ended discretion like that possessed by the DPP in this case. There was also a statutory procedure for testing the Minister's decision in Court

IS THE DPP'S DECISION REVIEWABLE?

The Office of Director of Public Prosecutions was first created under s.85 of the 1970 Constitution and continued in s.96 of the 1990 Constitution and s.114 of the 1997 Constitution. The DPP has to be a person qualified for appointment as a Judge. The idea behind

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the creation of the office was clearly to keep political considerations out of the prosecutorial process by having that process administered by an independent person of standing; this principle was acknowledged by the Privy Council in Attorney-General v. Director of Public Prosecutions (1982), 28 F.L.R. 20,25.

The DPP's constitutional powers include the taking over and staying of private prosecutions. The right of any person to lay a private prosecution is found in s.78(2) of the Criminal Procedure Code (Cap.21). Indeed, as stated by Lord Diplock in Gouriet v. United Postal Workers (1978) A.C. 435,477, the right to lay a private prosecution "remains a valuable constitutional safeguard against inertia or partiality on the part of authority" although Lord Diplock acknowledged the right of the Attorney-General in England to control the process. There is no requirement that a private prosecutor has to have the Police first investigate the alleged charge. One safeguard against irresponsible private prosecution, other than the intervention of the DPP, lies in the tort of malicious prosecution. We do not rate highly therefore the argument that the right of the respondents to have the Police investigate an alleged crime is necessarily a reason why judicial review should not be entertained. However, in general it is desirable that the Police be given an opportunity to investigate an alleged offence before a private prosecution is commenced.

Section 71 of the Criminal Procedure Code gives flesh to the DPP's constitutional right to enter a ***nolle prosequi*** but goes on to provide that discharge of an accused following the entry of a ***nolle prosequi*** ,"shall not operate as a bar to any subsequent proceedings against him on the same facts".

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In this Court, in the judgment that was appealed to the Privy Council, i.e. Attorney-General v. Director of Public Prosecutions (Civil Appeal No.18 of 1981, judgment 5 August 1981) it was stated at p.31 concerning the DPP, "He is accountable to the Courts in the performance or non-performance of his functions". S.136 of the 1970 Constitution which is replicated in s.158 of the 1990 Constitution, was clear authority for this statement.

S.158 of the 1990 Constitution states:

> ***"158 No provision of this Constituion 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 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."***

S.94 (10) of the 1997 Constitution is in ***pari materia***.

Before this Court, the DPP acknowledged that, in exceptional circumstances, the decision of the DPP is amenable to judicial review when exercising a constitutional power such as entering a ***nolle prosequi*** on a private prosecution as was done here. One wonders therefore why there was a sustained argument against the proposition in the Court below, given the above provision.

There is some Australian case law which suggests that a Court cannot interfere with a ***nolle prosequi*** decision made by the relevant official. In Maxwell v. R. (1966), 70 ALJR 324 342 it was said in the joint judgment of Gaudron and Gummow, JJ. in the High Court of Australia:

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> ***"The power of the Attorney-General and of the Director of Public Prosecutions to enter a nolle prosequi and that of a prosecutor to decline to offer evidence are aspects of what is commonly referred to as "the prosecutional discretion". In earlier times, the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the courts. That approach may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute, such as that conferred on a prosecutor by s.394A of the Act.***
>
> ***It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what. "***

With respect to the views just quoted which may be based on a different legal framework, we consider that the DPP must be answerable to judicial review because of the constitutional provision in Fiji cited above. Decisions from New Zealand, England and Canada support the proposition.

In Amery v. Solicitor-General, [1987] 2 NZLR 292, an attempt was made to review the Solicitor-General's stay of criminal proceedings pursuant to a statutory power. On the facts, the New Zealand Court of Appeal did not feel the need to decide whether the actions of the Solicitor-General were reviewable, as Sinclair J. in the High Court had found them to be. At p.391, the Court indicated a likelihood that such a decision could be reviewed but decided on the facts that the continuation of the prosecutions would amount to a clear abuse of process because the charges were based on activities for which the accused had already been convicted.

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In England, a Divisional Court in R. v. Director of Public Prosecutions, ex parte C [1995] 1 Cr. App.136, granted judicial review of the DPP's decision because she had not followed the Code issued pursuant to her statutory powers when making a decision to refuse to prosecute the applicant's husband for buggery. We note that counsel for the respondents in this present case did not claim that the DPP had failed to comply with her own Code. Counsel claimed he had never received a copy of any Code; unlike the English situation, there does not seem to be any statutory authority in Fiji for the issue of one.

In Canada, the Kostuch case (cit supra) contains a useful summary of the Canadian law on this topic. Canada has bill of rights provisions similar to Fiji's. The Alberta Court of Appeal rejected an argument that the Charter prevented the Attorney-General from interferring in a private prosecution.

In addition to making the statement mentioned earlier, the Alberta Court of Appeal stated that "The test for review of prosecutorial discretion remains that of flagrant impropriety and it is not unreasonableness as suggested by counsel for the appellant" (ibid 451).

At 449, the Court specifically referred to the Attorney-General (the equivalent officer in Alberta to the Fiji DPP) having to have regard not only to the interests of the persons laying the charges, but also to the rights of the person charged with the offence and to the public interest. It was stated at 449: "the fundamental consideration in any decision regarding prosecutions must be the public interest."

The same theme was stated in another way by the English Court of Appeal in Raymond v. Attorney-General [1982] 2 All E.R. 487, 491:

> ***"On the other hand there may be what appear to the director substantial reasons in the public interest for not pursuing a prosecution privately commenced. What may emerge from those proceedings might have an adverse effect on a pending prosecution involving far more serious issues. The director, in such a case, is called on to make a value judgment. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned. The safeguard against an unnecessary or gratuitous exercise of this power is that by s.2 of the 1979 Act the director's duties are exercised 'under the superintendence of the Attorney-General. That officer of the Crown is, in his turn, answerable to Parliament if it should appear that his or the director's powers under the statute have in any case been abused.***
>
> ***Mr Raymond, if he is still concerned to bring Mr Carne to trial, can seek to start again."***

We consider that the law in Fiji is best expressed in the various authorities which we have cited with approval. We proceed later to examine whether there was enough evidence, even at the leave stage, to show an 'arguable case' for 'flagrant impropriety' on the part of the DPP - a handy description of the rare occasions when the DPP's decision is reviewable.

S.117 Penal Code

Before doing so, however, we examine s.117 of the Penal Code to see whether, even if the DPP's action in issuing the ***nolle prosequi*** should be reviewed, any prosecution was doomed to failure because of the provisions of that section. We here note that we cannot agree with counsel for the respondents that this issue should await a full hearing. If there is to be a

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'technical knock-out; it is far cheaper and less traumatic for all concerned that it be delivered sooner rather than later.

The section reads as follows:

> *"117. - (1) Any person lawfully sworn as a witness in a judicial proceeding who wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true is guilty of the misdemeanour termed perjury, and is liable to imprisonment for seven years.*
>
> *(2) Any person lawfully sworn as an interpreter, who wilfully in the course, or proposed course, of his duties as such, makes any misstatement, or actively or by omission misinterprets any statement whether or not that statement is material in any judicial proceeding is guilty of perjury and is liable to imprisonment for seven years.*
>
> *(3) Where a statement made for the purpose of a judical proceeding is not made before the tribunal itself but is made on oath before a person authorised by law to administer an oath to the person who makes the statement and to record or authenticate the statement it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.*
>
> *(4) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial."*

The section was apparently based on the English Perjury Act of 1911. It was considered in the then Supreme Court of Fiji by Mills-Owens C.J. in two cases in 1967, i.e. Lal v. R 13 FLR 1 and Attorney-General v. Mariappan Gounder, 13 FLR 123. In both those cases, the accused was alleged to have made a false statement in an affidavit filed in judicial proceedings and sworn before a Commissioner for Oaths in the normal way. In the first case, the affidavit was by a defendant seeking to have a judgment by default for debt set aside; in the

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second, an affidavit of service by a police officer of a summons for a traffic offence was alleged to have been false.

In both cases, Mills-Owens, C.J. carefully considered the provisions of s.117 then bearing a different section number and having only three subsections, the present subsection (3) being then subsection (2). He decided that, in each case, there could be no conviction under the section of a deponent who had merely gone before a Commisioner for Oaths to swear to the truth of the contents of the affidavit with the Commissioner then merely attesting the deponent's signature. There was no suggestion that anything other than this normal procedure occurred with the taking of the affidavits in this case in which perjured statements were allegedly found.

The reasoning of Mills-Owens, C.J. was expressed thus in the Lal case at pp. 3 - 4:

> ***"Obviously there is no such things as an offence contrary to subsection (2); that subsection merely extends the operation of subsection (1). This in itself might not, however, be regarded as a very serious matter. What is abundantly clear is that the section relates only to perjury committed by a person lawfully sworn as a witness or interpreter, and that it must be perjury committed in a judicial proceeding. The object of subsection (2), quite clearly, is to extend the provisions of subsection (1) to a statement made by a witness for the purpose of a judicial proceeding before some person other than the tribunal itself. The obvious case is where the statement in question is made in the course of evidence taken on commission (that is, where evidence is taken out of Court before an examiner or commissioner). The two affidavits were sworn before Mr Whippy merely in his capacity as a Commissioner for Oaths, that is as a person authorised to attest the signature of a deponent. It is quite clearly not the fact that Mr. Whippy was, in this case, in the terms of subsection (2), a person authorised to record or authenticate the statements made by the appellant in those affidavits. A Commissioner for Oaths does not, as such, record or authenticate statements, although he may of course be specially appointed as an***

> ***examiner or commissioner to take the evidence of a witness, as, for example, for the purpose of proceedings abroad. And by no stretch of imagination could the appellant be said to be making any statement as a "person lawfully sworn as a witness." The affidavits were made by him, unequivocally, in the capacity of a party to the suit, namely as the defendant; he was not giving evidence as a witness; he had never been sworn as a witness; the civil proceedings had not yet reached the stage at which the evidence of witnesses was required to be given; the action never came to trial because it was discovered that the "debt" was unenforceable."***

We find it impossible to fault the reasoning of Mills-Owens, C.J. in decisions which have stood unchallenged in this country for over 30 years. Our finding means that a person cannot be prosecuted for making a blatantly false statement in an affidavit sworn in the normal way. That anomalous situation has been the law of Fiji since 1967 and no legislative change has been made. We recommend that urgent consideration be given to a legislative change to rectify this gap in the law. A less convoluted section which clearly indicates that a false affidavit can give rise to a perjury charge is section 108 of the New Zealand Crimes Act 1961, which provides a useful precedent

Counsel for the respondents referred us to Archbold as refuting the Mills-Owens approach. The 1996 edition of Archbold is unhelpful on this point; it contains no commentary on the English requirement that the person who administers the oath has also to record or authenticate the statements deposed to by the accused. There is a note (28-176) on what is required by way of proof on an indictment for perjury by affidavit. However, there is nothing germane to the present problem.

The DPP suggested that a person making a false affidavit might be charged under s.120 for perverting the course of justice and cognate offences. That may very well be, but the

charges here were laid under s.117 and the ***nolle prosequi*** applied to those charges. There should be in Fiji, as in other jurisdictions, an offence of committing perjury in an affidavit.

Accordingly we consider that there was an impassable roadblock in the way of the private prosecutions commenced by the respondents. It is unfortunate that this point was not argued in the Court below but, because it is a discrete legal issue, the duty of this Court is to rule on it. That is sufficient to allow the appeal. In deference to the argument we will now consider briefly whether there was sufficient "arguable case" evidence as would justify the grant of leave to commence judicial review proceedings against the DPP because of the entry of the ***nolle prosequi***.

Evidence of 'Arguable Case' to justify Leave

Adopting the Albertan guideline for judicial review of 'flagrant impropriety', on the part of the DPP there is just no evidence of this disclosed in the respondent's affidavit which was before the High Court. That affidavit exhibited letters which were replete with assertion and suspicion but short on hard fact.

Looking at the reasons given by the DPP in Mr Naigulevu's letter, it is hard to see the decision to file a ***nolle prosequi*** as other than one which was reasonable in the public interest. As the letter states, many of the allegedly false statements in the charges are statements of belief about entitlement to office and about customary processes and rituals. These assertions might or might not be objectively correct. But in an emotionally-charged situation

such as a contested claim to an important chiefly title, it would be hard to characterise such an assertion as blatantly and subjectively false, as distinct from mistaken. At least one of the charges, as the Naigulevu letter pointed out, was quite inappropriate; the deponent simply "craved leave" to refer to someone else's affidavit. Such a mechanical statement could never be the basis of a charge of perjury.

Clearly, the DPP saw this dispute as one over claims to a chiefly title which had been fully ventilated before the appropriate tribunal with subsequent attempts to challenge the tribunal in the Courts. The DPP probably saw little merit in the use of the criminal law to relitigate deeply held claims between rival factions. Certainly, her assessment of the public interest was not a flagrant misuse of her powers.

Accordingly, we find no reason that would justify the grant of leave to issue judicial review proceedings. Not only does s.117 mean that the prosecutions were doomed to fail, but none of the limited bases on which the decision of the DPP can be challenged has been shown to exist in arguable form.

The appeal is allowed; leave to bring judicial review procedings is set aside.

Because the argument about s.117 was not made before Fatiaki J. we make no order as to costs.

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Result: (a) Appeal allowed.

(b) Leave to issue application for judicial review set aside.

(c) No order as to costs.

.....
Sir Moti Tikaram
President

.....
Sir Ian Barker
Justice of Appeal

.....
Mr Justice Ian R. Thompson
Justice of Appeal

Solicitors:

Office of the Director of Public Prosecutions, Suva for the Appellant
Messrs. Fa and Associates, Suva for the Respondents

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