

## **Brioche v Attorney-General**

**(2013) SLR 425**

Egonda-Ntende CJ, De Silva J

22 October 2013

CP 6/2013

**Counsel** J Camille for first petitioner  
A Amesbury for second, third, fifth and sixth  
petitioners  
K Domingue for fourth petitioner  
A Juliette for seventh petitioner  
  
N Gabriel for eighth petitioner  
R Govinden, Attorney-General, and Robert for  
respondent

### **EGONDA-NTENDA CJ**

[1] I have had the advantage of reading in draft the ruling of my brother, De Silva J, in this matter. That ruling sets out fully the facts of the case. I agree with him this petition must fail for the reasons that he has elaborated in his ruling. However there are a few remarks that I must make in my own words in addition.

[2] The petitioners were charged jointly with one Michael Joseph Hoareau in Criminal Case No 11 of 2013 before the Supreme Court with various offences including trafficking in a controlled drug; unlawful possession of firearms and ammunition without a licence; possession of turtle meat; conspiracy to commit the offence of drug trafficking in a controlled drug; aiding and abetting the commission of the offence of unlawful possession of firearms and ammunition and

several other offences. The petitioners contend that some time prior to 24 July 2013 the first respondent, acting pursuant to art 76 of the Constitution and s 61A of the Penal Code Act, entered into a plea bargain agreement with the Mr Hoareau. Following that agreement the first respondent entered a nolle prosequi in favour of Mr Hoareau on all charges, leaving the petitioners as the only accused persons.

[3] The petitioners contend that the first respondent has contravened their right to a fair trial/ hearing and right to equal protection of the law when he exercised his powers under art 76 of the Constitution and in pursuance of s 61 of the Penal Code Act entered into a plea bargain agreement with the one Michael Joseph Hoareau to give evidence against the respondents in Criminal Case No 11 of 2013 leading to the withdrawal of charges against Michael Joseph Hoareau. In taking the decision that the first respondent took it is alleged that he failed to have 'regard to public interests, the interests of justice and the need to prevent abuse of the legal process.' It is contended that the nolle prosequi is the prize to Mr Hoareau for agreeing to testify against the petitioners and is an abuse of the legal process.

[4] The petitioners, pursuant to art 46(1) of the Constitution, are seeking a multiplicity of relief in this petition. Firstly a declaration that the first respondent has contravened their right to a fair trial/hearing and their right to equal protection of the law. Secondly that the petitioners be remanded to bail forthwith and criminal proceedings in CR No 2/2013 be stayed; Thirdly that this Court issue a writ of certiorari quashing the first respondent's decision to enter nolle prosequi in favour of Joseph Hoareau, or in the alternative to issue a writ of mandamus compelling the first respondent to enter a

nolle prosequi against all petitioners and lastly award any damages to compensate the petitioners for any damages they may have suffered.

[5] This petition is supported by an affidavit sworn jointly by the petitioners.

[6] The respondents have filed a preliminary objection to these proceedings contending that the petition is frivolous and vexatious in light of the provisions arts 76(4) and 76(10) of the Constitution which vest the first respondent with the power he exercised which is not subject to the direction and control of any other person or authority. The respondents reserved their defence on the merits. This ruling is on the preliminary point of law raised.

[7] What the petition in this case seeks to do in the words of Mrs Amesbury is to challenge the exercise of discretion by the first respondent whether it has been a valid exercise of discretion. The respondents in their preliminary objection contend that the petitioners or any other persons, are precluded from doing so in light of the art 76(4) and (10) of the Constitution. I shall set out art 76(4) and (10).

#### Article 76(4)

The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have power, any case in which the Attorney-General considers it desirable so to do-

(c) to discontinue any stage before judgment is delivered at any criminal proceedings instituted or undertaken under subclause (a) or by any other person or authority.

#### Article 76(10)

In the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not be subject to the direction or control of any other person or authority.

[8] It is not contended for the petitioners that s 61A of the Criminal Procedure Code is unconstitutional in anyway. What is sought to be challenged is that the Attorney-General in exercise of powers he can validly exercise both under the Constitution and the law the Attorney-General has not correctly exercised the same. And in doing so has contravened the petitioners' rights to a fair trial/hearing and equal protection of the law.

[9] In providing under art 76(10) of the Constitution that in exercising the power vested in the Attorney-General in art 76(4) the Attorney-General is not subject to the direction or control of any person or authority does not, in my view, imply that the Attorney-General's exercise of power cannot be subject to challenge in the Court. It goes to the independence of the Attorney-General in exercising that power. He is independent in exercising the power reposed in him by art 76(4) of the Constitution. He should not take any instructions in this matter from any person or authority, including the Executive, which is the organ of state within which his office falls. Clause (10) should not be read to mean that the exercise of the power can not be subject to litigation or be questioned in a court of law.

[10] This view is consistent with the holding of the Privy Council in the case of *Mohit v the Director of Public Prosecutions of Mauritius* [2006] UKPC 20 in which it was concluded that the decisions of the Director of Public Prosecutions may be subject to judicial review by the courts on the traditional grounds of illegality,

impropriety and or irrationality much as the courts will not seek to substitute their own judgment for that of the DPP in matters for which the DPP alone is entrusted with the power to make a decision by the Constitution or a statute.

[11] The Privy Council in the *Mohit* case cited with approval the following remarks of the Supreme Court of Fiji in *Matululu v DPP* [2003] 4 LRC 712 which I believe express the position as it is under the law of Seychelles.

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.

[12] 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, dishonestly. 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.

[13] 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.

[14] I reject the contention by the Attorney-General that the decisions made under art 67(4) of the Constitution are not amenable to judicial review. The wording of art 76(10) imports no such meaning, other than, to buttress the independence of the Attorney-General from all manner of influence, in exercising the powers given solely to the Attorney-General under art 76(4) of the Constitution. It would be permissible for a person who claims to have been adversely affected by such a decision to invoke the supervisory jurisdiction of the Supreme Court under art 125(1)(c) of the Constitution for judicial review of such a decision.

[15] The following words expressed in *Mohit v DPP* in relation to the powers of the DPP in Mauritius are equally applicable to the Attorney-General of Seychelles:

....the DPP is a public officer. He has powers conferred on him by the Constitution and enjoys no powers derived from the royal prerogative. Like any other public officer he must exercise his powers in accordance with the Constitution and other relevant laws, doing so independently of any other person or authority. Again like any public officer, he must exercise his powers lawfully, properly, and rationally, and an exercise of power that does not meet those criteria is open to challenge and review in the courts. The grounds of challenge certainly include those listed in *Matalulu*, but need not necessarily be limited to those listed. But the establishment in the Constitution of the office of DPP and the assignment to him and

him alone of the powers listed in section 72(3) of the Constitution - the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and, in some cases, the difficulty or undesirability of explaining his decisions - these factors necessarily mean that the threshold of a successful challenge is a high one. It is, however, one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any review at all.

[16] Nevertheless I agree with the Attorney-General that the petition now before this Court is frivolous and vexatious.

*Abuse of process and right to a fair trial / hearing*

[17] The petitioners contend that from the time of their arrest and detention they exercised their right to remain silent or gave truthful statements that did not implicate the seventh petitioner and the entering of the *nolle prosequi* against the skipper was his prize for co-operating with the respondents, and this is they aver an abuse of the legal process and also contravened their right to a fair trial.

[18] It is not shown exactly how the legal process has been abused on the petition. Nor is it shown how the first respondent's actions have contravened the petitioner's right to a fair trial. It is just regurgitated without providing what constituent element or elements of the right to a fair trial or fair hearing has or have been contravened or is or are likely to be contravened. The petition does not state the prejudice that the petitioners have been put to by virtue of the *nolle prosequi* entered in favour Mr Hoareau and plea bargain agreement,



perhaps other than that Mr Hoareau is now a Crown witness, and will presumably testify in support of the case for the prosecution.

[19] There has been no contravention of the right to a fair trial for the petitioners in the actions of the Attorney- General complained of which cannot be taken care of by the trial Court at the appropriate stage in that trial. If the objection is to Mr Hoareau testifying against the petitioners during the course of the trial the petitioners will have a right to object to his testimony on whatever grounds they may have and can muster at law; and the court will rule on such objections. For as long as the petitioners have not challenged the constitutionality of s 61A of the Criminal Procedure Code I do not see how they can challenge at this stage of the proceedings in Criminal Case No 11 of 2013 the exercise of the power granted to the Attorney General under the Constitution and law of Seychelles. Discretion is left to the Attorney-General to exercise and he alone is obliged to exercise it, not concurrently or under supervision by a court of law.

[20] The petitioners will have a right to appeal the decisions of the trial court if they are not satisfied. The Court cannot compel the Attorney-General to initiate, or continue as the petitioners now demand criminal proceedings against Mr Hoareau. Neither is there a justifiable reason to order the Attorney-General to drop charges against petitioners. The Attorney-General is within his powers to initiate and continue a prosecution against the petitioners to its logical conclusion. The petitioners are entitled to a fair trial before an impartial and independent court established by law.

[21] It is important to point out to the petitioners, if only to avoid multiplicity of proceedings, that the Constitutional Court, is not an appellate court in respect of decisions of the Supreme Court that aggrieve them. The appellate court is the Court of Appeal. A criminal

trial of course involves the observance of the Seychellois Bill of Rights including the right to a fair trial/hearing and the right to equal protection of the law. Recourse to the Constitutional Court should not be used to deter the progress of a criminal trial with matters that arise time and again in the conduct of criminal proceedings under the guise of ‘enforcement of constitutional rights.’

[22] In my view what the petitioners are seeking, in substance, in this petition is for this Court to sit on appeal over the decision of the Attorney-General that is complained against rather than challenging its constitutionality or otherwise. The petitioners have no such right available to them under any law. Neither is the Constitutional Court endowed with the authority to sit on appeal or review the merits of the decision of the Attorney-General in this regard. The power to exercise such authority is the sole province of the Attorney-General subject of course to the supervisory jurisdiction of the Supreme Court. That jurisdiction has not been invoked. The petitioners have instead chosen to petition the Constitutional Court to review the merits of the decision of the Attorney-General. That jurisdiction is not available to the Constitutional Court.

[23] From the bar it was made clear that the petitioners before the Supreme Court had raised the issue of abuse of process after the charges were dropped against the Mr Hoareau and the Court pronounced itself on that matter at the stage it was raised. The proper course of conduct is to take up this matter on appeal at the appropriate time rather than regurgitating the same in another parallel forum. Or if the issue was raised prematurely in the trial court it can be raised again at the appropriate stage of the proceedings or trial.

*Equal protection of the law*

[24] The petitioners contend that their right to equal protection of the law has been contravened contrary to art 27 of the Constitution. The petitioners 'aver that the charges as laid, are unfair in that they are duplicitous, malicious and inconsistent with other charges laid in other similar cases and in that regard they aver that they have been denied the right to equal protection of the Law.'

[25] Article 27 provides:

- (a) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this charter without discrimination on any ground except as necessary in a democratic society.
- (b) Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.

[26] Equal protection is often invoked in respect of a person or groups of people who are denied certain rights and freedoms in preference to other persons on some clear ground as the basis for different treatment. The ordinary grounds of discrimination being race, gender, sex, religion, colour, age, disability, or any other ground. Contravention of art 27 would have to be linked not only to a denial of a right or freedom under the charter to the petitioners which another similarly situated person or persons are allowed to enjoy on account of a ground such as race, gender, sex, religion, colour, age, political or other opinion or persuasion, language, ethnicity, national or social group or any other recognisable ground.

[27] The petition does not allege any discrimination of the petitioners on any grounds whatsoever other than that 'the charges are

duplicitous, malicious and inconsistent with some other charges laid in other similar cases.’ In my view no cause of action is established by the petitioners in relation to the claim that art 27 has been contravened or is likely to be contravened. The claim is simply frivolous and vexatious.

### **Decision**

[28] In the result I would uphold the preliminary objection of the Attorney-General. I find that this petition is frivolous and vexatious. I would dismiss it. As my brother De Silva J, agrees, this petition is dismissed accordingly. Each party shall bear its costs.

### **DE SILVA J**

[29] The eight petitioners in this application allege violations of their ‘constitutional rights’ by the first respondent (who is the Attorney-General of the Republic of Seychelles) and seek redress for such violations in terms of art 130 of the Constitution of the Republic of Seychelles and for relief by way of the supervisory jurisdiction of this Court in terms of art 125(c) of the Constitution of the Republic of Seychelles.

#### *Petitioner’s case in brief*

[30] The petitioners aver that the first six petitioners along with one Micheal Joseph Hoareau who was the skipper of the fishing vessel “Charitha” (the skipper) were charged before the Magistrate on 7 January 2013 with the offences of trafficking in a controlled drug, namely cannabis herbal material, trafficking in cannabis resin, possessing firearms and ammunition (two counts) and for possession of turtle meat, by the Republic in case CR No 2/2013.

[31] It is averred in the second paragraph of the petition that on 29 February the charges were amended and the suspects were further remanded at the insistence of the first respondent who is the Attorney-General. The amendment of the charges was made by bringing in two other accused persons ie the seventh and the eight respondents, who, allegedly were not on board of “Charitha” and by adding charges of conspiracy to traffic in a controlled drug, aiding and abetting others to possess firearms without a licence and counselling other persons to commit an offence of possessing turtle meat.

[32] The petitioners submit that the first respondent being the Attorney-General is the person vested with powers under arts 76(4) (a)–(c) of the Constitution of the Republic of Seychelles (the Constitution) to institute and undertake criminal proceedings and to takeover, continue or discontinue such proceedings “at any stage before the judgment is delivered” and the Attorney-General exercising such powers on a date unknown to them entered into a “plea bargaining agreement” pursuant to the constitutional powers and the powers vested in him under s 61A of the Penal Code of Seychelles (the section cited should be corrected as s 61A of the Criminal Procedure Code and not of the Penal Code which hereinafter will be referred to as s 61A of the CPC) with the skipper of the vessel “Charitha” on the understanding that he will give evidence against the eight petitioners, thereby dropping all charges against the skipper.

[33] The petitioners submit therefore:

- i) That the first to the sixth petitioners were the fishermen/crew on board “Charitha” who were at all times acting under the exclusive instructions and command of the skipper when “Charitha” left Port Victoria on the 21 November 2012 on a fishing trip

and the 7<sup>th</sup> and 8<sup>th</sup> petitioners were not on board “Charitha” at all material times.

ii) That the 7<sup>th</sup> and 8<sup>th</sup> petitioners were not on board “Charitha” at all material times.

iii) That the first respondent acting under s 61A of the CPC and by virtue of powers vested in him under art 76 of the Constitution entered a *nolle prosequi* in favour of the skipper and by doing so, has failed to have regard to,

a) public interest,

b) interests of justice and

c) the need to prevent the abuse of legal process,

and, thereby contravened the petitioners fundamental right to a fair hearing enshrined in art 19(1) of the Constitution. It is the petitioners’ position that the right to a fair hearing postulates a “fair charge or indictment” and the first respondent by his failure to indict the skipper, by entering a *nolle prosequi* in his favor and making him a state witness, has violated the petitioners' Constitutional right for a fair hearing.

The charges laid are unfair in that they are duplicitous, malicious and inconsistent with the other charges laid in similar cases and thereby the petitioners’ right to equal protection of the law enshrined in art 27(1) of the Constitution is violated.

[34] In the prayer of the application to this court [ie prayers (i) and (iii)] the petitioners pray that this Court interalia make the following orders:

Prayer (i)

Declare that the first respondent has contravened the petitioners' right to a fair trial/hearing and their right to equal protection of the law.

Prayer (iii)

To issue a writ of certiorari quashing the first respondent's decision to enter a *nolle prosequi* in favor of the skipper of the vessel 'Charitha' and, in the alternative, to this issue a writ of mandamus compelling the respondent to enter a *nolle prosequi* against all petitioners.

*The preliminary objection by the first respondent*

[35] The first respondent raised a preliminary objection to the petitioner's application in terms of r 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.

[36] The objection raised by the first respondent is that the petition is frivolous and vexatious and should be dismissed in law in that in pursuance to art 76(4) read with art 76(10) of the Constitution the first respondent (the Attorney-General) has the power in any case which the first respondent considers it desirable so to do, to discontinue any criminal proceedings at any stage before judgment is delivered and in the exercise of such power the first respondent is not subject to the directions or control of any other person or authority.

[37] Whilst taking up the above preliminary objection, the first respondent reserved his defence on the merits.

*The first respondent's arguments and the law*

[38] In support of his contention (the first respondent's) that: "where he considers desirable to do so under the Constitution" he has the power to undertake criminal proceedings against any person for any offence alleged to have been committed by said person and to discontinue the same before the judgment is delivered, to issue a *nolle prosequi* in terms of arts 76(4)(a) and (c) read with s 61(1) of the CPC and in doing so the first respondent is not subject to the direction or control of any person or authority in terms of art 76(10) of the Constitution; the first respondent relied on the Privy Council judgment in *Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20 [*Mohit's case*], the judgment of the Supreme Court of Nigeria in *The State v Ilori* SC 42/1982 [*Ilori's case*] and the judgment in *S v Kurotwi* [2011] ZWHHC 56. I do not wish to refer to the *Kurotwi* judgment as it has no significance to the matter under discussion.

*Nolle prosequi*

[39] In terms of art 76(4) of the Constitution, the Attorney-General has power to institute, undertake and discontinue legal proceedings. I shall refer to that article.

Article 76(4)

The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have powers, in any case in which the Attorney-General considers it desirable so to do.



- (a) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person; to take over
- (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 criminal proceedings instituted or undertaken under sub-clause (a) or by any other person or authority.

[40] Article 76 cl (11) provides that an Act may make provision for any person or authority other than the Attorney-General to institute proceedings before a military court or tribunal and further provides that the Attorney-General, unless otherwise provided, shall not exercise his powers under art 76(4) of the Constitution in relation to such proceedings.

#### Article 76(6)

Subject to clause (7), the power conferred on the Attorney-General by clause (4) (b) to take over any proceedings or by clause (4) (c) to discontinue any proceedings shall be vested in the Attorney-General to the exclusion of any other person or authority.

#### Article 76(10)

In the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not

be subject to the direction or control of any person or authority.

[41] The only limitation, as seen, under the constitutional provisions to the Attorney-General's powers under the art 76(4) is the limitation under art 76(11) of the Constitution which provides that unless an Act otherwise provides in regard to the proceedings instituted by a person or authority other than the Attorney-General before a military court or tribunal established for the trial of military offences by persons subjected to military law, the Attorney-General's powers under art 76(4) are not exercisable.

#### Section 60 of the Criminal Procedure Code

The Attorney-General is vested with the right of prosecuting all crimes and offences of which the courts of Seychelles have jurisdiction.

#### Section 61(1) of the Criminal Procedure Code

In any criminal case at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a nolle prosequi, either by stating in court or informing the court in writing that the Republic 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 ..., 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.

#### Section 61A of the Criminal Procedure Code

The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to

have directly or indirectly concerned in or privy to an offence, notify an offer to the effect that the person:

- (a) Would be tried for any other offence of which the person appears to have been guilty; or
- (b) Would not be tried in connection with the same matter,

on condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.

[42] The petitioner's application for the issuance of writs in the nature of certiorari and mandamus leads to a discussion of the issue whether the taking over of the proceedings and issuing a *nolle prosequi* by the Attorney-General as laid down in art 76(4)(b) of the Constitution read with s 61(1) CPC excludes the powers of court to intervene and review the Attorney-General's action by way of judicial review.

[43] The offences complained of being indictable offences are ones in which only the Attorney-General has the power to indict and since the petitioners have no complaint about the Attorney-General's 'right' to indict the petitioners on the charges levelled, save that the charges are unfair as alleged, in my view, this aspect needs no further consideration. The allegation of 'unfairness of the charges' will be dealt with subsequently.

[44] Hence, in my view what should be considered here is whether the courts can intervene by way of administrative review

where the Attorney-General has discontinued proceedings against the skipper by issuing a *nolle prosequi*.

[45] In the case of *The State v Ilori*, all seven judges of the Supreme Court of Nigeria basically agreed with the views expressed by His Lordship, Justice Kayode Eso, who delivered the lead judgment on the issue considered, “the vulnerability of *nolle prosequi*” to judicial review.

[46] In discussing the issue, Justice Eso cited the English Case of *R v Comptroller-General of Patents* [1899] 1 QB 909 pointing out the position in England in the 19th century where it had been held that when the Attorney-General of England exercised his functions on behalf of the Crown, the Queen’s Bench Division or any other court was not empowered to question the issuance of *nolle prosequi*.

[47] With regard to the Nigerian scenario, Justice Eso makes a comparison between the English Common Law and the 1961/1963 Nigerian Constitutions on the one hand and the 1979 Nigerian Constitution on the other. Justice Eso, discussing s 191(3) of the 1979 Nigerian Constitution, stated that the requirement in this subsection that “the Attorney-General in his exercise of *nolle prosequi* shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process” is merely declaratory of what the Attorney-General should take into consideration in the exercise of his powers and found no basis for challenge by a person adversely affected by it. In his judgment, Justice Eso further submitted that the powers of the English Attorney-General and the powers of the Attorney-General/DPP under the pre-1979 constitutions in Nigeria were the same in that they were not subject to review and although the pre-1979 constitutions in Nigeria (1960 and 1963 Constitutions) did not have a provision such as in art 191(3) of the 1979 constitution,

such powers were not exercised by the Attorney-General arbitrarily or by a rule of thumb. Justice Eso expressed the view that as the Chief Law Officer of the State, the Nigerian Attorney-General has always exercised this power while having regard to public interest, interests of justice and the need to prevent abuse of legal process.

[48] Justice Eso is critical of the judgment of Kazeem JCA the Court of Appeal who heard the first appeal in *Ilori's case* and concluded in the first appeal that:

Until the appellant has been able to establish in the proceedings here that they acted maliciously or they were motivated by ill-will against him or that they did not act in the interest of justice, the appellant cannot ask the court to go behind the certificate of discontinuance filed by the Attorney General under section 191(3) of the 1979 constitution to discontinue the case.

[49] Justice Eso critically questions what happens if the view expressed by Kazeem JCA is entertained. He submits that then the courts will have to stop the prosecution and commence an inquiry into the complaint of the accused person. He further submits that art 191(3) does not delimit the powers of the Attorney-General under the 1979 Constitution and the Attorney-General has as much power as that of the English Attorney-General.

[50] Although all seven Judges in *Ilori's case* which was decided in 1982 were more or less unanimous on the issue that the Attorney-General's power to enter a *nolle prosequi* was not subject to review, the judicial approaches in other jurisdictions and of the Privy Council have not contributed towards this view but seemingly agreed with the

view expressed by Kazeem JCA in the first appeal before the Court of Appeal of Nigeria whose decision was overruled by Justice Eso of the Nigerian Supreme Court in *Ilori's case*.

[51] Next I wish to refer to the advice of the Privy Council in *Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20 delivered by Lord Bingham of Cornhill.

[52] In this case the appellant appealed against the judgment of the Supreme Court of Mauritius that refused judicial review of a decision of the DPP of Mauritius where he entered *a nolle prosequi* in favour of one Mr Berenger (who was holding very high political office) ending the private prosecution brought against Mr Berenger by the appellant. The Supreme Court held in favour of the DPP. The Privy Council allowed the appeal setting aside the decision of the Supreme Court of Mauritius.

[53] Lord Bingham cited s 72 of the 1968 Constitution of Mauritius where the DPP's power to institute, undertake, to take over and continue and to discontinue such criminal proceeding instituted or undertaken by himself or any other person or authority is set out. Basically, these powers are the same as those of the Attorney-General of Seychelles as set out in art 76(4)(a)–(c) of the Constitution. Furthermore the power of the Attorney-General of Seychelles to take over any proceeding and discontinue any proceeding to the exclusion of any other person or authority is equally seen with the DPP of Mauritius in terms of art 72(5) of the 1968 Constitution of Mauritius. Similarly both the Seychelles Attorney-General (art 76(10) cited above) and the DPP of Mauritius (art 72(6) of the 1968 Constitution of Mauritius) have constitutional protection for their actions as they are not subject to the direction or control of any other person or authority. In my view this 'constitutional protection' is the one of the

main matters which is subject to challenge in this application before us.

[54] Their Lordships referred to art 119 of the 1968 Mauritian Constitution which provides that:

no provision of this constitution that any person or authority shall not be subjected 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 performed those functions in accordance with this Constitution or any other law or should not perform these functions.

[55] It is pertinent to point out at this stage that the Attorney-General in his submissions before us drew the attention of the Court to the above provision in the 1968 Mauritian Constitution and submitted that the Constitution of the Republic of Seychelles has no similar provision. However, as seen by the decision in *Matalulu's case* (below) the absence of such provision is not a bar for judicial review.

[56] His Lordship in the course of his opinion refers to the warnings echoed in earlier decisions of the Supreme Court of Mauritius such as in *Edath-Tally v Glover* [1994] MR 200 against over ready identification of the Mauritian DPP with the English Attorney-General and submitted that the Mauritian Supreme Court in *Mohit*, ignoring such warnings, based its decision on *Lagesse v Director of Public Prosecutions* [1990] MR 194 and *Gouriet v Union of Post Office Workers* [1978] AC 435 and the observations of the High Court of Australia in *Maxwell v R* [1996] 1 LRC (Cons) 744 and

held that the Attorney-General's power to prosecute, not to prosecute or issue a *nolle prosequi* is not amenable to review.

[57] Their Lordships in the course of their opinion discussed inter alia the prerogative power of the English Attorney-General to enter a *nolle prosequi*, the reviewability of the decisions of the English DPP that existed for some period of time as his office was a statutory one (unlike that of the English Attorney-General which is an office at Common Law) and the change in the legal approach as the English DPP functioned under the Attorney-General, the observations of Lloyd LJ in *R v Panel on Take-overs and Mergers, Ex parte Datafin PLC* [1987] QB 815 at 845 that "If the source of power is statute, or subordinate legislation under a statute, clearly the body in question will be subject to judicial review" and proceeded to agree with the Fijian Supreme Court decision in the Fijian case of *Matalulu v DPP* [2003] 4 LRC 712 [*Matalulu's case*], quoting the following paragraph there from (at pages 735–736):

It is not necessary for present purposes to explore exhaustively the circumstances in which the occasion 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 to 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-e.g. 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.*

[Emphasis added]

### *The alleged violation of constitutional rights*

[58] The petitioners allege that their right to a fair hearing as enshrined in art 19(1) of the Constitution and the right to equal protection of the law as enshrined in art 27(1) of the Constitution have been violated by the decision of the first respondent.

Article 19(1)

Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

Article 27(1)

Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary for a democratic society.

[59] In support of her contention, of the violation of the petitioners' right to fair hearing, counsel for the petitioner relies on the averments in paragraphs 7, 8 and 9 of the petition.

[60] In paragraph 7 the petitioners submit that the right to a fair hearing begins with a fair charge or indictment. No explanation is given by counsel why the charges against the petitioners are not fair. However, the averments in paragraph 8 of the affidavit shed some light on the petitioners' position why the charges are unfair as they submit. The petitioners rely on the argument that the first respondent, by entering a *nolle prosequi* in favour of the skipper and by leaving the petitioners as the accused, in the purported exercise of the powers under art 76 of the Constitution, has failed to have regard to 'the public interest, the interests of justice and the need to prevent abuse of legal process'.

[61] The petitioners aver in paragraph 9 of the petition that from the time of arrest and detention they exercised their right to silence or gave truthful statements but did not implicate the seventh petitioner.

For ‘cooperating’ with the respondents, presumably for agreeing to stand as state witness, the petitioners submit, the ‘prize’ of the skipper was a *nolle prosequi* in his favour, entered by the first respondent.

*Petitioners reply to the preliminary objection*

[62] Counsel for the petitioners responding to the first respondent's objection to the petition submits that:

- a) It is not open for the first respondent to say in his objections that the petitioners’ application is frivolous or vexatious in terms of art 46 (7) and only court has the power to so conclude.
- b) The petitioners’ complaint is whether ‘the exercise of power by the first respondent under consideration is a valid exercise of power’ and against the manner it was exercised.
- c) That no time was given before the plea bargaining and it was informed to them only five minutes before the trial.
- d) The counsel drew the attention of court to the following excerpt from judgment in *Mohit'scase* (above):

where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP’s discretion as a prosecutor. But the Board is not persuaded by the court’s reasons for holding that in DPP’s decision to file a *nolle prosequi* or not to prosecute are not amenable to judicial review.

[At page 8 of the internet version of the judgment.]

[63] In the submissions made before the Court counsel for the petitioners submitted that the averments in the petition are relied upon in addition to the submissions made. Hence, I refer to the following averments in the petition as those, in my view, counsel for the petitioners wished to use as material to support the alleged constitutional violation:

That we object to the “deal” made by the Attorney-General, the first respondent with the skipper of the Vessel Charita in which all charges against him were dropped in return for him to testify against us. Because the first constitutional power to prosecute or not to prosecute has to be exercised in the public interest, the interest of justice and to prevent abuse of the legal process and to reward the skipper by entering a *nolle prosequi* against him because he ‘cooperated with the NDEA is against public interest as Seychelles is a maritime nation, against the interest of justice and is an abuse of power. We are being penalized for not cooperating and exercising our right to remain silent.

- i) That save for the 7th and 8th deponents who were not present the rest of us were at all material times under the control and command of the captain and to refuse to obey his orders would have brought us foul of the maritime laws and would have us accused of.
- ii) In the respondent’s affidavit, Michael Hoareau, the Skipper/Captain told agent Jimmy Louise that “He collected the gunny bags containing the herbal material from Providence Island.”

- iii) We are advised and believe that in the case of *R v Marengo* (2004) SLR 116 the 8 accused were charged with possession of 1141 Kgs of turtle meat and they were released on bail. We have been denied bail.
- iv) We are advised and believed that in the case of *R v Murangira* (1993) SLR 90, the ship Malo had the following arms and ammunition: “arms of war, namely, artillery, bombs, grenades, machine guns and small bore breech loading weapons, bullets, cartridges and shells and they were released on bail and only the Captain, Sebastien Murangira, was convicted. The other two were acquitted. The two who were acquitted were the first and second officers of the vessel. In our case, there was one AK47 and 30 rounds of ammunition and we were simply fisherman and yet, we are in custody.
- v) We are advised and believed that in the case of *R v Priyashantha Hettiarachi* of the fishing vessel Lucky Too, Criminal Side No. 5 of 2012 there were five crew members on the ship. Only the master was charged for illegal fishing and the other five crew members were not charged.
- vi) We are advised and believed that in the case of *R v Nabi Bux* of fishing vessel Al-Fahad, another case of illegal fishing, only the captain Nabi Bux was charged although he had 27 other crew members

and once again, only the Captain was charged with illegal fishing.

- vii) We are advised and believed that in yet another case of illegal fishing (The Republic v/s Chabir of fishing vessel Al-Naveed), there were 22 other crew members and once again, only the captain was charged with illegal fishing.
- viii) We aver that base on the above we have denied our right for equal treatment before the law because a different standard is being used. In the other cases, the fishermen were not detained for as long as we have been, or at all.
- ix) We are advised and verily believe that based on the circumstances of this case that the 1st Respondent failed to have regard to the public interest, the interests of justice and the need to prevent abuse of the legal process and this act, contravened our fundamental right to a fair hearing.

*The petitioners' case discussed based on applicable judicial decisions*

*Alleged violation of art 19(1) and 27(1) of the Constitution*

[64] The sum total of the submissions made on behalf of the petitioners, as it appears to me, is that the first respondent (the Attorney-General) has violated the rights of the petitioners enshrined in arts 19(1) and 27(1) of the Constitution by carrying out his statutory functions:

- a) By undertaking and discontinuing the proceedings against the skipper by issuing a *nolle prosequi* in terms of art 76(4) of the Constitution read with s 61(1) of the Criminal Procedure Code.
- b) By making a conditional offer, a plea bargaining agreement with the skipper as alleged by the petitioners by paying the price for his cooperation with the prosecution, allegedly the entering of *nolle prosequi*.
- c) By laying charges that are unfair in that they are duplicitous, malicious and inconsistent with the other charges laid in similar cases.

[65] In fact the complaint of the petitioner is as to the manner of exercise of such constitutional and statutory power vested in the first petitioner and not against the vesting per se. The complaint is that, as mentioned before, the respondent has failed to have regard to the public interest, the interests of justice and the need to prevent the abuse of legal process. Despite the petitioner setting out as above a few instances where the skipper was charged (in my view not relevant to the issue before us) the petitioner has not made out any case on the alleged of ‘unfairness of charges.’

[66] Although the petitioners have used the words “failed to have regard to the public interest, the interests of justice and the need to prevent the abuse of legal process” the petitioners have not clothed these words giving any description how the violation was made and such words, without any factual material, as described by the Chief Justice Stone in the US case of *Snowden v Hughes* (below) are mere opprobrious epithets.



[67] I wish to quote the following two paragraphs from the opinion of Chief Justice Stone who delivered his opinion in *Snowden v Hughes* 321 US 1 (1944):

After setting out these facts the complaint alleges that Horner and respondents Hughes and Lewis, '*willfully, maliciously and arbitrarily*' failed and refused to file with the Secretary of State a correct certificate showing that petitioner was one of the Republican nominees, that they conspired and confederated together for that purpose, and that their action constituted 'an unequal, unjust and oppressive administration' of the laws of Illinois. It alleges that Horner, Hughes and Lewis, acting as state officials under color of the laws of Illinois, thereby deprived petitioner of the Republican nomination for representative in the General Assembly and of election to that office, to his damage in the amount of \$50,000, and by so doing deprived petitioner, in contravention of, 8 U.S.C. 41, 43 and 47(3) 8U.S.C.A. §§ 41, 43, 47(3), of rights, privileges and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, both guaranteed to him by the Fourteenth Amendment.

*But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another.*

*The lack of any allegations in the complaint here, tending to show a purposeful discrimination between*

*persons or classes of persons is not supplied by the opprobrious epithets 'willful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. United States v. Illinois Cent. R. Co., 303 U.S. 239, 243, 58 S.Ct. 533, 535, 82 L.Ed. 773. So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee. Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged. Indeed on the allegations of the complaint, the one Republican nominee certified by the Board was entitled to be certified as the nominee receiving the highest number of votes, and the Board's failure to certify petitioner, so far as appears, was unaffected by and unrelated to the certification of the other, successful nominee. While the failure to certify petitioner for one nomination and the certification of another for a different nomination may have involved a*

*violation of state law, we fail to see in this a denial of the equal protection of the laws more than if the Illinois statutes themselves had provided that one candidate should be certified and no other.* [Emphasis added]

[68] The mere act of issuing a *nolle prosequi* and proposing to call the skipper as a state witness is not enough to establish discrimination. To quote again the words of Chief Justice Stone from the above judgment I refer to the following paragraph:

*The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.* This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86, 87, 36 S.Ct. 498, 501, 60 L.Ed. 899, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 374, 6 S.Ct. 1064, 1072, 1073, 30 L.Ed. 220. But a discriminatory purpose is not presumed, *Tarrance v. State of Florida*, 188 U.S. 519, 520, 23 S.Ct. 402, 403, 47 L.Ed. 572; there must be a showing of 'clear and intentional discrimination', *Gundling v. City of Chicago*, 177 U.S. 183, 186, 20 S.Ct. 633, 635, 44 L.Ed. 725; see *Ah Sin v. Wittman*, 198 U.S. 500, 507,

508, 25 S.Ct. 756, 758, 759, 49 L.Ed. 1142; *Bailey v. State of Alabama*, 219 U.S. 219, 231, 31 S.Ct. 145, 147, 55 L.Ed. 191. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 L.Ed.567; *Norris v. State of Alabama*, 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed.1074; *Pierre v. State of Louisiana*, 306 U.S. 354, 357, 59 S.Ct. 536, 538, 83 L.Ed. 757; *Smith v. State of Texas*, 311 U.S. 128, 130, 131, 61 S.Ct. 164, 165, 85 L.Ed. 84; *Hill v. State of Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.Ed. 1559. *But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race.* *State of Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.Ed. 667; *Martin v. State of Texas*, 200 U.S. 316, 320, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497; *Thomas v. State of Texas*, 212 U.S. 278, 282, 29 S.Ct. 393, 394, 53 L.Ed. 512; cf. *Williams v. State of Mississippi*, 170 U.S. 213, 225, 18 S.Ct. 583, 588, 42 L.Ed. 1012.

[Emphasis added]

[69] Next I wish to refer to the judgment in *Siddappa v The State of Mysore* AIR 1967 Kant 67; AIR 1967 Mys 67; (1966) 1 Mys LJ. Justices Hegde and Bhimiah presided. Hegde J stated in the judgment:

He urged that the Colleges, which are now affiliated to the Bangalore University, were constituent parts of the

Mysore University till about a year back: they had common syllabi; the teaching standards were common; and the examinations held were similar and therefore the Government should not have treated similar things in a dissimilar manner. None of these facts have been set out in the affidavit filed in support of the petition. *It must be remembered that there is a strong presumption that a classification made is a valid classification. The burden of proving that classification is illegal or otherwise violative of Article 14 is heavily on the person who challenges the validity of the classification. When a citizen wants to challenge the validity of any classification on the ground that it contravenes Article 14, specific, clear and unambiguous allegations must be made in that behalf and it must be shown that the impugned classification is based on discrimination and that such discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the said classification.*

... What is of the essence is hostile discrimination - an intentional unequal treatment of persons similarly placed - *We are unable to agree with Mr. S. K. Venkataranga Iyengar, that any and every contravention of a Rule brings the case within Article 14 and the equality clause requires that if one person is wrongly selected, every one else similarly situated is also entitled to be selected. This contention is wholly untenable. In cases of this nature, there is no hostile discrimination. To take an erroneous view of the law*

*does not amount to a hostile discrimination against any one. In such a case there is no question of contravention of Article 14.*

### *Judicial review*

[70] I have set out hereinbefore the applicable position in the Commonwealth jurisdictions based on the five conclusions reached in *Matalulu's case*.

[71] The petitioners have not stated any facts setting forth any situation contemplated in *Matalulu's case* except for setting out three instances of illegal fishing and one instance of carrying arms and ammunition where the captain of the ship has been charged which matters I have set out under the head 'Petitioners reply to preliminary objection.'

[72] There are no charges of illegal fishing in the background of this application as seen from the matters set out in the petition. Furthermore, the fact that all suspects in a case of possession of turtle meat were released on bail (set out under the same head) has no bearing on this application for constitutional relief.

[73] In *Sharma v Brown-Antoine* [2006] UKPC 57 and [2007] 1 WLR 780, the Privy Council endorsed the *Matalulu* decision once again. This time, however, the application was not in relation to the issue of a *nolle prosequi* but in respect of a decision to indict. The Privy Council, having acknowledged the availability of challenge, refused the application having regard to the vast sphere of prosecutorial discretion available to the Attorney-General and the extreme exceptional situations where it should be granted. It is seen from the judgment that their Lordships are unaware of a single instance that a writ was issued questioning the Attorney-General's

right to indict. In *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 both the *Matalulu* and *Mohit* principles were acknowledged once again.

### *Presumptions*

[74] At this stage I wish to mention that the petitioners have not set out material particulars relating to the charges of trafficking in the sense whether the controlled drug, namely cannabis/cannabis resin on board of “Charitha” was detected at a time when it was arriving from a place outside Seychelles or not. When the detection was made, whether “Charitha” was arriving from a place outside Seychelles (in the sense outside the waters of Seychelles) will make a difference in the evidentiary position as the presumptions attached changes, depending on whether the applicable section is s 17 or s 18 of the Misuse of Drugs Act (Chapter 133).

[75] Section 17 of the Misuse of Drugs Act (Chapter 133) attaches a presumption, until the contrary is proved, if a controlled drug is found in a vessel or an aircraft arriving from any place outside Seychelles *that the drug has been imported in the vessel or the aircraft with the knowledge of the master or the captain of the vessel or the aircraft.*

[76] Similarly, if a controlled drug is found in a vehicle, vessel or aircraft *other than a vessel or aircraft referred to in s 17 of the Act,* under s 18 of the Act *it shall be presumed that, until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or the aircraft and of the person in charge of the vehicle, vessel or aircraft for the time being.*

[77] The application before this Court does not shed any light on the issue under which section, out of the above mentioned two sections of the Act, the charges have been levelled.

[78] In my view, s 17 of the Act deals with the situation where the vessel or the aircraft arrives from a place outside the territorial waters of Seychelles.

[79] Section 18 clearly attracts the presumption against both the owner of the vehicle, vessel or the aircraft and the person in charge of such vehicle, vessel or aircraft, often being the driver, master/captain or pilot.

[80] In situations where the s 18 presumption applies, in my view, for example, the Attorney-General can exercise his ‘prosecutorial discretion’ to decide on the evidence before him to prosecute either the owner or the person in charge or both and to launch a prosecution accordingly.

[81] A presumption of fact is a rebuttable conclusion arrived on one thing on the proof of the other. *Black’s Law Dictionary* (Abridged Fifth Edition, St Paul, Minn, West Publishing Co, 1983) defines a presumption of fact as “Such are presumptions which do not compel a finding of the presumed fact but which warrant one when the basic fact has been proved.”

[82] Therefore, in my view, if the charges are under s 18 of the Misuse of Drugs Act, to call the one with a lesser degree of culpability, out of the skipper and the owner, as a State witness against the other is perfectly in order provided my assumption of facts is correct.

*Conclusion*



[83] Article 129(7) of the Constitution provides:

Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause (6), the person alleging the contravention or the risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

[84] I state that the petitioners have failed to set out in their petition sufficient material to maintain violations of arts 19(1) and 27(1) of the Constitution. The mere averment that the first respondent ‘has failed to have regard to public interests, the interests of justice and the need to prevent abuse of legal process’ which may, in the absence of facts to support a violation, aptly be described as ‘opprobrious epithets’ in the words of Chief Justice Stone (above), in my view, is in no way sufficient to maintain this application. I also wish to mention that an erroneous decision by a State officer does not amount to an intentional and purposeful hostile discrimination by the State. Hence, in my view the petitioners have failed to establish violations of arts 19(1) and 27(1) of the Constitution by the respondents.

[85] In respect of the second relief sought by the petitioners, I wish to state that the Attorney-General’s decision to enter *nolle prosequi* is amenable to judicial review, but, only in very exceptional circumstances as laid down in *Matalulu’s case* (and later confirmed in *Mohit’s case* and several other cases). In the application before us none of the situations mentioned in those judgments are seen. Moreover, the application is not based on any factual material to support the petitioner’s case.

[86] Hence, the petitioner's application for review cannot be maintained.

[87] Therefore, I uphold the preliminary objection raised by the first respondent and reject the petitioners' application for the reasons set out above.

[88] Each party shall bear its own costs.