In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2025: No. 3

BETWEEN:

JEROME ASTWOOD, POLICE SGT

Appellant

-v-

SB

Respondent

JUDGMENT

Date of Hearing: **4th April 2025**
Date of Decision: **17th April 2025**
Date of Judgment: **24th April 2025**

Appearances: **Mr Adley Duncan, Senior Crown Counsel, for the Appellant**
Ms Nicole Smith, Legal Aid Counsel, for the Respondent

Reporting Restriction

The Respondent stands charged with a "sexual offence" within the meaning of section 329C(10) of the Criminal Code; specifically an offence under Part X. Pursuant to section 329C(6), therefore, "no matter likely to lead members of the public to identify him as the person against whom the accusation has been made shall be published in a written publication available to the public, or be broadcast" at this time. This judgment has been anonymised accordingly.

JUDGMENT of Richards J

Introduction

1. The facts of the offence alleged in these proceedings are almost entirely irrelevant to the issue before me. All I need say about them is that the Information (23CR00123) contains a single charge, contrary to section 199(2) of the Criminal Code. This offence is commonly called Intrusion.

2. That matter was tried before a Learned Magistrate, the Worshipful Mr C. Craig S. Attridge on 5th and 19th September 2024 ("the Magistrate"). Following further argument on 16th December 2024, the Magistrate issued a detailed written Ruling dated 31st January 2025. He concluded that *"...these proceedings should never have been instituted. Instituted as they were without the consent of the Director. They are a nullity – or invalid should nullity offend – and on that basis the Court has no choice but to discharge the Defendant"*.

3. There is before me an appeal against that decision, brought pursuant to section 4(1)(a) of the Criminal Appeal Act 1952 ("**CAA**").

4. As announced in court on 17th April 2025, I have decided to allow the appeal, set aside the Magistrate's decision and remit the matter to him with a direction to proceed to judgment on the charge of Intrusion (a disposal permitted by section 19(2) of the CAA). I provided brief oral reasons for my decision at that time and now explain more fully in writing.

The Supreme Court's Appellate Jurisdiction

5. This first issue is, I must recognise, substantially if not entirely, of my own devising. Nevertheless, I consider that I must resolve whether the Magistrate's decision is one that is properly susceptible to this Court's appellate review at the instance of the Informant pursuant to section 4(1)(a) of the Criminal Appeal Act 1952. Section 4 provides as follows:

> **"Point of law; appeal by informant**
>
> 4 (1) A person who was the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction shall have a right of appeal to the Supreme Court, in the manner provided by this Act, upon a ground which involves a question of law alone—
>
> (a) where the information was dismissed, then against any decision in law which led the court of summary jurisdiction to dismiss the information;
>
> (b) in any other case, against any decision in law which led the court of summary jurisdiction, after convicting the defendant in those proceedings, to impose a particular sentence or to deal with him in a particular way.
>
> (2) For the purposes of this section, a decision of a court of summary jurisdiction in respect of a trial on an information—

(a) discharging an accused person on the grounds that there is no case to answer;
(b) staying proceedings as an abuse of process; and
(c) issuing a ruling which would otherwise have the effect of terminating the trial, shall be deemed to involve a question of law alone."

6. On 28th February 2025, I pointed out to Counsel then appearing on this matter (who were not those who subsequently argued the appeal) that since the Magistrate had not purported to "*dismiss*" the information, I would need to be addressed on whether his determination was appealable under section 4(1)(a) and, if not, whether it could be reviewed in any other way (I had in mind the remedies available in this Court on an application for Judicial Review). It may be that this was not conveyed to Mr Duncan and Ms Smith because, when filing their subsequent written submissions, neither side sought to address the issue. Undeterred, I raised it again during oral argument. Improvising perhaps, Mr Duncan offered a number of responses and some others subsequently in writing.

7. One such response was that section 2 of the CAA affords a broad general route of appeal upon which the Informant could rely instead of section 4. I reject that argument. First, the former section clearly provides that this Court has an appellate jurisdiction over courts of summary jurisdiction that is *"subject to and in accordance with this Act"* (i.e. including section 4). Secondly and in contrast to the position with appeals under sections 3, 4, 4A, 5 or 6, no subsequent section of the Act makes detailed provision as to how an appeal under section 2 is to be heard or the Court's powers on determination of the same. Lastly, this argument is essentially analogous to an argument rejected by the Court of Appeal in *R v Durrant and Gardner* [2006] Bda LR 85 and *R v AH & AW* [2023] CA (Bda) 29 Crim. Speaking in terms of sections 16 and 17 of the Court of Appeal Act 1964 (equivalent, in my judgment, to sections 2 and 4 of the CAA), the Court of Appeal has clearly and on more than one occasion held that *"there is no section 16 right of appeal which is independent of restrictions imposed by section 17"*[1].

8. Mr Duncan also referred me to section 5 of the Criminal Jurisdiction and Procedure Act 2015 ("**CJPA**"). He says, in essence, that that section only permits a Magistrate hearing a summary trial to *"convict the accused person or dismiss the information"*. Since he clearly did not convict the Respondent (the argument runs), the Magistrate must be taken to have dismissed the information. It is true, as I observed in argument, that Magistrates may also stay proceedings as an abuse of process. Viewed through the lens of section 5, such a disposal must presumably also fall to be regarded as a dismissal of the Information (which may suggest a similar reading of section 4 of the CAA). However, I do not think section 5 can supply a complete answer to the jurisdictional question. It begins with the words *"on the summary trial of an information"* and I construe the Magistrate as having found that there was no valid information before him. If indeed there was not, there could not have been any valid summary trial either.

[1] per Sir Anthony Evans JA in *R v Durrant and Gardner* [2006] Bda L.R. 85 at para. 19.

9. Ms Smith has not contended that the Magistrate's decision is not appealable via section 4(1)(a) of the CAA. In her place I might have been tempted to argue otherwise, particularly if there is, as Mr Duncan suggested in argument, some impediment to the Director of Public Prosecutions ("**DPP**") instead seeking to invoke this Court's powers on an application for Judicial Review[2]. Ultimately, however, I have concluded that the Respondent's concession is properly made. First the words *"in any other case, against any decision in law which led the court of summary jurisdiction, after convicting the defendant..."* at the start of section 4(1)(b) clearly imply that, if the court of summary jurisdiction does not convict a defendant, it is to be regarded as having dismissed the information. Secondly, section 4(2)(b) clearly affords a right of appeal against a stay of proceedings as an abuse of process. Although such a disposal is not commonly termed a dismissal, this suggests (even more strongly than anything in section 5 of the CJPA does) that a stay falls within the meaning of *"dismissed"* in section 4(1)(a). Thirdly, it seems to me that section 4(2)(c) is apt to apply to the decision that the Magistrate made here (that is *"a ruling which would... have the effect of terminating the trial"*). Mr Duncan did not immediately seize on this provision when I asked him about it during oral argument, but his further written submissions do, in my view correctly, rely upon it.

10. Recapitulating part of what I said above about section 5 of the CJPA, it could again be said re section 4(2)(c) of the CAA that, since the Magistrate found there was no valid Information, he effectively found that there was no trial. Thus, his ruling did not so much terminate a trial as recognise that one had never actually started. However, if the Magistrate's decision was, in the view of this Court, wrong and the Information was valid, there was a trial and his ruling erroneously terminated it. It would further be bizarre if a magistrate could preclude appellate review of what was in effect a dismissal of an information simply by characterising it as something else. I do not suggest for one moment that this Magistrate had any such intention, not least because he expressly recognised that his decision could be appealed under the CAA (see paragraph 31 of his Ruling). Despite what some may regard as an unnecessarily scenic detour (at the instance of this Court), I conclude that he was right to apprehend that that was possible.

11. In my judgment, although the Magistrate never purported to *"dismiss"* the Information, his decision is to be regarded as a dismissal which may be appealed under section 4(1)(a) of the CAA.

The Substantive Appeal

12. Before embarking upon an analysis of the relevant case law and the parties' submissions, it is necessary to set out some of the relevant legislative provisions:

> Section 71(2) - (6) of the Constitution (read in accordance with section 71A and respecting the gender of the present DPP)

[2] And perhaps there is (see for example section 3 of the Crown Clauses Act 1951), but that question is not before me and I am not deciding it.

"(2) The DPP shall have power, in any case in which she considers it desirable so to do—

(a) to institute and undertake criminal proceedings against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

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

(3) The powers of the DPP under subsection (2) of this section may be exercised by her in person or by officers subordinate to her acting under and in accordance with her general or special instructions.

(4) The powers conferred upon the DPP by paragraphs (b) and (c) of subsection (2) of this section shall be vested in her to the exclusion of any other person:

Provided that, where any other person or authority has instituted criminal proceedings which have not been taken over and continued by the DPP under the said paragraph (b), nothing in this subsection shall, save when the DPP has exercised her powers under the said paragraph (b), prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(5) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court or to His Majesty in Council shall be deemed to be part of those proceedings.

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

Section 199(4) of the Criminal Code

"A prosecution shall not be instituted under this section without the consent of the Director of Public Prosecutions."

13. The Magistrate found that the DPP must give the consent apparently required by section 199(4) herself and that, on the evidence before him (or lack thereof), she had not done so. He further determined that, in those circumstances, the Information was to be regarded as a nullity or invalid.

14. More specifically, the Magistrate found that a Deputy Director of Public Prosecutions, Mr Carrington Mahoney (who was not Acting DPP at the time), could not give the requisite consent and so an endorsement on the Information signed by him was not sufficient. That endorsement was in these terms:

"I consent to the institution of this prosecution against the accused person named herein in respect of the charges set out.
Dated the 3rd day of May 2023
[Signature]
for the Director of Public Prosecutions"

15. This endorsement was actually on a copy of the Information in the possession of the prosecution and not the court, but I do not understand any issue to be taken there. The Respondent's argument is not that Mr Mahoney did not sign such a "fiat" when the Information was laid. Instead Ms Smith's challenge the legal sufficiency of any such endorsement signed by Mr Mahoney to meet the requirements of section 199(4).

16. Mr Duncan has sought to frame the issue in this appeal in the following way: *"it appears that the single narrow issue to be resolved is whether the DPP's consent to institute proceedings is delegable."* This is not a question that was directly confronted by any of the decisions of the local courts that were before the Magistrate. Neither the parties nor the Magistrate seem to have referred to the unreported ruling of Simmons J in *R v NM* (Indictment 27 of 2014) dated 24th December 2014 (perhaps because they were unaware of, did not recall or could not access it). Fortunately, a copy of it did come to my attention before the hearing of this appeal and was supplied to the parties. The other local decisions of relevance, to which the Magistrate was referred or did otherwise consider are *Whitter v DPP* (SC Appellate Jurisdiction 92 of 2001), *Philpott v Wolffe and Cooke* [2011] Bda LR 72 and *Miller v James* [2019] Bda LR 23. I shall refer to these four cases simply as *NM*, *Whitter*, *Philpott* and *James*.

17. At issue in *Whitter* was a certificate issued pursuant to section 452(2) of the Criminal Code (the precursor to section 80 of the CJPA which is in slightly different terms):

> "(1) A prosecution for a summary offence must, unless otherwise expressly provided, be begun within a period of six months after the offence is committed or within a period of three months of the date when facts sufficient in the opinion of the DPP to justify the institution of criminal proceedings first come to his notice, whichever period last expires:
>
> Provided that, and unless otherwise expressly provided, no prosecution for a summary offence shall be begun more than 12 months after the offence is committed.
>
> (2) A certificate purporting to be under the hand of the DPP and specifying the date upon which such facts first came to his notice shall be evidence that such facts first came to his notice upon such date."

18. According to the judgment, the certificate in *Whitter* read: *"I certify that acts (sic) sufficient, in my opinion, to justify the institution of criminal proceedings in this case came to my notice on the 1st November 2001."* It was signed by someone who was not then (and did not purport to be) the DPP, but Counsel subordinate to him. Ward CJ quashed the conviction because the police had previously issued a summons (that was not proceeded upon) within the summary time limit and:

> "In the absence of evidence to the contrary, no distinction can be drawn between facts which came to the knowledge of the Commissioner of Police and facts which came to the knowledge of the Director of Public Prosecutions."

19. In effect Ward CJ imputed the Commissioner's earlier knowledge of the offence to the DPP and consequently found that the proceedings were out of time. He further said as follows:

> "Counsel for the Appellant submitted that the Certificate pursuant to section 452(2) of the Criminal Code Act 1907 was not signed by the Director of Public Prosecutions and as such was invalid, as the Certificate was required to be signed by the Director of Public Prosecutions and by no one else, for the language of the section did not read signed by or on behalf of the Director.
>
> For many years similar Certificates have been signed by officers in the Chambers of the Attorney General and more recently in the Office of the Director of Public Prosecutions and the authority for same derives from section 71(3) of the Bermuda Constitution Order 1968…
>
> I would therefore conclude that the Director of Public Prosecutions is authorised to delegate his power to sign certificates pursuant to section 452 of the Criminal Code to subordinate officers in his department. However, where the fact of such delegation is challenged the onus of proof is on the Director of Public Prosecutions to establish that such delegation did in fact take place. The mere fact that a Crown Prosecutor signed the Certificate is not conclusive evidence that the delegation was in fact made to that particular officer. The Gazette Notice should have been produced as evidence of the delegation. This was not done."

20. With respect and although I agree with the result in *Whitter*, I am unable to accept the correctness of much of this reasoning. However, I am not the first to reconsider it. In *Philpott* Ground CJ said as follows:

> "12. There is, of course, much force in Ward CJ's reasoning. On the other hand, the statute seems strongly to imply the personal knowledge of the DPP, rather than some imputed knowledge, because the certificate referred to has to be under his hand, and that would be an odd thing to require if the knowledge of the police would suffice.

...

15. In my judgment the references in s 452 to the DPP are not caught by the general delegation effected by section 71 of the Constitution. Indeed, although the parties used the expression 'delegation' in argument, it is not really apt: subsection 71(3) automatically confers the powers in subsection 71(2) upon officers subordinate to the DPP "acting in accordance with his general or special instructions". It requires no separate delegation by him. On the other hand it is, in my view, to be strictly construed. It therefore extends only, to the powers listed in the subsection, they being the powers –

(a) to institute and undertake criminal proceedings;
(b) to take over so-called 'private prosecutions'; and
(c) to discontinue criminal proceedings.

16. I do not think, therefore, that section 71(3) of the Constitution is apt to apply to section 452(1), which does not itself confer any power. The extension of the six month time-limit effected by the DPP's knowledge occurs automatically by operation of the statute itself. It does not involve the exercise of any power by him. Moreover, even if there were doubt about that, I think the matter is clarified by section 452(2) when it refers to a certificate 'under the hand of' the DPP. I think that that expression strongly implies a personal act, rather than some action which can be performed by a subordinate."

21. The first two of these paragraphs were quoted with approval by Hargun CJ in *James* and the Magistrate referred to the third in his Ruling in this case. I agree with him (see paragraph 12 of the Ruling) that the reasoning in *Philpott* is to be preferred to that in *Whitter*.

22. Section 452 (and now section 80 of the CJPA) are concerned not merely with knowledge of facts, but knowledge of facts *sufficient to justify an opinion*. It is possible for a person to know that an offence has been committed some time before they know of facts sufficient to persuade them that a particular person should be charged with a particular offence. It is also not unknown for a police officer and a prosecutor to have very different opinions as to the sufficiency of the evidence in a case. The persons the Constitution says are generally charged with the responsibility for forming such opinions on behalf of the public are the DPP and her subordinates. To impute not just the knowledge, but the opinion of the Commissioner of Police to the DPP is unsustainable, in my view.

23. Further, as the Court of Appeal recognised in *Durham & Durham v The King* [2023] CA (Bda) 10 Civ (per Clarke P at paragraph. 26):

> "The Constitution does not permit, or even purport to permit the DPP to pursue cases to appeal otherwise than in accordance with the statutory

provisions. The same applies… to… the time limitation for proceedings in the Magistrates' Court laid down by section 80 of the CJPA."

24. This seems to me to reinforce what Ground CJ said at paragraph 16 of *Philpott*.

25. I would have decided *Whitter* the same way, but for the opposite reasons. Only the DPP's personal knowledge (and opinion) were relevant (and not the Commissioner's), but the Certificate did not even purport to assert when the DPP personally had such knowledge and had not been made under his hand. The information was therefore out of time.

26. However, I also find myself in (somewhat apprehensive) disagreement with part of Ground CJ's reasoning in *Philpott*. As Mr Duncan has pointed out, His Lordship did not refer to section 71(4) of the Constitution. This takes most of what sub-section (3) appears to give to the DPP's subordinates because it excludes them (and everyone else) from the power to take over and/or discontinue proceedings began by someone other than the DPP. Thus the list of 'delegated' powers in paragraph 15 of *Philpott* is wrong ((b) and (c) should be omitted). I agree however, that section 71(3) confers the powers mentioned in section 71(2)(a) upon the DPP's subordinates *"automatically"* and *"requires no separate delegation by [her]"*. I also agree that those powers should be strictly construed (indeed more strictly than *Philpott* itself recognises for the reason just identified).

27. In *NM,* although some of the charges were contrary to section 199(2), no writing asserting anyone's consent to the proceedings had been signed by anyone. The information instead bore a certificate pursuant to section 450(a) of the Criminal Code requiring the either way offences alleged to be tried upon indictment. This had been signed by Ms Smith, who was then Crown Counsel in the DPP's office.

28. Simmons J said as follows (at paragraph 10):

> "In my judgment the requirement for the DPP's personal signature under section 452 of the Criminal Code is to be distinguished from the signature required under section 450 of the Code. Section 450 concerns the power to require an offence that is triable either summarily or on indictment to be treated as an indictable offence. The power that is engaged is a function of instituting criminal proceedings, and as such falls squarely within section 71(2) of the Constitution. Consequently pursuant to section 71(3) the DPP's personal signature is not required and the certificate can be executed by his subordinate.
>
> I hold accordingly that the certificate appended to the information laid before the Senior Magistrate pursuant to section 450(a) indicating that the offences in this matter were fit for prosecution on indictment was properly signed by Crown Counsel Nicole Smith."

29. Later Her Ladyship continued (paragraph 15):

> "In my view section 199(4) of the Criminal Code must be read with section 71 subsections (2)(a) and (3) of the Constitution. When this is done, section 199(4) should be understood to mean that such a prosecution can only be instituted by the DPP or his subordinates. The DPP's consent would be relevant also if a person wishes to pursue a private prosecution under the section."

30. Simmons J then proceeded to quote from the English case of *Pearce* (1981) 72 Cr App R 295, but unfortunately she misquoted it slightly, but materially in my respectful view. The words *"Attorney General"* were changed to *"DPP"*. That would have been entirely appropriate if the quote had been from Bermuda legislation to which the Director of Public Prosecutions (Consequential Amendments) Act 1999 ("**DPPCAA**") applies. However, it does not assist the understanding and application of English case law in Bermuda. The English Court of Appeal said:

> "It is clear law since *Cain and Schollick* (1975 61 CAR 186) that if the Attorney General considers that the prosecutor should be at liberty to pursue any charge under a specified Act of Parliament which is justified by the evidence there is no constitutional objection to his giving consent in such general terms as were adopted in the present case."

31. It remains the position in England that some offences require the consent of the AG to prosecute, even though the DPP is the head of the Crown Prosecution Service. When the person who must consent to the proceedings is not the same person as the person who institutes them, the requirement for a separate instrument (or at least expression) of consent (however general) is obvious. I shall return to this point a little later.

32. Resuming at paragraph 20 of her Judgment Her Ladyship said as follows:

> "In my view the prohibition against prosecuting an offence contrary to section 199 of the Criminal Code unless the DPP's consent is first obtained should be construed as being obligatory. It ensures that adequate thought has been given to whether the facts are capable of supporting the charge. Further, that the consent given for a specified offence is not substituted at the indictment stage by another offence even if arising from the same facts. In this case, the consent was not endorsed on the information laid before the magistrate.
>
> I find therefore, that the requisite authority for the prosecution of the charges in count 2 and 3 did not and does not now exist. Accordingly the inclusion of counts 2 and 3 on the indictment amounts to a nullity."

33. Lastly I note that Defence Counsel in *NM*, Ms Elizabeth Christopher, is said at paragraph 12 of the Judgment to have asserted that *"consent was not granted by the DPP nor by one of his subordinates, the latter of which she accepts would have been permissible"*. This means

that the question whether *"the DPP's consent to institute proceedings is delegable"* (as Mr Duncan puts it) was not in issue between the parties in *NM*, as it is now.

34. I respectfully detect some tension within Simmons J's paragraph 15 and between it and her paragraph 20. I am unable to agree with the statement that a prosecution under section 199 *"may only be instituted by the DPP or his subordinates"*. Plainly, as the next sentence recognises, a private prosecution is possible, but it would require the DPP's consent. If Mr Duncan is correct, any of her subordinates can give that consent. That contention rests on section 71(2)(a) and (3) of the Constitution, but the word "consent" does not appear in section 71. The Constitution does not give the DPP the power to consent to prosecutions brought by others, but it does give her the power to take over and discontinued any prosecution of which she disapproves. And that power is conferred upon her alone (sub-section (4)). I am unable to agree with the Appellant, therefore, that when a statute says that proceedings may only be brought with the consent of the DPP, that a subordinate of the DPP may give that consent. The Constitution does not seem to me to compel such a reading.

35. That may seem as though it is or should be the end of the matter, but I respectfully disagree with how the Appellant has framed the issue in this appeal. To my mind the question is not whether the power to consent to proceedings is delegable. Instead the first question should be whether, when it is clear that it is the DPP who has instituted proceedings for an offence that may only be prosecuted with her consent, she must also separately signify that consent. In my judgment it would be absurd to require her to do so.

36. If section 199(4) of the Criminal Code purported to require the consent of the Minister of National Security, it seems clear to me that the Director would be fully able to institute such proceedings without any such consent. That has effectively already been decided in *Durham & Durham v The King* [2023] CA (Bda) 10 Civ, where it was held that even a statutory requirement for the Court's leave to bring certain proceedings could not withstand the autonomy conferred upon the DPP by section 71(6) of the Constitution. In those hypothetical circumstances a private prosecutor would still require the consent of the Minister, but the DPP would not. To hold otherwise would not only ignore section 71(6), but also the fact that the DPP possesses the Constitutional authority to *"institute and undertake criminal proceedings against <u>any person</u> before <u>any civil court of Bermuda</u> in respect of <u>any offence</u> against <u>any law</u> in force in Bermuda."* (emphasis added). It seems to me that, if the Legislature purported to create a criminal offence that could not be prosecuted by the DPP, she would nevertheless be able to institute proceedings for it.

37. In my judgment, the second question is or should be whether, when it is clear that a subordinate of the DPP (acting as such) has instituted proceedings for an offence that may only be prosecuted with her consent, the DPP must also separately signify that consent. Here I am attracted to some of Simmons J's ruling in *NM*, but I would respectfully express myself differently. When a subordinate of the DPP acts pursuant to section 71(2)(a), as they are entitled by section 71(3), they are exercising a portion of *her* Constitutional authority. The only person who may stop them is the DPP herself, but I do not believe they need more than her "general instructions"[3] to act validly in her stead pursuant to section 71(2)(a). The

[3] See the *DPP Code for Crown Counsel* dated 25.02.2016.

prosecution in *Durham* had been approved by the DPP personally, but I do not think the position would have been any different if it had been approved by a subordinate. They would still have enjoyed her authority to institute proceedings for *"any offence against any law"* and could thus have done so free from *"the direction or control of any other person or authority"*. If the DPP does not need separately to signify her consent to proceedings which she personally institutes, it seems to me that those who are entitled to do so on her behalf do not need her to do so either.

38. I think the Magistrate and I agree about more than we disagree about in this case. Where I respectfully part company with him is in his reliance upon a number of English decisions and legislation. I feel that reliance is misplaced because there is no public officer truly equivalent to the Bermuda DPP in England. The DPP there does not enjoy the codified Constitutional autonomy of his Bermudian counterpart. *Lalchan* [2022] EWCA Crim 736 is a case where the authority to prosecute had to come from the Attorney-General (or Solicitor-General) and was provided after the institution of proceedings. Mr Duncan says that the Magistrate's *"heavy reliance on* Lalchan *is with respect misconceived*" because the issue in this case is not the absence of a required *"fiat"*, but the *"validity"* of a *"fiat which had been issued"*. Again, I do not agree with how the Appellant frames this submission.

39. The Appellant's written submissions open by asserting that four matters are not in dispute:
    "a. A consent fiat is required to prosecute the offence of Intrusion.
    b. The consent for the fiat relates to the institution of the prosecution.
    c. The DPP has the constitutional authority to institute criminal proceedings.
    d. The DPP's constitutional authority to institute criminal proceedings is delegable."

40. I respectfully agree with only the second and third of these propositions.

41. As to the first proposition, I do not think that a "consent fiat" is required to prosecute Intrusion in Bermuda. What is required is a basis upon which the court before whom the proceedings are instituted can be satisfied that they are being (or were) instituted with the consent of the DPP. That evidence could come after the institution of the proceedings, but it would have to show that the required consent was in place at the time. I think the Magistrate and I agree about all that, but he found that that consent could only come from the DPP personally and that there was no evidence of such consent before him.

42. As to the fourth proposition, I agree with Ground CJ that the power to institute criminal proceedings is not "delegable", but automatically conferred upon the DPP's subordinates in accordance with section 71(3).

43. I agree with the Appellant that *Lalchan* does not assist, but that is because it deals with a fundamentally different scenario. The person who instituted those proceedings (the DPP of England and Wales) did not have the power to give the consent the statute required. Inferring that he had consented to the prosecution he was instituting, would not have cured the problem. A precisely similar situation cannot arise in Bermuda because any consent

provision naming the Attorney-General would have to be read as referring to the DPP by virtue of section 4 of the DPPCAA. However, I now return to my hypothetical concerning the consent of the Minister of National Security. If that were what section 199(4) purported to require, it seems to me that the Court would be bound to accept as valid an information laid without any evidence of the Minister's consent, provided that it was satisfied that the proceedings were being instituted by someone entitled to do so under section 71(2)(a) and (3) of the Constitution; that is the DPP or a subordinate. It makes no sense to me to require more formality of the DPP (or her subordinate) when the statutory consent requirement is for her consent than when it is for some other person's consent.

44. Ms Smith has argued that section 199(4) *"requires the consent of the DPP"* and that *"the consent of the DPP has to be shown to be provided. Clearly the simple answer is for the DPP to register consent by signature; and it should be none other than her signature on the fiat. If it were not so, the proviso in s. 199(4) would not exist."* I certainly agree that a "fiat" in the terms of the one signed by Mr Mahoney (save for the "for"), but signed by the DPP herself would have been a *"simple answer"*. However, I do not agree that section 199(4)'s existence can only be explained by a requirement for "*none other than her signature.*" When the Legislature intends such a requirement it says so (i.e. section 62 of the CJPA – and see *James*). Further, if my analysis is correct, section 199(4) still serves a proper purpose because it ensures that no one other than a subordinate of the DPP may validly bring an Intrusion charge without her personal prior consent.

45. Ms Smith also relies upon the ruling of Simmons J in *NM*, which she contends Mr Duncan has misunderstood. As will be apparent, I do not find myself in complete agreement with Simmons J. If one applies her reasoning to this case, it seems clear that she would have accepted Mr Mahoney's endorsement on the Information (and hence the information itself) as valid. She concluded that the Intrusion charges in *NM* could not stand because there was no such certificate on the information in that case. My own view is somewhat different on both points. First, I do not conclude that Mr Mahoney's endorsement in this case was sufficient because he enjoyed the delegated power to consent to a prosecution. I think that the Constitution entitled him to exercise the DPP's power to institute the proceedings and that her consent to them could and should have been inferred. Put another way, he could not consent to the bringing of the proceedings by anyone other than the DPP, but he could exercise her power to bring the proceedings, which necessarily carried with it the legal effect of her consent. On that analysis, however, the endorsement was not in entirely apposite terms and in my judgment it could simply have said *"I certify that these proceedings are being instituted by or on behalf of the Director of Public Prosecutions"*.

46. However, the Magistrate had before him an Information sworn, as is standard, by an officer of the Bermuda Police Service's Court Liaison Unit ('CLU'). It is not unknown for such informations (though usually only those alleging less serious, summary only offences) to be laid without the prior approval of charges by the DPP or her subordinate, but Mr Mahoney's endorsement clearly precluded that possibility in this case (my quibble over its wording notwithstanding). It might, I suppose, be argued that it was actually PS Astwood who had formally instituted the proceedings, but I do not think that is realistic. CLU officers take no role in the conduct of proceedings once the information has been sworn and it is clear from

the endorsement that this one was sworn at the direction of the DPP or her subordinate. It would be artificial in the extreme to characterise such a prosecution as anything other than one instituted by or on behalf of the DPP. The Magistrate also had before him the court record, which indicated that on the numerous intervening occasions that the matter was heard in court, a subordinate of the DPP appeared to prosecute the matter and on one occasion (7th August 2023) she did so herself. I therefore conclude that, if the Magistrate had asked himself whether the proceedings had been instituted by or on behalf of the DPP, he would have been bound to conclude that they had.

47. I am wary of seeking to support my reasoning by reference to *Walker* [2016] EWCA Crim 751, although it expresses some conclusions similar to my own. Its reasoning rests on section 37B of the UK Police and Criminal Evidence Act 1984 and the equivalent section of Bermuda's similarly titled Act (section 37) is not yet in force. Further, the consent provision in *Walker* was in different terms: *"No proceeding shall be instituted for an offence under subsection (1) above except by or with the consent of the DPP"*. Thus proceedings instituted by the DPP do not, simply as a matter of statutory construction, also require his consent. Ultimately I have concluded that this case cannot greatly assist as to the position in Bermuda one way or the other because the legislative framework, including most importantly section 1 of the Prosecution of Offences Act 1985 is just different.

48. The Magistrate placed some emphasis (paragraph 20) on the fact that in *Lalchan* the Court of Appeal found the Attorney-General's consent to be a *"condition precedent"* to valid proceedings. I do not take the view that section 199(4) does not establish a *"condition precedent"* to a valid information, but I conclude that, provided that the Magistrate were satisfied that the proceedings had been instituted by someone entitled to do so under sections 71(2)(a) and (3) of the Constitution, the required consent could and properly should have been inferred.

49. Responding to the Magistrate at his paragraph 25, it does not appear to me that it has simply been assumed *"that the consent required of the DPP may be subsumed into the charge decision and subsequent institution of the proceedings by a subordinate officer."* The officers of the DPP appear to have governed themselves according to the terms of Simmons J's ruling in *NM* (which was not before him). I do not see that thy can fairly be criticised for doing so.

Conclusion

50. For these reasons, I allow the appeal and remit the matter to the Magistrate with a direction to proceed to judgment.

51. I doubt whether I have the stature to write quite as Ground CJ did at paragraph 20 of *Philpott* without appearing patronising, but the Magistrate's thorough and detailed written ruling commands my respect, if not my complete agreement. He may even be right and I may be wrong, but for the time being at least it is my view of the matter which must prevail.

Postscript

52. As I was finishing this judgment, I noticed for the first time that, whereas the Information says it was *"taken"* on 1st May, 2023, Mr Mahoney's endorsement is dated 3rd May, 2023. That struck me as potentially significant. Although the Appellant has argued that that endorsement itself constituted a valid signification of consent, I have instead concluded that it may be viewed as part of the evidence from which the Magistrate could and properly should have concluded that the proceedings had been instituted by the DPP (or her subordinate). Either way, if the endorsement was affixed to the Information two days after it was laid, a different argument may have been open to the Respondent.

53. I do not see a date on page 23 of the Record of Appeal, which appears to be the Senior Magistrate's notes of the First Appearance. I therefore consulted the CourtSmart system to check whether that occurred on 1st or 3rd May 2023. The answer is the latter, but almost the first thing captured on 3rd May 2023 is a conversation between the DPP and Mr Mahoney (prior to the Senior Magistrate coming into the courtroom) which could conceivably have been found by the Magistrate, had he heard evidence of it, to be relevant to the question whether the DPP had personally consented to the proceedings (as he found she was required to do). As far as I am aware, neither of the parties have heard this audio. I will leave it to them to decide whether to request it and, if so, whether and how to deploy it. For the avoidance of doubt, I have not admitted this conversation as supplementary material on this appeal (as I believe I could pursuant to section 16(2)(e) and (3)). I do not consider it to be relevant, given my view of the law. I recognise, however, that a different view of the law could be taken elsewhere, which is why I think it right that the parties should be aware of this discovery.

54. Since it appears that 3rd May 2023 is the correct date of the two mentioned in the Information, I do not consider it necessary to reopen my consideration of this appeal at this time. It is not clear to me that anything has previously been made of this inconsistency, which may of course be because it was not noticed, but if either side wishes to address the Magistrate upon it when the matter goes back before him, they can seek his leave to do so.

55. It strikes me as obvious that, given the significance of the point argued in this appeal and the variety of subtly (and less subtly) different judicial views expressed in connection with it (and not yet at the level of the local Court of Appeal), there is a high likelihood of the unsuccessful party before me seeking to appeal further. Having come to the view that I have, I wondered whether the Respondent would require leave to appeal my decision and, if so, whether I could grant it; I would at least have given doing so serious consideration. This enquiry took me to section 17(1) of the Court of Appeal Act 1964, which provides:

> "A person convicted on indictment, or a person convicted by a court of summary jurisdiction and whose appeal to the Supreme Court under the Criminal Appeal Act 1952, has not been allowed, may appeal to the Court of Appeal—
>
> (a) against his conviction in the Supreme Court, or in any other case, against the decision of the Supreme Court, upon any ground of appeal involving a question of law alone; and

(b) with the leave of the Court of Appeal or upon the certificate of the Supreme Court that it is a fit case for appeal against conviction, upon any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or on any ground which appears to the Court to be a sufficient ground of appeal; and
(c) with the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law; and
(d) against the refusal of the Supreme Court or a Judge thereof to release an appellant from custody under section 20 or against the conditions attached to such release." (emphasis added)

56. Section 17 contains other provisions (e.g. prosecution rights of appeal etc.), but they do not appear relevant. In these proceedings, the Respondent is not yet (and may never become) a person convicted by a court of summary jurisdiction whose appeal to the Supreme Court has not been allowed. As such it does not seem to me that he is able presently to appeal my decision directly to the Court of Appeal. If the Magistrate convicts him, he can appeal to this Court and, if his appeal is dismissed, he can then appeal that decision to the Court of Appeal. If his appeal to this Court were solely on the basis that the Magistrate's Ruling of 31st January 2025 was correct, one would hope that the parties would agree to proceed summarily, so the matter could move on to the Court of Appeal without undue delay, but of course other grounds of appeal could conceivably arise. Further, he may yet be acquitted by the Magistrate and have no need to appeal.

57. Plainly I cannot decide the limits of the Court of Appeal's jurisdiction. That is a matter for them, but the statute seems clear to me. I would simply point out that attempting to go to the Court of Appeal prematurely (i.e. without the Magistrate having issued a judgment, only for them to conclude that they lack jurisdiction at this time) could waste significant time.

Dated this **24st** day of **April 2025**

THE HONORABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE