MATALULU v DIRECTOR OF PUBLIC PROSECUTIONS

SUPREME COURT — CIVIL JURISDICTION

VON DOUSSA, KEITH, FRENCH JJ

17 April 2003

[2003] FJSC 2

Practice and procedure — appeal — application for special leave to appeal against the decision of Court of Appeal — whether special to leave should be granted — whether judicial review covers decisions of the Director of Public Prosecutions (DPP) — whether s 117 of the Penal Code applies to false swearing of affidavits before a commissioner of oaths — whether Petitioners had satisfied the requirements for the grant of leave — whether the entry of nolle prosequi is a civil or criminal matter — affidavits of evidence — Constitution of Fiji 1990 ss 96, 131, 158 — High Court Rules O 33 r 3, O 41 rr 3(1), 8, O 53 r 3(2) — Penal Code (Cap 17) ss 4, 117, 120.

Napolioni Dawai was appointed to the Chiefly Office of Tui Nadi. On appeal, the Court of Appeal granted leave to apply for judicial review and declared the appointment invalid and required the Native Lands and Fisheries Commission to conduct an inquiry into the rightful holder of the title. The Commission ruled in favor of Dawai. The ruling was quashed by a judgment of Townley J. Following the decision, the Petitioners filed a private complaint against Dawai for perjury for false sworn statements contrary to s 117 of the Penal Code. These were decided by the Director of Public Prosecutions (DPP) and entered a nolle prosequi terminating each of the prosecutions. A judicial review was granted by Fatiaki J against the decision of the DPP. The Court of Appeal allowed an appeal from the decision of Fatiaki J and set aside the leave to issue an application for judicial review. It held that s 117 does not apply to the swearing of affidavits. The Petitioners sought special leave to appeal to the Supreme Court.

Held — (1) The judgment of Fatiaki J was given before the coming into operation of the 1997 Constitution. He gave leave to appeal to the Court of Appeal after it came into operation. Like the 1990 Constitution, the 1997 Constitution entrenches the independence of the office of DPP through an omnibus provision which applies to a number of office holders including the DPP who are listed in the Constitution.

(2) The Criminal Procedure Code provides for the laying of a complaint of the commission of an offence by any person and encompasses the initiation of private prosecutions. This is subject to the constitutional power of the DPP to take over and discontinue such a prosecution. In that sense, the DPP is empowered to regulate access to the criminal justice process.

(3) The petition for special leave arose out of a proceeding in which the Appellants sought judicial review of the DPP's decision to enter a nolle prosequi on a private prosecution for a criminal offence. There is a question whether it is a criminal or civil matter for the purposes of s 7 of the Supreme Court Act 1998. It is best regarded as a civil matter. The grant of special leave in criminal matters is lower than in civil matters because the liberty of the subject may be in issue. The court therefore applied to this petition for special leave the criteria applicable to civil matters under s 7(3).

(4) The availability of judicial review with the prosecutorial discretion of the DPP and its interaction with the leave requirement under O 53 is of substantial general interest in the administration of civil justice. It is also a matter of great general or public importance to its potential for impinging on the operation of the criminal justice system.

(5) The construction of s 117 and its application to the swearing of false affidavits is also of substantial general interest to the administration of the civil justice system. The swearing of affidavits by parties and witnesses in judicial proceedings is an indispensable incident of the civil justice system.

(6) It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient in cases involving exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

(7) The decisions of the DPP were made under powers conferred by the 1990 Constitution. It is directly from a written constitution and they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary to explore those limits in full under either the 1990 or 1997 Constitutions.

(8) An error of law which informs a decision not to continue with a prosecution is not an error within the scope of the DPP's power or vitiates the proper exercise of the DPP's discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is empowered to make such judgments even though they may be wrong on the law or mistaken on the facts.

(9) The DPP based her decision in part upon a construction of s 117 of the Penal Code which has been settled in Fiji for over thirty years. The Court of Appeal upheld it. The construction is erroneous and that s 117 does apply to the false swearing of affidavits. There was no credible basis for suggesting that DPP acted in good faith. The decision could not have been reviewable on that ground. There was no other viable ground for review advanced by the Appellants in their application before Fatiaki J and it would have been quite proper in the circumstances to refuse leave.

(10) A Commissioner of Oaths before whom an affidavit is sworn authenticates the statements made in it within the meaning of s 117. All the other elements of s 117 are satisfied where a person swears an affidavit for the purpose of use as evidence in a judicial processing. There is no relevant distinction to be drawn between a party who swears an affidavit of his or her evidence or any other witness in the proposed proceedings.

(11) The provisions of s 117 extend at least to affidavits of evidence sworn for use in judicial proceedings whether or not they are relied upon. The construction of s 117 of the Court of Appeal and Mills-Owens CJ were incorrect as the swearing of affidavits is not applicable.

Appeal dismissed.

Cases referred to

Attorney-General v Gounder [1967] 13 FLR 123; *Chartrand v Quebec (Minister of Justice)* (1987) 40 CCC (3d) 270; *Gouriet v Union of Post Office Workers* [1978] AC 435; [1977] 3 All ER 70; *Kostuch v Attorney-General of Alberta* (1995) 128 DLR (4th) 440; *Lal v R* [1983] FJSC 3; Crim App No 91 of 1983; *Maxwell v R* (1996) 184 CLR 501; *R v Director of Public Prosecution; Ex parte Kebilene* [2000] 2 AC 326; [1999] 4 All ER 801; [2000] 3 LRC 377; *Re Balderstone and R* (1983) 8 CCC (3d) 532; *Rokomatu Namulo v Native Lands & Fisheries Commission* (unreported, Jud Rev No HBJ 2 of 1995L), cited.

Bourke v Davis (1889) 44 Ch D 110; 38 WR 167; 62 LT 34; *Krieger v Law Society of Alberta* 2002 SCC 65,[2003] 3 LRC 249; (2002) 217 DLR (4th) 513; *R v Director of Public Prosecution; Ex parte C* [1995] 1 Crim App Rep 136; *R v Power* [1994] 1 SCR 601; (1994) 89 CCC (3d) 1; *Raymond v Attorney-General* [1982] 1 QB 839; [1982] 2 All ER 487; *Wayte v United States* (1985) 470 US 598, considered.

Isireli Fa for the Petitioners/Appellants.

Gerard McCoy QC (Director of Public Prosecutions) for the Respondent.

Von Doussa, Keith, French JJ.

Introduction

In 1994 Napolioni Dawai was appointed to the Chiefly Office of Tui Nadi. That appointment gave rise to lengthy litigation. It was unsuccessfully challenged in judicial review proceedings in 1995. On appeal, the Court of Appeal, by consent, granted leave to apply for judicial review, declared the appointment invalid and required the Native Lands and Fisheries Commission to conduct an inquiry into the rightful holder of the title.

A Native Lands Commissioner ruled in October 1997 that Mr Dawai was the rightful Tui Nadi. However, that decision was quashed by a judgment of Townley J on 16 March 2000. There is no current occupant of the office.

In the meantime, the present Petitioners in April 1997 filed private complaints alleging that Mr Dawai and two others had sworn false affidavits in the first round of judicial review proceedings in 1995. This was said to be contrary to s 117 of the Penal Code which prohibits false sworn statements in judicial proceedings. These prosecutions were taken over by the Director of Public Prosecutions (DPP) in December 1997 in the exercise of her constitutional powers. She entered a nolle prosequi terminating each of the prosecutions.

The Petitioners applied to Fatiaki J for leave to issue judicial review proceedings against the decision of the DPP. That leave was granted in July 1998 after substantial debate about whether the DPP could be subject to judicial review.

The Court of Appeal allowed an appeal from the decision of Fatiaki J. In so doing it held that s 117 does not apply to the swearing of affidavits. The Petitioners now seek special leave to appeal to this court.

For the reasons which follow, we have granted special leave to appeal but dismissed the appeal itself. The case raises some important questions about the operation of the High Court Rules in relation to the grant of leave to issue judicial review proceedings, the scope of judicial review of decisions of the DPP and whether s 117 of the Penal Code applies to the false swearing of affidavits.

History of the proceedings

The Petitioners both come from the Narewa village at Nadi. The Petitioner, Levai Matalulu, describes himself as a member of Mataqali Natogo, a traditional warrior of the Vanua of Nadi entrusted, as part of his customary duties, with the protection of the customary office of Tui Nadi. The Petitioner, Navitalai Rasolosolo, describes himself as a member of Matagali Vunaniu of the Yasuva Sila, a traditional spokesman and herald of the Tui Nadi.

The origins of their petition for special leave to appeal to this court lie in a dispute about the appointment, in 1994, of Napolioni Naulia Naquqi Dawai to the Chiefly Office of Tui Nadi. The appointment was made on 30 November 1994 by the endorsement of the Ministry of Fijian Affairs on the advice of the Roka Tui Ba. Another claimant for the office, Ratu lsireli Rokomatu applied to the High Court at Lautoka for leave to issue judicial review proceedings in respect of the appointment decision. The named Respondents were the Native Lands and Fisheries Commission, the Permanent Secretary of Fijian Affairs, the Native Land Trust Board, the Attorney General of Fiji and Napolioni Dawai, That

application was refused by Lyons J in the High Court on 4 December 1995. An appeal against that decision was lodged by Ratu Rokomatu and on 6 February 1997 a consent order allowing the appeal was made in the following terms:

(1) By consent the appeal against the decision of Mr Justice Lyons delivered on 4 December 1995 is allowed.

(2) Appellant is given leave pursuant to O 52 r 3 to apply for judicial review of a purported decision of the 1st Respondent dated 30 November 1994 endorsing the advice of the Roka Tui Ba that the 5th Respondent be installed as the Turaqa Tui Nadi.

(3) By consent the following declarations and orders are made on the Appellant's application for judicial review:

(a) The 1st Respondent has made no valid decision in law as the holder of the title of the Turaqa Tui Nadi.

(b) The 1st Respondent's letter of 30 November 1994 does not constitute a decision of the 1st Respondent under the Native Lands Act Cap 133.

(c) The 1st Respondent take immediate steps to conduct an inquiry as to the rightful holder of the title of Turaqa Tui Nadi pursuant to s 17 of the Native Lands Act Cap 133.

(d) No further payment be made by the 3rd Respondent to the 5th Respondent or to any other person in respect of lease moneys due and payable to the holder of the title Turaqa Tui Nadi until the decision is made pursuant to s 17 of the Act.

(e) No order as to costs.

(f) Liberty to apply to the High Court is reserved to any party.

Following this decision, the Petitioners, on 22 April 1997, filed a private complaint against Napolioni Dawai alleging that, on 17 March 1995, he committed an act of perjury under s 117(1) and (3) of the Penal Code (Cap 17). The complaint was particularised in a document headed "Charge". The particulars alleged in substance that Dawai had sworn an affidavit before a commissioner of oaths knowing full well that the said affidavit was false and that it was being used in judicial review proceedings before the High Court of Fiji in Action No HBJ002 of 1992. A summons was issued to Dawai on the same day. Similar complaints were made against Tevita Maqu and Nemia Vunimakadra Vainitova.

The complaints came before the Magistrates' Court at Suva on 26 May 1997 but the court adjourned or stayed the prosecutions pending the decision of the native lands and fisheries commission about the Tui Nadi title. The commission was not due to meet until 13 September 1997. In the meantime counsel for the three accused wrote to the office of the DPP on 5 August 1997 requesting that the DPP "take immediate steps to stop all of the abovementioned proceedings, either by entering nolle prosequi or in other manner deemed appropriate". It was submitted that there was no realistic prospect of conviction and that it was in the public interest for the prosecutions to be terminated. The DPP's office wrote to the Petitioners' solicitors on 14 August 1997 asking that they indicate what was the evidential basis for the charges and whether the matter had been referred to the police for investigation.

The charges again came before the Magistrates' Court on 14 August but the magistrate adjourned them as he thought it desirable that they be further amended and particularised. The charges were amended on 20 August. The amended charge against Dawai now set out eight counts of perjury and a statement of

offence for each. The particulars in each case identified the allegedly false statements contained in the affidavit of 17 March 1995. Similar detailed particulars of allegedly false statements were set out in amended charges relating to Maqu and Vainitovu.

The Petitioners' solicitors, on 12 September 1997, wrote to the DPP seeking a copy of the representations made by the solicitors for the accused. This was provided on 1 October 1997.

On 4 October 1997, a Native Lands Commissioner appointed to inquire into the Tui Nadi dispute ruled that Napolioni Dawi was the rightful Tui Nadi in accordance with the customs and traditions of the Vanua of Nadi. This decision was ultimately overturned by Townley J on 16 March 2000— *Rokomatu Namulo v Native Lands and Fisheries Commission* (HBJ 0021 of 1997L, unreported).

On 23 October 1997, the Petitioners' solicitors made a submission to the DPP that the findings of the Native Lands Commissioner had no bearing on the charges. They forwarded statements of six prosecution witnesses to the DPP on 24 October 1997.

The prosecutions again came on for mention in the Suva Magistrates' Court on 29 October 1997. Counsel for the DPP then informed the court that the DPP's office was considering representations from the legal representatives of the Petitioners and the accused to determine whether the prosecutions should proceed. Further correspondence from the Petitioners' solicitors was sent to the DPP on 6 and 17 November 1997 urging that the prosecutions be allowed to proceed. The DPP replied to the letter of 6 November by a letter dated 11 November.

On or about 3 December 1997, the DPP decided to take over the prosecutions and to enter a nolle prosequi in relation to them. The DPP's office wrote to the Petitioners' solicitors on 10 December 1997 setting out its reasons for deciding to enter a nolle prosequi. The DPP was said to have been guided by prosecution guidelines which had been disclosed. In reviewing the charges before the court and the evidence, the DPP concluded that there was no prima facie case against any of the accused. The decision, it was said, was arrived at on the basis of a number of binding decisions that statements made for the purpose of judicial proceedings and referred to in s 117 of the Penal Code did not extend to affidavits sworn before a Commissioner of Oaths for the purpose of civil proceedings. The Commissioner of Oaths, it was said, was not a person authorised to record and authenticate statements contained in the affidavit. And the deponent in such circumstances was not a person lawfully sworn as a witness. On this ground alone it was the view of the DPP that this was an appropriate case to enter a nolle prosequi.

The DPP's letter went on to set out further bases for its decision as follows:

> 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.
>
> 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, by 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.

Notwithstanding the nolle prosequis, the magistrate refused to discharge the accused and terminate the prosecutions. The DPP applied to the High Court under s 323 of the Criminal Procedure Code. By that provision the court was empowered to call for and examine the record of any proceedings before any Magistrates' Court for the purpose of satisfying itself as to the correctness, legality or propriety of any sentence, finding or order recorded or passed, and as to the regularity of any proceedings of such court. On 21 January 1998 the Chief Justice upheld the DPP's submission that the accused should be discharged.

In the meantime, on 19 December 1997 the Petitioners applied to the High Court for leave, under O 53 r 3(2) of the High Court Rules to apply for judicial review of the DPP's decision of 10 December. The relief ultimately sought was by way of certiorari and declarations that the decision was "unreasonable taking into account all the circumstances of the case and as such illegal" and that the DPP had taken into account irrelevant considerations. The grounds for review relied upon in the High Court application were:

(a) That the decision by the 1st and 2nd Respondent to enter a nolle prosequi against the private prosecutions commenced by the applicant 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.

(b) That the 1st and 2nd Respondent had acted in breach of the rules of natural justice as it had made a pre-determination in arriving at its 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 s 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 reason.

As the Court of Appeal correctly pointed out, the only proper Respondent was the DPP. The petitioner had named the office director and the then current holder of the office as Respondents.

The application for leave to issue proceedings came before Fatiaki J (as he then was) and on 16 July 1998 he granted the application for leave to issue an application for judicial review. On 4 August 1998, his Honour gave leave to the DPP to appeal to the Court of Appeal against his judgment. That appeal was heard on 3 February 1999 and on 12 February 1999 the Court of Appeal allowed the appeal, set aside the leave to issue an application for judicial review and made no order as to costs.

From that judgment the Petitioners seek special leave to appeal to this court, their application having been filed on 26 March 1999.

The constitutional framework

The office of DPP was established by s 85 of the 1970 Constitution. Its establishment was continued by s 96 of the 1990 Constitution and s 114 of the 1997 Constitution. The particular appointment to that office prior to the 1997 Constitution was continued, as were other appointments to public offices, by s 195 of the 1997 Constitution.

The 1997 Constitution came into effect on 27 July 1998 — s 193(2). At the time that Fatiaki J made his decision the 1990 Constitution was still in force. The decision of the Court of Appeal was made at a time when the 1997 Constitution had come into operation. That Constitution, with exceptions which are immaterial for present purposes, continued in force all written laws in the State of Fiji "as if enacted or made under or pursuant to this Constitution", and "all other law in the State continues in operation" (s 195(2)(e)). The courts established by the 1990 Constitution continued in existence but the Fiji Court of Appeal was redesignated as "the Court of Appeal" (s 195(2)(g)).

It was provided in s 195(1)(h) of the 1997 Constitution that:

> (a) all proceedings in the courts established by the Constitution of 1990 that had commenced before that repeal but had not been determined continue, on and after that repeal, as if the provisions of this Constitution were in force at their commencement.'

The judgment of Fatiaki J was given on 16 July 1998, some 11 days before the coming into operation of the 1997 Constitution. He gave leave to appeal to the Court of Appeal on 4 August 1998 after it came into operation.

The substantive law governing the powers of the DPP and their amenability to judicial review is to be found, in part, in the Constitution. A question arises, which was the substantive law to be applied by the Court of Appeal and by this court having regard to the provisions of s 195(2)(h) of the 1997 Constitution? Whether that question is useful depends upon whether there was any material difference between the powers of the DPP as set out in the 1990 Constitution and the position as it exists now.

The relevant provision of the 1990 Constitution was s 96 which provided that there shall be a Director of Public Prosecutions whose office shall be a public office (s 96(1)). The power to appoint a DPP was vested in the Judicial and Legal Services Commission (s 96(2)). The appointee had to be a person qualified for appointment as a Judge of the High Court (s 96(3)). The primary powers of the DPP were set out in s 96(4):

> 96(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—
>
> (a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law)
>
> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.'

His independence of "any other person or authority" was entrenched in s 96(6) and (7):

> 96(6) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (4) of this section shall be vested in him to the exclusion of any other person or authority:

> "Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court."

> 96(7) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

The powers of the DPP conferred by s 96(4) were generally applicable to the appellate process by operation of s 96(8). The independence of the DPP, for which s 96(6) and (7) of the 1990 Constitution provided, was tempered by the preservation of existing accountability under the rule of law applicable to all such independent holders of public office. This was the effect of s 158:

> 58 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 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.

Under the 1997 Constitution the DPP is provided for in s 114. The office established by the 1990 Constitution "continues in existence" (s 114(1)). Qualification for judicial appointment remains a prerequisite for appointment as DPP (s 114(2)). Appointment is now made by the Constitutional Offices Commission following consultation with the Attorney-General (s 114(3)). The primary powers of the DPP are set out in s 114(4) with slightly more economical wording which does not appear to have altered their substance:

> 114(4) The Director of Public Prosecutions may:
>
> (a) institute and conduct criminal proceedings;
>
> (b) take over criminal proceedings that have been instituted by another person or authority; and
>
> (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority.

Like the 1990 Constitution, the 1997 Constitution entrenches the independence of the office of DPP through an omnibus provision in s 170(5) which applies to a number of office holders, including the DPP, who are listed in s 169 (see s 169(d)). The language of s 170(5) is more concise than that of s 96(4) and (7) in the 1990 Constitution. It provides:

> (5) In the performance of his or her duties or functions or the exercise of his or her powers, a person to whom this Part applies is not subject to direction or control by any person or authority.

In common with the holders of certain other constitutional offices, the tenure of the DPP during his or her term of appointment is protected. The DPP is appointed for 5 years (s 170(1)) and may be removed only for inability to perform the functions of his or her office or for misbehaviour (s 170(2)).

The accountability of the DPP under the rule of law is maintained in common with that of other constitutionally independent officers by s 194(10) which is in the following terms:

> A provision of this Constitution to the effect that a person or authority is not subject to the direction or control of any other person or authority in the performance of functions or the exercise of powers is not to be construed as precluding a court of law from exercising jurisdiction in relation to a question whether the first mentioned person or authority has performed the functions or exercised the powers in accordance with this Constitution or whether that person or authority should or should not perform the functions or exercise the powers.

Section 156(2) establishes a Constitutional Code of Conduct for public office holders. The justiciability of that Code was not in issue before the court on this application.

The application was conducted upon the basis that it falls to be decided by reference to the powers of the DPP under the 1990 Constitution. And it may be that s 195(2)(h) of the 1997 Constitution can be construed as providing for the continuance of proceedings rather than the retrospective alteration of the substantive law of the Constitution to the extent that it affects the rights and liabilities in issue. It is, however, unnecessary to determine that matter for present purposes as it was not put in issue before us.

Statutory framework — The statutory powers of the DPP

Section 71 of the Criminal Procedure Code provides in subs (1):

> In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

Subsection (2) is not material for present purposes. Having regard to the primary power of the DPP, conferred by the Constitution, to discontinue criminal proceedings, the provisions of the Criminal Procedure Code may be seen as ancillary to its exercise. It is not disputed that the power to discontinue encompasses the entry of a nolle prosequi.

Also of importance is s 78 of the Criminal Procedure Code, which provides for the laying of a complaint of the commission of an offence "by any person" and so encompasses the initiation of private prosecutions. This is, however, subject to the constitutional power of the DPP to take over and discontinue such a prosecution. In that sense the DPP is empowered to regulate access to the criminal justice process.

Statutory framework — The Supreme Court

The present petition is a petition for special leave to appeal. Section 7(2) and (3) of the Supreme Court Act 1998 set out the criteria for granting, special leave thus:

> 7 (2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless—
>
> (a) a question of general legal importance is involved;
>
> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
>
> (c) substantial and grave injustice may otherwise occur.

(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises—
(a) a far-reaching question of law;
(b) a matter of great general or public importance;
(c) a matter that is otherwise of substantial general interest to the administration of civil justice.'

Statutory framework — The High Court Rules

At the time that Fatiaki J made his decision granting leave to proceed to issue judicial proceedings the applicable rule, O 53, provided in the relevant parts:

3 (1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.
(5) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

The rule was amended in December 1998 but the amendment has no relevance to this case.

Statutory framework — The Penal Code

Each of the complaints laid by the Petitioners alleged the commission of offences under s 117 of the Penal Code (Cap 17). That section provides:

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.
117(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.
117(3) Where a statement made for the purpose of a judicial 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.
117(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.

Subsection (2) was inserted by Ordinance No 12 of 1969 and the former subss (2) and (3) renumbered as subss (3) and (4).

The term judicial proceeding is defined in s 4 of the Penal Code thus:

"[J]udicial proceeding" includes any proceeding had or taken in or before any court, tribunal, commission of inquiry, or person, in which evidence may be taken on oath.

The term "judicial proceedings" is similarly defined in s 2 of the interpretation Act 1967 (Cap 7).

Statutory framework — The Legal Practitioners Act 1965 (Cap 254)

Section 31 of the Legal Practitioners Act 1965 (Cap 254) made provision for the appointment of Commissioners of Oaths and was referred to by counsel for the Petitioners:

31(1) The Chief Justice may appoint … such and so many barristers and solicitors and other persons … to be Commissioners for taking affidavits and declarations and receiving production of documents … which may be

necessary to be taken in respect of any proceedings in any court, and any order of a court for the attendance and examination of witnesses … before any such Commissioners within the jurisdiction of the Court shall be enforced in the same manner as an order to attend or be examined … before the Court.

31(2) No action shall be brought against any Commissioner in respect of any act or order performed or made by him in good faith in the execution or supposed execution of the powers or jurisdiction vested in him, but every such act or order, if in excess of such powers and jurisdiction, shall be liable to be revised, altered, amended or set aside upon application to the Court.

31(3) The signature of a person when placed on a document in the exercise by that person of the powers of a Commissioner under this section shall be followed by the description "Commissioner for Oaths."

The section in these terms was reproduced as s 115 in the Legal Practitioners Act 1997 which repealed the 1965 Act.

The judgment at First Instance

In the High Court, Fatiaki J identified as two issues for determination:

1. Whether the Petitioners had satisfied the requirements for the grant of leave.
2. Whether the DPP's decision was reviewable.

His Lordship referred to O 53 r 3 and the necessary condition that the court considers the applicant "has a sufficient interest in the matter to which the application relates". The Petitioners' private prosecutions having been taken over and terminated by the DPP, he considered that they had a sufficient interest in the matter. So much was apparently conceded by the DPP. The DPP, however, contended that the decision to take over the prosecutions and to enter a nolle prosequi was not reviewable by the court.

His Lordship referred to the powers of the DPP under s 96 of the 1990 Constitution. He accepted that the power to initiate criminal proceedings was not exclusive to the DPP and referred both to the language of the Constitution and the long-standing common law right to institute private prosecutions — *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 79–80 per Lord Wilberforce. The power to enter a nolle prosequi was referred to and s 71 of the Criminal Procedure Code was cited.

The constitutional guarantee of the independence of the DPP from the direction or control of any other person or authority set out in s 96(7) of the 1990 Constitution was considered as counsel for the DPP relied upon it in support of the proposition that the decision of the DPP to enter a nolle prosequi was not reviewable by a court of law. Fatiaki J, however, accepted that the section did not bar the jurisdiction of the court to determine the lawfulness of the exercise by the DPP of its powers under s 96. In this respect he referred to s 158 of the 1990 Constitution. He did not accept the limitation on judicial review for which the DPP contended, namely that the jurisdiction of the court left open by s 158 was to determine whether the DPP was exercising its power within constitutional limits. Nor did he accept the submission that outside that area of review the only remedy for abuse of power by the DPP lay in the removal of the holder of that position from his or her office pursuant to s 131 of the 1990 Constitution. An argument for routine discretionary rejection of judicial review was also not accepted as was a submission that the decision "being entirely administrative" was not to be amenable to judicial review. Fatiaki J did not set out what he considered to be the scope of judicial review in relation to decisions of the DPP.

The judgment of the Court of Appeal

The Court of Appeal observed that much of the argument before Fatiaki J related to the question whether the DPP's decision to enter a nolle prosequi could be the subject of judicial review. The court observed that Fatiaki J did not go on to consider whether there was an arguable case for judicial review warranting the grant of leave. In particular, the court said that Fatiaki J was not asked by counsel appearing for the DPP whether s 117 of the Penal Code could ever apply to false statements made in affidavits which had merely been attested in the normal way by a Commissioner of Oaths. The court said that:

> 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.

It was noted also that counsel for the DPP acknowledged in the Court of Appeal that the DPP could be subject to judicial review in most exceptional circumstances. The court added:

> That acknowledgement could well have been but was not made by her counsel before Fatiaki J.

The Court of Appeal then turned to the principles governing applications for leave to issue judicial review proceedings. It accepted as applicable the proposition which it had set out in *Fiji Airline Pilots' Association v Permanent Secretary for Labour and Industrial Relations* (Civ App, ABU 0059/1997S, 27 February 1998, unreported) and which it quoted in its judgment in this case. There it was said:

> 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 for relief.

There was some further reference to the desirability of dispensing with the leave requirement which need not detain this court.

The Court of Appeal then considered whether the DPP's decision was reviewable. It referred to the constitutional and statutory framework of the powers of the DPP which have been set out earlier in these reasons. It also referred to an observation in a joint judgment of Gaudron and Gummow J in *Maxwell v R* [1996] 1 LRC 299 that it should be accepted that certain decisions involved in the prosecution process are of their nature insusceptible of judicial review including the decision to enter a nolle prosequi (at 329–330). The court, however, considered that in Fiji the DPP must be answerable to judicial review because of the constitutional provision in s 158. The court then referred to a number of authorities including that of the Alberta Court of Appeal in *Kostach v Attorney-General of Alberta* (1995) 128 DLR (4th) 440 at 451 in which it was said:

> The test for review of prosecutorial discretion remains that of flagrant impropriety and it is not unreasonableness …

The court mentioned the English Court of Appeal decision in *Raymond v Attorney-General* [1982] 12 All ER 487 at 491 where it was said of the DPP:

> Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned.

The court without expounding its own statement of principles concluded that:

> the law in Fiji is best expressed in the various authorities which we have cited with approval.

The court added:

> We proceed later to examine whether there was enough evidence even at the leave stage to show an arguable case of "flagrant impropriety" on the part of the DPP— a handy description of the rare occasions when the DPP's decision is reviewable.

The Court of Appeal then considered the operation of s 117 of the Penal Code, the breach of which was said by the Petitioners to constitute the offences of which they complained. The court did not accept that resolution of the question whether any prosecution reliant on that section was doomed to failure should await a full hearing:

> If there is to be a "technical knockout"; it is far cheaper and less traumatic for all concerned that it be delivered sooner rather than later.

The court cited decisions covering the operation of the section by Mills-Owens CJ, in what was the Supreme Court of Fiji and is now the High Court of Fiji, in *Lal v R* [1967] 13 FLR 1 and *Attorney-General v Mariappan Gounder* [1967] 13 FLR 123 decided in 1967. In each case the accused was said to have made a false statement in an affidavit filed in judicial proceedings and sworn before a Commissioner of Oaths in the normal way. In each case it was held that the accused could not be convicted.

The reasoning of Mills-Owens CJ was reflected in a passage from the Lal case set out in the judgment of the Court of Appeal. It may be noted that s 117 did not then include what is now s 117(2). The reasoning was to the effect that s 117(3) merely extends the operation of s 117(1) and does not create a substantive offence. The object of s 117(3) is to extend the provisions of subs (1) to a statement made by a witness for the purpose of a judicial proceeding before a person other than the tribunal itself. Evidence taken on commission would fall within the scope of s 117(3). A Commissioner of Oaths is not a person authorised to "record or authenticate" statements within the meaning of the subsection. Nor can the deponent to an affidavit be said to be "lawfully sworn as a witness".

The Court of Appeal found it quite impossible to fault the reasoning of Mills-Owens CJ in decisions "which have stood unchallenged in this country for over thirty years". The court acknowledged the consequences of this reasoning that "a person cannot be prosecuted for making a blatantly false statement in an affidavit sworn in the normal way". It described that situation as "anomalous" but said it had been the law in Fiji since 1967. The court recommended urgent consideration be given to legislative change to rectify this gap in the law. The DPP referred in the Court of Appeal to s 120 of the Penal Code, which creates the offence of perverting the course of justice, but the availability of that provision was not relevant to the coverage of s 117. The court concluded that there was therefore "an impassable roadblock" in the way of the private prosecutions commenced by the applicants. This was a sufficient basis to allow the appeal.

The Court of Appeal went on to consider whether, s 117 apart, there was a sufficient arguable case for leave to commence judicial review proceedings. There was, it found, no evidence of "flagrant impropriety" on the part of the DPP. The first applicant's affidavit exhibited letters which were "replete with assertion and suspicion but short on hard fact". The reasons given in the letter of 10 December from the DPP's office were "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.

The court said that the DPP saw the 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 Court of Appeal said:

> 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 power.

So the court held that not only were the prosecutions doomed to failure because of the proper construction of s 117, but none of the limited bases upon which the decision of the DPP could be challenged had been shown to exist in arguable form.

The grounds of the petition

It is unnecessary to set out in full the grounds of the petition. They do not in terms address the criteria under s 7 of the Supreme Court Act 1998 for special leave. The questions to which they give rise are as follows:

(1) What is the function of the judges of the High Court in determining whether leave should be granted under O 53 to issue judicial review proceedings and the function of the Court of Appeal on appeal therefrom (grounds 2(iii), (iv), (v) and (vi)).

(2) Whether, and to what extent, the decision of the DPP to enter a nolle prosequi is susceptible to judicial review (ground 2(vii)).

(3) Whether s 117 of the Penal Code applies to the swearing of an affidavit before a Commissioner of Oaths (grounds 2(i) and (ii)).

A further ground which asserts that the judges who sat on the Court of Appeal should have disqualified themselves as they made the consent order of 6 February 1997 has no merit and was not pressed.

Whether special leave to appeal should be granted

The court was satisfied at the hearing of the petition that special leave to appeal should be granted. It so ordered and argument proceeded on the substantive appeal. The Petitioners are hereinafter referred to as the Appellants.

The petition for special leave arose out of a proceeding in which the Appellants sought judicial review of the DPP's decision to enter a nolle prosequi on a private prosecution for a criminal offence. There is a question whether it is a "criminal matter" or a "civil matter" for the purposes of s 7 of the Supreme Court Act 1998. In our opinion the better view is that the matter, involving review in civil proceedings of the exercise of the powers of a public officer, is best regarded as a civil matter. The threshold for the grant of special leave in criminal matters is lower than in civil matters because the liberty of the subject may be in issue. It is undesirable to encourage fragmentation of the criminal process by placing civil proceedings for judicial review of decisions made in connection with that process on the same footing. The court therefore applied to this petition for special leave the criteria applicable to civil matters under s 7(3).

The grant of special leave was warranted. The operation of O 53 and the criteria for the grant of leave to issue judicial review proceedings are matters of substantial general interest to the administration of civil justice. The availability

of judicial review in connection with the prosecutorial discretion of the DPP and its interaction with the leave requirement under O 53 is similarly a matter of substantial general interest in the administration of civil justice. It may also be seen as a matter of great general or public importance having regard to its potential for impinging on the operation of the criminal justice system.

The somewhat narrower question relating to the construction of s 117 and its application to the swearing of false affidavits is also of substantial general interest to the administration of the civil justice system. The swearing of affidavits by parties and witnesses in judicial proceedings is an indispensable incident of the civil justice system. As the Court of Appeal acknowledged, the construction of s 117 which it accepted left a gap in the law which required urgent attention. The question raised by the construction of s 117 is also properly characterised as "a matter of great general or public importance".

The court has considered the application of the criteria for the grant of special leave in this case with some particularity. Petitioners for special leave should ensure that when they frame their petitions, they do so with care. The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant would undermine the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principle or, in the criminal jurisdiction, "substantial and grave injustice".

Leave to issue judicial review proceedings

Order 53 of the High Court Rules reflects the provisions of the former O 53 of the English Rules of the Supreme Court which was repealed in 2000 and replaced with what is now called Pt 54: Judicial Review. That rule still provides for a leave requirement for the issue of judicial review proceedings although it now uses the term "permission" instead of "leave". It is unnecessary to set out the full text of O 53 here. It provides for an application for leave to be made ex parte, although it may be heard inter partes, and to be supported by an affidavit verifying the facts relied upon (O 53 r 3(2)). The structure of the rule requires that the party seeking leave to issue judicial review proceedings demonstrate that that party has a sufficient interest in the matter to which the application relates. This is a standing requirement. It is a necessary condition for the grant of leave. It is not a sufficient condition. The judge to whom the application is made must then exercise a discretion whether or not to grant the leave. The grant of leave is not an automatic consequence of the applicant's satisfaction of the sufficient interest requirement.

The discretion to grant leave is not to be limited by the formulation of unduly prescriptive rules about how it is to be exercised. Its purpose is the same as that of Pt 54 of the English Rules, described in the Supreme Court Practice 2002 p 1158, as:

> to eliminate at an early stage claims which are hopeless, frivolous or a vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is a case fit for consideration.

This reflects the stated purpose of O 53 of the Rules of the Supreme Court in its earlier form which was closer to the form of O 53 of the High Court Rules — see Supreme Court Practice 1991 p 823. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 105, Lord Diplock described the purpose of the former O 53 as designed to—

> prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

Counsel for the Appellants submitted, in effect, that the grant of leave was not the occasion for the resolution of important questions of law involved in the application. There is much merit in that contention. The resolution of an important question of law which may lie at the threshold of an application for judicial review is best dealt with in the judicial review proceedings. Where convenient to do so, the court may hear and determine questions of law or fact as separate or preliminary questions — O 33 r 3. Where the decision of the court on a separate question substantially disposes of the cause or matter, the whole proceeding may be dismissed.

The leave proceedings in this case were conducted inter partes before Fatiaki J who heard substantial argument on the question of the reviewability of the DPP's decision to enter a nolle prosequi. That is not to criticise the procedure followed at first instance. The question of the reviewability of the DPP's decision was closely connected to the question whether leave should be granted.

In the Court of Appeal, the focus was upon the construction of s 117 as a threshold legal question. The court justified its decision to determine the proper construction of s 117 upon the basis that "if there is to be a "technical knock-out"; it is far cheaper and less traumatic for all concerned that it be delivered sooner rather than later". To the extent that this statement would justify the resolution of important questions of law on applications for leave under O 53, we have some reservations about it. If there is a "technical knock-out" it may, according to the circumstances of the particular case, be better resolved by the separate hearing and determination process under O 33 and even then only where there is some real saving of time and resources to be effected.

The fact that the Court of Appeal heard and determined the s 117 issue was in part a product of the particular circumstances of this case. The proposed proceedings would have impinged upon a decision of the DPP of such a kind that, for powerful considerations of law and public policy discussed below, judicial review is not lightly entertained. The DPP having terminated the prosecution in part on the basis that there was no liability under s 117, there was no other forum to test that view which of itself, as we have observed, raises a matter of general importance. The court acknowledges the very special circumstances which brought about the course of decision-making in this case but would wish to emphasise that it should not be taken as a model for the way in which most applications for leave under O 53 or appeals from decisions made under that rule should be conducted.

The judge granting leave to issue judicial review proceedings has a discretion once a sufficient interest is shown by the applicant. That discretion must be informed by the evident purpose of O 53. It is not an occasion for a trial of issues in the proposed proceedings. That having been said, the judge considering the grant of leave is entitled to have regard to a variety of factors relevant to the purpose of the rule. These include:

(1) Whether the proposed application is frivolous or vexatious or an abuse of the process of the court.

(2) Whether the application discloses arguable grounds for review based upon facts supported by affidavit.

(3) Whether the application would serve any useful purpose, eg whether the question has become moot.
(4) Whether there is an obvious alternative remedy such as administrative review or appeal on the merits which has not been exhausted by the applicant.
(5) Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review.

The question whether there are arguable grounds for review is not to be determined by the resolution of contestable issues of law. But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted. The submission was made on behalf of the Appellants that leave to issue judicial review proceedings should be granted wherever a "potentially arguable case" is disclosed. We do not understand the full significance of the term "potentially arguable". It cannot be used to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen.

There are cases in which a restrictive approach to the grant of leave may be warranted because of the limited grounds upon which review is available in such cases and public policy considerations which should constrain the incidence of such review. This is particularly applicable to decisions made by prosecuting authorities in the administration of the criminal justice system. The decision to prosecute or not prosecute a particular case is likely to be affected by a wide variety of considerations. Other decisions of a governmental character may fall into the same category where they involve questions of policy, the allocation of resources and the determination of priorities for government action including the delivery of services. That is not to say that such decisions are immune from review where they are made unlawfully or in excess of power. It does say that an application for leave to seek judicial review of such decisions may require close scrutiny by a judge before leave is given.

The reviewability of the DPP's decision

Although it had been contended before Fatiaki J that a decision of the DPP to enter a nolle prosequi is not amenable to judicial review upon any ground whatsoever, that contention was not maintained before the Court of Appeal or before this court.

The Court of Appeal, as was observed earlier, referred to a number of authorities which, it said, best expressed the law in Fiji. It did not essay its own summary of the principles upon which it thought review would be available beyond the observation that "flagrant impropriety" was "a handy description of the rare occasions when the DPP's decision is reviewable". That term had the support of the Alberta Court of Appeal in *Kostuch v Attorney-General of Alberta* (1995) 128 DLR (4th) 440 at 450 where it was said:

> Assuming that the Court has the power to review prosecutorial discretion, that power will be exercised only in cases where there has been flagrant impropriety in the exercise of prosecutorial discretion.

The term appears to have originated in the judgment of the Manitoba Court of Appeal in *R v Baldeistone* (1983) 8 CCC (3d) 532 at 539. Examples of what might constitute flagrant impropriety were suggested in a decision of the Quebec Court of Appeal in *Quebec (Attorney-General) v Chartrand* (1987) 40 CCC (3d) 270 at 271. These included breach of the law, abuse of power

through corruption in favour of the accused or prejudice against the victim or the law creating the offence. Obvious unreasonableness in the decision was also suggested as amounting to such impropriety.

The last mentioned example, however, was doubted by the Alberta Court of Appeal (*Kostuch v Attorney-General of Alberta* (1995) 128 DLR (4th) 440 at 451).

"Flagrant impropriety" was clearly designed to indicate that courts in Canada should set a high threshold before entertaining applications for the judicial review of prosecutorial discretion. The underlying policy primarily related to separation of powers considerations. This was the expressed basis of the reasoning in *R v Balderstone* cited in Kostuch. It was also the basis upon which the Supreme Court of Canada in *Krieger v Law Society of Alberta* [2003] 3 LRC 249 at [49] itself adopted the flagrant impropriety test saying:

> Within the core of prosecutorial discretion, the court cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution."

In arriving at that conclusion the justices cited with approval the observation of L'Heureux-Dube J in *R v Power* [1994] 1 SCR 601 at 621–623:

> It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law.

The term "flagrant impropriety" seems to have acquired the status of a term of art in this area of Canadian public law. We have reservations about its utility as descriptive of more than a visceral response to official misconduct which may vary according to the sensibilities of the judge who is asked to accept its application to a particular case.

The court was helpfully referred, by counsel for the DPP, to a large number of cases in a variety of jurisdictions including New Zealand, Australia, the United Kingdom, Canada, Northern Ireland, the United States, Hong Kong, Samoa, Guyana, Barbados and the European Court of Human Rights. Apart from an obiter statement by Gaudron and Gummow JJ in *Maxwell v R* [1996] 1 LRC 299 at 329–330, there is now little or no support for the proposition that such decisions are completely beyond the reach of judicial review albeit the occasions on which it may successfully be invoked are likely to be rare because of the width of the power and the mix of factors that may legitimately be taken into account in its exercise. This proposition is well reflected in a passage from the judgment of Powell J in *Wayte v United States* [1985] USSC 60; (1985) 470 US 598 at 607–8 cited by counsel for the Respondent:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may e undermine prosecutorial effectiveness by revealing the government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

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

(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 a 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 — for example one that precludes prosecution of a specific class of offences.

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

A mistaken view of the law upon which a proposed prosecution is based will not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced. Where a complaint is particularised in such a way as to raise the question of law for determination it may be struck out or where an indictment does the same, the indictment may be quashed. Such an error of law does not fall within the category of an error of law which goes to the DPP's powers to prosecute.

Where the DPP decides to discontinue a prosecution on the basis of a mistaken view of the law then, by definition, there is no court proceeding within which that view can be tested and it may be a stronger case for review can be made. In *R v DPP; Ex parte Kebeline* [2000] 3 LRC 377 at 420, Lord Steyn stated, as a general principle, that in the case of a decision not to prosecute, judicial review is available. His Lordship cited *R v DPP; Ex parte C* [1995] 1 Crim App R 136 observing that "in such a case there is no other remedy". That, however, was a case in which the Crown prosecutor, acting on behalf of the DPP in making the decision not to prosecute, had failed to comply with the settled policy of the DPP set out in a Code for Crown Prosecutors issued by the DPP pursuant to s 10 of the Prosecution of Offences Act 1985. It was nevertheless accepted by the Divisional Court in that case that the power to review a decision of the DPP not to prosecute was to be sparingly exercised.

Again, an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the DPP's power or vitiates the proper exercise of the DPP's discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is empowered to make such judgments even though they may be wrong on the law or mistaken on the facts.

In the present case the DPP based her decision in part upon a construction of s 117 of the Penal Code which has been settled in Fiji for over thirty years. The Court of Appeal upheld it. As it happens, and for reasons which we express below, we consider that construction to be erroneous and that s 117 does apply to the false swearing of affidavits. There was, however, no credible basis for suggesting that in coming to that view the DPP acted other than in good faith. The decision could not have been reviewable on that ground. There was no other viable ground for review advanced by the Appellants in their application before Fatiaki J and it would have been quite proper in the circumstances to refuse leave. In this case there were additional reasons for the DPP's decision to discontinue the prosecution. These, as set out in the letter of 10 December 1997, were based upon factual aspects of the allegations made. They included the character of the statements in the affidavits which were said to be false, their prior examination by the Native Lands Commission of Inquiry and the involvement of the civil courts. It is nothing to the point that the Native Lands Commission decision was subsequently quashed. It was a factor which the DPP was entitled to take into account at the time the decision to discontinue the prosecutions was made.

For these reasons there was a proper basis for refusing leave to seek judicial review. The Court of Appeal took the view that leave should have been refused, albeit it did so in reliance upon an erroneous construction of s 117. In our opinion the fact that the DPP's view and that of the court on the point was wrong does not give rise to a ground which would have justified the grant of leave to seek judicial review in the first place.

Counsel for the Appellants complained that by being refused leave to proceed they were deprived of the opportunity, through discovery and interrogatories, of examining the full context of, and reasons behind, the DPP's decision. But the interlocutory processes of the court are not to be used to determine whether an applicant has a case. There must be grounds for suspecting that the DPP has acted in a way that attracts judicial review before the powers of the court can be called in aid.

For these reasons the appeal will be dismissed. It will be apparent, however, that the appeal would have been dismissed whatever views this court had taken of s 117 so that strictly speaking it is not necessary to address the question of its construction. But, as it has been argued before us and raises a question of considerable importance to the administration of justice generally in Fiji, we propose to state our view about it.

Section 117 of the Penal Code

The terms of s 117 have been set out earlier in these reasons. It is perhaps not surprising that the submissions made on behalf of the DPP in support of the judgment of the Court of Appeal on this issue were not particularly elaborate and did not evince great enthusiasm for the construction which has been so long held in Fiji. In our view, and with the greatest of respect to the long-standing decision of Mills-Owens CJ, those decisions are in error and the error should not be allowed to stand.

It is quite correct to say, as was said in the case of *La1 v R* [1967] 13 FLR 1, that what is now s 117(3) extends, by its interpretive operation, the scope of s 117(1). Mills-Owens CJ saw its operation as thereby extended to a statement made by a witness for the purpose of a judicial proceeding before some person other than the Tribunal itself. He cited the case of evidence taken out of court on commission before a commissioner or an examiner. He distinguished their position from that of a Commissioner of Oaths taking an affidavit on the basis that the Commissioner of Oaths is not a person authorised to record or authenticate the statements taken.

We were not referred to any statutory provision regulating the form of affidavits or the manner in which they are to be taken before a Commissioner of Oaths. The Legal Practitioners Act provisions provide little assistance on this point. The Oaths Act contains no relevant section. There is, however, a rule of court, O 41 of the High Court Rules, which makes plain the duty of a Commissioner of Oaths to be satisfied that a deponent understands the contents of an affidavit. So O 41 r 3(1) provides:

> Where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that—
>
> (a) the affidavit was read in his presence to the deponent,
>
> (b) the deponent seemed perfectly to understand it, and
>
> (c) the deponent made his signature or mark in his presence;
>
> and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.
>
> (2) Where it appears to the person administering the oath that the deponent does not understand the English language he must certify in the jurat that:
>
> (a) the affidavit was read, explained and interpreted, either by himself or through the medium of a sworn and named interpreter in his presence, to the deponent in a specified language with which the deponent was familiar,
>
> (b) the deponent seemed perfectly to understand it, and
>
> (c) the deponent made his signature or mark in his presence;
>
> and the affidavit shall not be used in evidence without such a certificate.

The necessary independence of the Commissioner of Oaths is emphasised in O 41 r 8 which provides:

> No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner, or clerk of that barrister and solicitor.

It is useful in this connection to recall the observation of Kay J in *Bourke v Davis* (1889) 44 Ch D 110 at 126:

> The commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to I swear to; and he should not be satisfied on this point by anyone but the witness himself. For this reason it has been the rule since the time of Lord Hardwicke that the Court does not accept an affidavit sworn before the solicitor in the cause, nor his clerk, although he may be a commissioner… The Court requires the security of an independent commissioner, and it is obvious that he ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit. Where, as in this case, many of the witnesses are in a humble position of life, I do not see how the commissioner can be satisfied without having the affidavits read over in his presence. If an educated man says to him, "I have read over this affidavit, to the truth of which I am going to swear, and all the statements in it are accurate", that may in some cases be sufficient.

Against this background it may properly be said that a Commissioner of Oaths before whom an affidavit is sworn authenticates the statements made in it within the meaning of s 117. So much being accepted, all the other elements of s 117 are satisfied where a person swears an affidavit for the purpose of use as evidence in a judicial processing. There is no relevant distinction to be drawn between a party who swears an affidavit of his or her evidence or any other witness in the proposed proceedings.

In our view the provisions of s 117 extend at least to affidavits of evidence sworn for use in judicial proceedings whether or not the affidavits are ultimately relied upon. The question whether affidavits of discovery and answers to interrogatories fall into that category, can await another day.

For these reasons, we are of the view that the Court of Appeal and Mills-Owens CJ were incorrect in their construction of s 117 as not applicable to the swearing of affidavits. So saying, we consider it desirable that the statute law be clear and respectfully suggest that some express provision be made for the false swearing of affidavits.

Conclusion

For the reasons expressed earlier, the appeal will be dismissed. In our opinion, however, having regard to the way in which the issues have fallen out, there should be no order for costs.

Appeal dismissed.