IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 02 of 2021

IN THE MATTER of an application by **VERONICA RALOGAIVAU MALANI** for a Judicial Review under Order 53 of the High Court Rules 1988.

AND

IN THE MATTER of Decisions purported to be made by the **DIRECTOR OF PUBLIC PROSECUTIONS** on or about 7th January 2021.

STATE: **DIRECTOR OF PUBLIC PROSECUTIONS**

THE ATTORNEY-GENERAL OF FIJI

Respondents

EX-PARTE: **VERONICA RALOGAIVAU MALANI**

Applicant

BEFORE: **His Lordship Hon. Chief Justice Kamal Kumar**

COUNSEL: **Mr. S. Valenitabua (Snr), Mr. S. Valenitabua (Jnr) and Mr. V. Rokodreu for the Applicant**

Mr. S. Sharma, Ms S. Chand and Mr S. Kant for the Respondents

DATE OF HEARING: **3 September 2021**

DATE OF RULING: **10 September 2021**

RULING

(Application for Leave to Apply for Judicial Review)

1.0 INTRODUCTION

1.1 On 7 April 2021, the Applicant filed Application for Leave to Apply for Judicial Review of the decision of the Director of Public Prosecution dated 7 January 2021, pursuant to Order 53 Rule 3(2), (3) of the High Court Rules in person.

1.2 On 6 May 2021, the Respondents filed Notice of Opposition.

1.3 On 13 July 2021, the Application was called before this Court when:-

(i) Mr Simione Valenitabua informed the Court that he had been instructed to appear for the Applicant.
(ii) Applicant's Counsel sought time to make Application to amend the Application for Leave to Apply for Judicial Review.
(iii) Court after hearing Counsel, directed Mr Simione Valenitabua to file and serve Notice of Appointment of Solicitors and for Applicant to file and serve Application for Leave to Amend the Application for Leave to Apply for Judicial Review.
(iv) This matter was adjourned to 4 August 2021.

1.4 On 13 July 2021, Valenitabua & Associates filed Notice of Appointment of Solicitors for and on behalf of the Applicant.

1.5 On 16 July 2021, Applicant filed Application for Leave to Amend Application for Judicial Review which Application was called on 4 August 2021.

1.6 On 4 August 2021:-

(i) Leave was granted for Applicant to file and serve Amended Application for Leave to Apply for Judicial Review;
(ii) Parties were directed to file Affidavits (if necessary) and Submissions.
(iii) The Application for Leave to Apply for Judicial Review was adjourned to 3 September 2021, for hearing.

1.7 On 16 August 2021, Applicant filed Amended Application for Leave to Apply for Judicial Review of the Director of Public Prosecutions (**"DPP"**) decision dated 7 January 2021 (**"the Application"**).

1.8 Applicant filed Affidavit in Support sworn and filed on 7 August 2021, and Supplementary Affidavit sworn and filed on 16 August 2021.

1.9 Parties filed Submissions and made oral submissions.

2.0 BACKGROUND FACTS

2.1 On 5 July 2020, the Applicant lodged a complaint with the Fiji Police Force against Mr. Aiyaz Sayed-Khaiyum (**"the Attorney-General"**), alleging the involvement of the Attorney-General in two separate bombing incidents alleged to have taken place in October 1987.

2.2 Following investigations of the Applicant's complaint, the Fiji Police Force sent the police file to the Office of the DPP for assessment of the evidence and a decision on whether any charges should be laid against the Attorney-General.

2.3 On 7 January 2021, the DPP, through a press release, published his decision. The full text of the press release is set out below:

> *"No Charges Against Attorney-General*
>
> *The Director of Public Prosecutions, Christopher Pryde, (DPP) has decided that no charges will be laid against the Attorney-General, Aiyaz Sayed-Khaiyum, in relation to his alleged involvement in two bombing incidents in 1987.*
>
> *The police file was sent to the DPP for an assessment of the evidence and a decision on whether any charges should be laid following a complaint that the Attorney-General had been involved in two separate bombing incidents in 1987. The file was returned to the police on 13.11.20 for further investigation and the file was returned to the DPP's Office on 14.12.20.*

The DPP stated that "following a review of the police docket, it is our opinion that there is insufficient credible or reliable evidence to support any criminal charges being laid against the Attorney-General and, therefore, the docket has been returned to police with the instruction not to charge and no further action is required."

3.0 GROUNDS FOR AMENDED APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

3.1 Respondents submit that the Applicant has chosen to plead each and every ground that is available in public law, ranging from illegality, abuse of discretion, breach of the rules of natural justice, bias, excess of jurisdiction, unreasonableness, irrationality, arbitrariness, breach of legitimate expectations, bad faith, relevant/irrelevant considerations etc.

3.2 In ***The State v The Permanent Arbitrator ex-parte: Fiji Electricity Authority*** Judicial Review No. 1 of 1997 (12 June 1997) His Lordship Justice Fatiaki stated as follows:-

"In its application for leave to issue 'judicial review' the Authority has advanced no less than six (6) 'grounds' on which it claims the Permanent Arbitrator erred.

…

I must confess that in the ***absence of particulars or any details in the*** *supporting affidavit, the* ***'grounds' as drafted, are of little or no assistance in directing the Court's attention to any prima facie vitiating error that may have occurred either in the course of the hearing of the reference or in the actual award of the Permanent Arbitrator****.*

It might well be that all of the 'grounds' advanced are recognised as good and sufficient grounds to warrant the grant of a 'prerogative writ', but that ***alone is no reason to indiscriminately advance them all in an application for judicial review, of course unless they are clearly evidenced in the supporting affidavit or demonstrated by counsel's submissions. This 'form of pleading' (for want of a better***

> ***expression) which is fast becoming the norm in applications for 'judicial review' is unacceptable, unhelpful and often duplicitous****."*

3.3 The Court of Appeal in ***Kasiepo v Minister of Immigration*** Civil Appeal No. 54 of 1996 (14 November 1997) stated:-

> *"**The grounds of the application were numerous and included a denial of natural justice**, on the grounds of not giving a fair hearing and bias, taking into consideration irrelevant matters, failing to take into account relevant matters, acting unreasonably, not giving regard to or taking into account the legitimate expectations of the applicant and failing to give reasons for the decision. In effect, **the appellant raised almost all imaginable grounds available in administrative law to challenge the decision but did not make clear what matters were relied upon to support the individual grounds. This is an unacceptable procedure when seeking judicial review. We add, that adopting this scatter-gun approach is inimical to the applicant's prospects of success for the Court is left unclear as to what are the important issues in the case**."*

3.4 This Court accepts Respondent's Submission that the Applicant has pleaded each and every ground possibly available in an Application for Judicial Review in the hope that this Court will identify the grounds itself and decide the Application.

3.5 Based on what is stated in **Fiji Electricity Authority** and **Kasiepo**, the Applicant when making Application for Judicial Review should only state and rely on grounds that can be supported by the facts with supporting evidence.

3.6 This Court has no hesitation in accepting Respondents contention that the grounds that need to be dealt with and determined by the Court are:-

(a) That the DPP acted **illegally** as he did not have the authority to terminate criminal investigations against the Attorney-General;

(b) That the Applicant **was denied the right to be heard** on the decision by the DPP to terminate the investigations against the Attorney-General; and

(c) That the **DPP was biased** in his decision to terminate the proceedings against the Attorney-General.

4.0 APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

4.1 Order 53 Rules 1 to 3(1) of the High Court Rules provide:-

> *"1.(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.*
>
> *(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to:-*
>
> *a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari.*
>
> *b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and*
>
> *c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.*
>
> *2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.*
>
> *3.(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."*

4.2 The test for Application for Leave for Judicial Review was stated by her Ladyship Justice Scutt in **Nair *v* Permanent Secretary for Education & Ors** Judicial Review No. 2 of 2008 as follows:-

- ***Does the applicant have sufficient interest in the application?***
- ***Is the decision susceptible to judicial review – that is, is it of a private or public nature?***
- ***Are alternative remedies available to the applicant and, if so, have they been pursued by the applicant?***

- ***Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case?***

4.3 The fact that Applicant has sufficient interest is not challenged by the Respondents.

4.4 Order 53 Rule 4(1) of High Court Rules provides:-

> "4(1) Subject to the provisions of this Rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under Rule 3 is made after the relevant period has expired, the Court may refuse to grant:-
> *(a)* leave for the making of the application; or
> *(b)* any relief sought on the application,
> if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

4.5 Even though the Applicant filed the Application on the last day, Respondents are not raising the issue of delay and as such this Court will deal with the Application.

4.6 Also there is no issue as to whether Applicant has any alternative remedy.

4.7 The only point of contention between the parties is that whether Applicant has arguable case.

Arguable Case

4.8 The test for arguable case was stated by *Lord Diplock* in ***Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd*** [1982] AC 617 as follows:-

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into matter at any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him, leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which is it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

4.9 The leading Authority in Fiji on this issue is ***Matalulu & Anor. v Director of Public Prosecutions*** [2003] 4 LRC 712. The Supreme Court stated as follows:-

"The Judge granting leave to issue judicial review proceedings has discretion, once a sufficient interest is shown by the applicant. That discretion has to be informed by the evident purpose of Order 53. It is not an occasion for a trial of issues in the proposed proceedings. The judge 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*."* (emphasis added)

5.0 REVIEW OF DPP'S DECISION

5.1 Section 117(1)(3)(8)(10) of the Constitution of the Republic of Fiji (**"the Constitution"**) provide as follows:-

> *"(1) The office of the Director of Public Prosecutions established under the State Services Decree 2009 continues in existence.*
> *(2) …*
> *(3) The Director of Public Prosecutions shall be appointed by the President on the recommendation of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General.*
> *…*
> *(8) 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 (except proceedings instituted by the Fiji Independent Commission Against Corruption);*
> *(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 (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and*
> *(d) intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.*
> *(9) …*
> *(10) In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or a written law."*

5.2 In **Matalulu**; the Supreme Court stated:-

> *"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*.*

…

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- eg. 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 decision would be reviewable for want of natural justice****."* (emphasis added)

5.3 The above principle has been adopted and applied internationally in ***Marshall v Director of Public Prosecutions*** [2007] 4 LRC 557 (Privy Council): ***R (F) v***

Director of Public Prosecutions [2014] 2 WLR 190 and ***Young v Frederick*** [2013] 2 LRC 179.

5.4 In ***Nata v The State*** Suva High Court HAM 40 of 2003S, (5 March 2004) Her Ladyship Justice Shameem stated as follows:-

> *"Although Matalulu was an appeal from a leave application ruling in a judicial review matter, I do not consider that this threshold of review should be any different when an applicant decides instead to use the Constitutional Redress procedure. The same policy issues apply.* ***Firstly the courts should be extremely reluctant to venture forth into the area of prosecution. There is a danger that the separation of powers between the judiciary and the prosecutor could be eroded, thus undermining the independence of the judiciary. A judge should not assess whether or not a person should be prosecuted, and then proceed to try that person. Secondly, the DPP's Office, created as it is by the Constitution is an independent office, and the DPP should be free to make decisions****, even value judgments on his or her assessment of the public interest."* (emphasis added)

5.5 The Privy Council adopted the **Matalulu** principle in **Marshall**, where Lord Bingham stated as follows:-

> *"[17] The position and functions of the DPP are such that judicial review of his decisions though available in principle, is* ***'a highly exceptional remedy'****... Where policy considerations come into the decision, it is particularly difficult for a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in Matalulu v DPP [2003] 4 LRC 712 at 735-736, which was cited with approval by the Board in Mohit v DPP of Mauritius [2006] UKPC 20, [2006] 5 LRC 234.*
>
> *...*
>
> *[18]* ***Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors****...."* (emphasis added)

5.6 In ***R v Director of Public Prosecutions, Exparte Manning & Anor*** [2000] 3 WLR 463 at page 474, Lord Bingham stated:

> *"Authority makes clear that a decision by the director not to prosecute is susceptible to judicial review; see for example R v DPP, ex p C [1995] 1 Cr App Rep 136. But as the decided cases also make clear,* ***the power of review is one to be sparingly exercised****. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant to whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial.* ***In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find their decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere****."* (emphasis added)

5.7 In ***R (F) v Director of Public Prosecutions*** at page 193, the Divisional Court of the High Court of England and Wales (Lord Chief Justice) held:

> *"…* ***the court examining the decision not to prosecute is not vested with a broad jurisdiction to exercise its own judgment, and second guess the Director's decision, and direct reconsideration of the decision simply because the court itself would have reached a different conclusion****. The remedy [of judicial review] is carefully circumscribed. In the decided cases different epithets have been applied to highlight how sparingly this jurisdiction should be exercised. The remedy is "highly exceptional", "rare in the extreme", and "very rare indeed".* (emphasis added)

5.8 In ***Young***, the Eastern Caribbean Court of Appeal held that:-

> *"[20] The decided cases show when challenges may be made to the decisions of the DPP. Such a challenge will succeed where one can show by evidence bad faith, fraud, corruption or dishonesty and the like (See Matalulu v DPP…).* ***The granting of relief against the decision of the DPP not to prosecute is an exceptional remedy. Mere grounds for***

> ***suspicion will not suffice. All of the cases say that.*"** (emphasis added)(page 188)

5.9 In the Constitution, the primary decision to institute or not to institute criminal proceedings is entrusted to the DPP as head of an independent department, who is not subject to the direction or control of any other person or authority, except by a court of law or as prescribed by the Constitution or a written law – s117(10) of the Constitution.

5.10 There is no provision in the Constitution or written law that makes DPP subject to the direction or control of any other person or authority.

5.11 This Court is bound by the principles in **Matalulu**, fully endorsed by **R (F) v Director of Public Prosecutions** and **Young**.

Illegality

5.12 Applicant by her Counsel submits that the DPP did not have authority to terminate criminal investigation against the Attorney-General.

5.13 In reference to s117(8)(d) of the Constitution, Applicant's Counsel does not dispute that the DPP has discretion to either institute or not to institute criminal proceedings against any person.

5.14 Prosecution Code 4.1, 5.1, 5.2 and 5.3 provide as follows:-

> *"4.1 That proceedings in all criminal cases are usually instituted by the Police or the relevant statutory authority. If the prosecutor, (whether the police or public) is satisfied that there is insufficient evidence, charges must not be laid. There should be a referral to the DPP for instructions, or a request for further investigation.*
> *…*
> *5.1 The test for prosecution: No person in Fiji shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute…*
> *5.2 The First step is to be sure that there is a reasonable prospect of a conviction. This is an objective test, which includes an assessment of the*

reliability of evidence, and the likely defence case. The test is whether a court, [properly] directed in accordance with the law is more likely than not, to convict the accused of the charge alleged. …
5.3 Prosecutors should not ignore evidence because they are not sure whether it can be used or is reliable. They should examine it closely when deciding if there is a reasonable prospect of conviction."

5.15 New Zealand Prosecution Guidelines which is similar to our Prosecution Code was subject to discussion by Supreme Court of New Zealand in ***Osborne v Worksafe New Zealand*** [2018] 1 NZLR 444. The Court stated as follows:-

"[28] The Guidelines provide that prosecutions should be initiated or continued only if the "test for prosecution" is met. There is provision for review of the charges before trial to determine whether the charges should be prosecuted or, among other things, withdrawn.

[29] The Guidelines describe the "test for prosecution" as being met if:

5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
5.1.2 Prosecution is required in the public interest – the Public Interest Test.

[30] The Guidelines require each test to be "separately considered and satisfied before a decision to prosecute can be taken". They are to be considered in sequence, with the evidential test being satisfied before consideration of the public interest test.

[31] The evidential test is met where "there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence". Credible evidence is evidence which is "capable of belief". The Guidelines provide that only evidence which is or reliably will be available and legally admissible can be taken into account in reaching a decision to prosecute. This evidence must be capable of meeting the criminal standard of proof. What is required by the evidential test is that "there is an objectively reasonable prospect of a conviction on the evidence". (emphasis added)

5.16 Section 54 of Criminal Procedure Act 2009 (**"CPA"**) provides as follows:-

> *"Every police officer lawfully conducting a prosecution and every public prosecutor appointed by the Director of Public Prosecutions shall be subject to the directions of the Director of Public Prosecutions."*

5.17 In ***Marshall v Director of Public Prosecutions*** [2007] 4 LRC 557, the Privy Council held:-

> *"[18] Where the decision is based on an assessment of evidence and the prospects of securing a conviction, the courts would still accord great weight to the judgement of experienced prosecutors as to whether a jury is likely to convict." (page 565)*

5.18 From what is stated in the CPA, the Prosecution Code and in **Osborne** and **Marshall**, this Court is of the view that prior to instituting criminal proceedings, the DPP must be satisfied and be sure that:-

(i) There is sufficient evidence and it is in the public interest to prosecute;
(ii) There is reasonable prospect of conviction bearing in mind the reliability of the evidence and likely defence case;
(iii) There is credible evidence which is capable of belief upon which the Court properly directed in accordance with law is more likely than not, to convict the accused of the charge alleged.

5.19 The Applicant by her Counsel submitted that the DPP cannot instruct Police to not to lay charges or not to take further action but should wait for charges to be laid in Court, after which the DPP can file "nolle prosequi" (withdraw the charge) on the ground that there is insufficient evidence.

5.20 With due respect to the Counsel for the Applicant, this Court finds such submission to be absurd and nonsensical.

5.21 The prudent and sensible approach is to analyse the evidence prior to laying charges to ensure that evidence is sufficient, reliable and credible to establish

the charges beyond reasonable doubt. In addition to sufficiency and credibility of evidence the likely defence of the person charged is to be assessed. This will obviously work against wastage of useful time and resource for all concerned.

5.22 In the press release of 7 January 2021, following statement of DPP was quoted:-

> *"following a review of the police docket, it is our opinion that there is insufficient credible or reliable evidence to support any criminal charges being laid against the Attorney-General and, therefore, the docket has been returned to police with the instruction not to charge and no further action is required."*

5.23 It is evidently clear that in making his decision to not institute criminal proceedings against the Attorney-General, DPP was fully conversant with test laid down in Codes 5.1, 5.2 and 5.3 of Prosecution Code, **Osborne** and **Marshall**.

5.24 This Court has no hesitation in holding that the DPP acted within the powers conferred upon him under s117(8)(a) of the Constitution, s54 of CPA and the Prosecution Code (in particular Code 4.1) and as such acted legally.

5.25 Before going to next ground, it is appropriate to deal with Applicant's submission in reference to ***Chandra v State*** Petition No. CAV21 of 2015 (10 December 2015). Counsel of the Applicant submitted that in view of **Chandra's** decision, the credibility of evidence in a criminal case should be left to the Judge or Magistrate and not the DPP.

5.26 It appears that Counsel for the Applicant did not fully comprehend the facts of **Chandra**.

5.27 In **Chandra**, the Supreme Court referred to evidence given by witnesses in Court during the trial.

5.28 The Supreme Court held that the Trial Judge did not give proper and adequate direction to assessors on the evidence produced in Court and did not assess the credibility of evidence himself.

5.29 In the present case, evidence that needs to be assessed by the DPP is prior to laying charges and matter ending up in Court. If the charge is not laid and evidence is not produced in Court, there is no way a Judge or Magistrate can assess the credibility of the evidence.

Breach of National Justice

5.30 Most of Applicant's submissions under this ground are about the DPP not laying charges and the DPP not acting within the crux of his constitutional and statutory duties.

5.31 Towards the end of Applicant's submission under this ground it is alleged that *"…DPP made the decision without advising or telling the Applicant and complainant that her complaint was going to be discontinued."*

5.32 The Supreme Court of Bermuda in ***Police Constable GA v The Director of Public Prosecutions & Ors*** [2021] SC (Bda) 58Civ, stated:-

> *"28. … This allegation forms the basis of the ground that the DPP's decision to withdraw the charges was procedurally unfair. … Furthermore that the DPP has a statutory power under section 71(2) of the Constitution to decide not to prosecute in a particular case and* ***there is no requirement in the Constitutional provisions that the victim of the alleged crime must be consulted or informed before arriving at the decision not to prosecute.*** *As the decision in* ***Matalulu****, approved by the Privy Council in* ***Jeewan Mohit****, makes clear "****nor is it easy to conceive situations in which such decisions would be reviewable for want of natural justice."*** (emphasis added)

5.33 Our Constitution also has no provision that states that the victim of alleged crime must be consulted or informed before arriving at the decision to not prosecute.

5.34 This Court holds that there is no need for DPP or even the Police Officers to consult or inform victims before arriving at the decision to not to prosecute the person against whom complaint is lodged.

5.35 In this instance, DPP did not breach rules of natural justice by not consulting or informing the Applicant that no charges will be laid against the Attorney-General on her complaint, prior to making such decisions.

5.36 The Applicant submits that she had legitimate expectation that the Attorney-General would be charged on the basis of statements given by her and others to Police.

5.37 The New Zealand Court of Appeal in ***Osborne*** stated as follows:-

> *"[86] Mr Hampton submitted the appellants had a legitimate expectation Worksafe would "meaningfully consult with the victims and… [seek] their agreement to the proposal that $3.41 million was paid in return for the offering of no evidence". **Put that way, the argument appears to suggest that the victims needed to consent to or approve discontinuance of the charges. That cannot be sound,** as we will explain. Mr Hampton's agreement also rested on a broader expectation of consultation, short of a requirement for victim consent, and he emphasized the exceptional circumstances and the fact the victims would effectively be precluded from bringing a private prosecution.*
>
> *[87] What is singular here, however, is that the alleged expectation is based wholly on provisions of the Victims' Rights Act 2012 and prosecution guidelines. We make four points. Firstly, statutory provisions are not be enlarged by individual applications of the doctrine of legitimate expectation. Secondly, what legitimate expectation requires is a commitment to act in a certain way plus reasonable reliance on that commitment by the applicant. Thirdly, the evidence of Ms Osborne and Ms Rockhouse does not allege any such commitment by Worksafe: neither a prior representation nor practice as to consultation on which a legitimate expectation by them as to consultation on the continuation or otherwise of charges might be founded. They simply depose that they were not asked, and did not consent. Fourthly, the implications of the argument pressed on us run far beyond the immediate case. **The case law analysed above emphasizes that the Crown has an independent discretion to be***

> ***exercised as to the bringing of charges. As the cases show, it would be wrong for the Crown to fetter their discretion by a policy not to enforce the law in some respect. So too it would be wrong for it to fetter its discretion by making arrangements to bring or to drop a prosecution by reference to the consent of victims.*** *Had an arrangement been made with the victims in this case that the prosecution would continue unless they agreed otherwise, that arrangement would itself have been unlawful."*

5.38 In view of what is said at paragraphs 5.32 to 5.37 of this Ruling, this Court is of the view that this Submission lacks merit and is misconceived.

Bias

5.39 The Applicant submits that:-

(i) The DPP was appointed in that position by the President of the Republic of Fiji, on the recommendation of Judicial Services Commission (**"JSC"**) in consultation with the Attorney-General - s117(3) of the Constitution.

(ii) The DPP worked as Solicitor-General in the Office of the Attorney-General.

(iii) The DPP is paid remuneration as determined by the JSC in consultation with the Attorney-General - s117(5) of the Constitution.

(iv) Knowledge of these facts would create a suspicion of bias.

5.40 In **Re Cao Juan Wen** [2002] FLR V37, Court quoted following test for bias from **In Medicaments and Related Classes of Goods** (No. 2) [2001] 1 WLR 700 (at page 440):-

> *"The new test is as follows:*
>
> *The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."*

"The material circumstances will include an explanation given by the Judge under review as to his knowledge or appreciation of those circumstances."

5.41 Court of Appeal in ***Young*** stated as follows:-

"[15] Simply to make an allegation of a past association without some other connecting factor would not be sufficient to ground a finding of apparent bias.

…

[16] There was required to be some other evidence which showed that these past associations influenced his decision to take over and dismiss the proceedings. There was nothing but past association, but Locabail makes it clear that this cannot be enough.

…

[21] ***If you cannot show that the DPP's decision was perverse and made in bad faith, then all the complaints about irrationality are of no consequence. Mohit says that great weight must be given to the DPP's discretion. The DPP has a very broad overarching power to take over and discontinue prosecutions. Andrews makes it clear the court cannot interfere with the DPP's decision-making power merely on a party raising general issues of an appearance of bias. The threshold is very high. In the absence of evidence of fraud, dishonesty, mala fides or corruption, a court will be very loath to find that the DPP's decision would be reviewable****."* (emphasis added)

5.42 Court of Appeal of England and Wales in ***Locabail (UK) Ltd Bayfield Properties Ltd*** [2000] 3 LRC 482, stated:-

"[25] It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. ***Nor at any rate ordinarily, could an objection be soundly based on judge's social or educational or service or employment background or history, nor that of any member of the judges family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular*** *utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to*

consultation papers); or previous receipt of instructions to act for or against any party or solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local law society or chambers…"

5.43 Respondents have rightly submitted that the "Applicant must show clear evidence that there is a real possibility or a danger that the decision of the DPP to not to lay charges against the Attorney-General was influenced by his association with the Attorney-General."

5.44 It appears that either due to an oversight or intentionally, Counsel for the Applicant only refers to Court parts of s117 of the Constitution that suits the Applicant. This is not expected from a legal practitioner as senior Counsel for the Applicant.

5.45 This Court refers to subsection 10 of Section 117 of the Constitution. s117(10) of the Constitution which provides as follows:-

"117(10) In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or a written law."

5.46 The mere fact that the DPP held the position of Solicitor-General some years ago does not of itself support the allegation of bias or show any real danger.

5.47 DPP's appointment is by the President on the recommendation of the JSC in consultation with the Attorney-General - s117(3).

5.48 The process in s117(3) is same for appointment of Supreme Court Judges, Court of Appeal Judges, High Court Judges. Masters of High Court and Magistrates who are appointed by JSC in consultation with the Attorney-General. Also most Tribunals are either appointed by the Attorney-General or are appointed in consultation with the Attorney-General.

5.49 If the procedure for appointment of DPP will be a ground to establish bias, then does it mean that Judicial Officers (Judges, Masters of High Court and Magistrates) cannot handle proceedings filed by the Attorney-General or proceedings filed against Attorney-General? Surely not.

5.50 From the press release of 7 January 2021, this Court takes note of the following:-

(i) The police file for assessment of evidence on a decision on whether any charges should be laid against the Attorney-General on Applicant's complaint was sent to the DPP.

(ii) On 13 November 2020, the DPP returned the file to Police for further investigation.

(iii) Police returned the file to DPP on 14 December 2020 (after a month).

(iv) After that the DPP assessed the evidence and decided that no charges be laid for reasons stated in the press release.

5.51 The fact that DPP returned the file to Police and did not make a decision straightaway shows that he analysed the evidence in good faith.

5.52 This Court also notes that the allegation of bias are based on mere assertion, suspicion and speculation because of manner of DPP's appointment and his past appointment as Solicitor-General and not supported by credible evidence.

Section 16(1)(b) of the Constitution

5.53 Applicant's Counsel in Reply to Respondent's Submission submitted that the DPP breached s16(1)(b) of the Constitution by not informing her of his decision.

5.54 Applicant has not pleaded breach of s16(1)(b) in her Application and cannot add grounds to the Application during the Submissions.

5.55 However, this Court takes note that DPP published his decision in the local media with the reasons for the general public including Applicant's information.

6.0 CONCLUSION

6.1 After analysing the Affidavit evidence and submissions, this Court makes following findings:-

(i) DPP's decision to not institute criminal proceedings against the Attorney-General on Applicant's complaint was not in excess of DPP's constitutional and statutory authority.

(ii) DPP did not act under the direction or control of any other person or authority.

(iii) DPP did not act in bad faith in holding that there was insufficient credible evidence or reliable evidence to support any criminal charges against the Attorney-General.

(iv) DPP correctly applied the evidential test stated in Prosecution Code (Fiji), **Osborne** and **Marshall**.

(v) DPP did not breach rules of natural justice by not contacting or seeking Applicant's consent or consulting the Applicant, before coming to the decision to not institute criminal proceedings against the Attorney-General.

(vi) There was no need for the DPP to consult the Applicant before coming to the decision to not institute criminal proceedings against the Attorney-General.

(vii) Applicant has failed to produce any evidence to prove that the DPP was biased in coming to the decision to not institute criminal proceedings against the Attorney-General, and claim for bias was based on mere assertions, suspicion and speculation.

(viii) The Applicant's Application for Leave to Apply for Judicial Review is frivolous, vexatious and an abuse of Court process on the ground that all the allegations are based on mere assertions, suspicion and speculation.

6.2 Before finalising this matter this Court intends to make it clear that:-

(i) The Application before this Court is for Leave to Apply for Judicial Review of the DPP's decision to not institute Criminal Proceedings against the Attorney-General.

(ii) It is rightly pointed out by Applicant's Counsel, that Applicant is not challenging the merits of the DPP's decision but the manner in which it was reached.

(iii) This Court cannot order and no such order is sought for the DPP or Police to institute criminal proceedings on Applicant's complaint. To do so will fracture the doctrine of separation of power and the Court will end up usurping the Constitutional power/discretion of an independent department.

7.0 COST

7.1 This Court takes into consideration that:-

(i) Both parties filed Submissions and made Oral Submissions.

(ii) Applicant failed to provide any evidence to support the alleged grounds to establish an arguable case but based her grounds on mere assertion, suspicion and speculation.

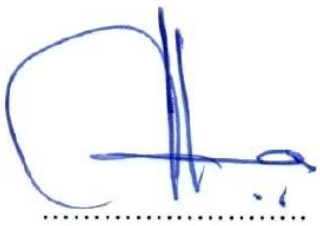
7.2 In view of what is stated in the preceding paragraph and Court holding that Application for Leave to Apply for Judicial Review is frivolous, vexatious and an abuse of process, on the ground that her claim is based on mere assertions, suspicion and speculation, it is just and fair that Applicant do pay the Firstnamed Respondent's cost.

8.0 ORDER

This Court orders that:-

(i) Application for Leave to Apply for Judicial Review of Director of Public Prosecutions decision dated 7 January 2021, filed on 6 May 2021, and Amended Application for Leave to Apply for Judicial Review of Director of Public Prosecutions decision dated 7 January 2021, and filed on 16 August 2021, are dismissed and struck out.

(ii) Applicant do pay Director of Public Prosecutions cost of this proceeding assessed in the sum of $5,000.00 within twenty-one days from date of this Ruling.



K. Kumar
Chief Justice

At Suva
10 September 2021

Valenitabua & Associates for the Applicant
Office of the Attorney-General for the Respondents