



Neutral Citation Number: [2025] CICA (Crim) 3

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT CRIMINAL DIVISION**

CRIMINAL APPEAL 5/2024

Ind# 0031/2023

BETWEEN

HIS MAJESTY THE KING

Appellant

AND

WILLIAM MCKEEVA BUSH

Respondent

Before:

The Rt Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Michael Birt, Justice of Appeal

Appearances:

Mr Charles Miskin, KC instructed by the Office of the Director of Public
Prosecution for the Appellant
Mr Jerome Lynch KC and Mr Dennis Brady of Brady Law for the Respondent

Date of Hearing: 13 May 2025

Judgment Delivered: 11 July 2025

The President

1. The Respondent, who was the former Speaker of the Parliament of the Cayman Islands, was indicted on four counts. Counts 1 and 3 respectively alleged indecent assault and common assault in respect of MLM. Counts 2 and 4 made similar allegations in respect of AC. The trial

began on 19 February 2024. On 29 February 2024, just before the close of the prosecution case, the trial judge, Justice Stanley John (Acting), invoking his ‘inherent jurisdiction to prevent any abuse of process’ ordered that the case be stayed on the grounds that ‘the prosecutorial system was being misused by person/s with their own agenda.’ The judge gave a short extempore judgment purporting to give an outline of the reasons for his order. He indicated he would give a more detailed judgment towards the end of March 2024. The jury was discharged. On 11 April 2024 the judge handed down a written judgment, which included his own headnote. By a Notice of Appeal of 19 April 2024, the Appellant, the Director of Public Prosecutions (DPP), appeals the judge’s decision under section 28 of the Court of Appeal Act (2023 Revision) (the Act) on the grounds, broadly, that the judge’s decision was not warranted and was based on unfounded speculation.

2. Mr Charles Miskin KC represented the DPP, Mr Jerome Lynch KC and Mr Dennis Brady the Respondent. Mr Miskin and Mr Brady appeared below. At that hearing, Mr Brady appeared with Ms Bennett-Jenkins KC.

The Jurisdiction of the Court of Appeal

3. By section 28 of the Act:

“28. (1) Where an accused person tried on indictment is —

(a) discharged or acquitted by a trial judge sitting alone or by a jury (where such a jury has been directed to do so by the trial judge) including where the judgment or verdict of acquittal is as a result of a decision by the trial judge to uphold a no case submission or withdraw the case from the jury;

...

the Director of Public Prosecutions or the complainant may appeal to the Court of Appeal against the judgment of the Grand Court on any ground of appeal that the decision of the trial judge is erroneous on a point of law.

...

(3) Upon the hearing of an appeal brought by the Director of Public Prosecutions or a complainant under subsection (1), the Court of Appeal may allow the appeal if it appears that the discharge or acquittal of the accused should be set aside on a ground of a wrong decision of law and, in any other case, shall dismiss the appeal.

(4) Where the court allows an appeal under subsection (1), it shall set aside the discharge or acquittal of the accused person and remit the case to the court of original jurisdiction to be retried.”

4. It is agreed that the DPP is entitled to appeal under section 28(1)(a).

Extension of time

5. Mr Lynch submitted the Notice of Appeal was not lodged in time.
6. Paragraphs 1 and 2 of the Schedule to the Act state that:
 - “1. Notice of an application for leave to refer a case to the Court under section 28 or 30 shall be given to the Court within fourteen days from the day on which the sentence or the last of the sentences was passed.
 2. If the Registrar is given notice of an application to the Court under Section 28 or 30, the Registrar shall
 - (a) take all necessary steps for obtaining a hearing of the application....”
7. Section 30 provides that the DPP may, with leave of the Court refer unduly lenient sentences to the Court of Appeal. While Mr Lynch accepted that, referring as it does to ‘sentence’ and ‘sentences,’ paragraph 1 cannot apply to appeals under section 28, he argued that the court should ‘assume the rule applies strictly to 14 days from the ruling rather than a written judgment provided 7 weeks later (or whenever it might have been).’ Mr Lynch went on to submit that ‘given that appeals by the Crown are exceptional and a relatively recent phenomenon we see no reason why courts should construe any application by the Crown to permit an appeal out of time generously.’ Mr Lynch argued that the 14 days should run from the date of the ex tempore judgment.
8. In our view paragraph 1 of the Schedule (and for that matter paragraph 2, which also refers to section 28), cannot without more be read as applying to section 28 appeals. Not only does paragraph 1 define time by reference to the date of sentencing, it also refers to applying for leave to the Registrar. Unlike section 30, an appeal under section 28 does not require leave. In short, it appears there is a lacuna in the Act with regard to the time within which the DPP may appeal under section 28. Accordingly, there being no specified time limit, there is no basis on the face of it upon which the DPP need seek an order extending it. Whether the lacuna could be rectified by recourse to the provisions of the Constitution so as to incorporate the sort of provision suggested by Mr Lynch is not something upon which we heard argument and in respect of which we need make a decision. For in the present case, it is academic. Even assuming a time limit of 14 days from the ex tempore judgment, the court would have extended time. As is clear from the transcript of the hearing on 28 February, Mr Misikin had made it plain that depending upon the judge’s detailed reasons, the DPP might appeal. He sought an

indication from the judge as to when the written judgment could be expected so that ‘the defendant is not kept in suspense for too long.’ The position was clear to everyone, not least the Respondent. No point was taken by him. The Notice of Appeal was filed shortly after the written judgment. It could not be said that in all those circumstances the Respondent has been prejudiced by the sequence of events.

Abuse of process

9. In *R v Maxwell* [2010] UKSC 48 the issue before the Supreme Court of the United Kingdom was whether, in the face of gross prosecutorial misconduct, the court should order a retrial, the accused having subsequently made detailed admissions of his guilt. By a majority, the court upheld the order of the Court of Appeal that there be a retrial. However, in uncontentious observations, Lord Dyson said at [13] that:

*“It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court’s sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court’s sense of justice and propriety’ (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).”*

10. In *Latif* Lord Steyn (at page 112H) had said:

*“The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v Horseferry Road Magistrates’ Court, Ex parte Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge’s discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not*

be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies the means.”

11. In *Warren and others v Attorney General for Jersey* [2012] 1 AC the Judicial Committee of the Privy Council considered whether a stay should have been imposed in circumstances where, in the context of a suspected conspiracy to import a large quantity of cocaine, the Jersey police, with the agreement of the Jersey prosecuting authority, installed audio equipment into a vehicle the suspect was to drive in France, knowing that French law did not permit such an installation and misleading the French authorities about the nature of the installation. The court held that the trial judge was entitled in the exercise of his discretion not to impose a stay, a decision which had been upheld by the Jersey Court of Appeal. In giving the lead judgment, with which the other members of the court agreed, Lord Dyson (at [25]) described as a ‘useful summary of some of the factors that are frequently taken into account by the courts’ the comments of Professor Andrew L-T Choo in the second edition of *Abuse of Process and Judicial Stays of Criminal Proceedings* where he said:

“The courts would appear to have left the matter at a general level requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a balancing test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.” See [24]

12. Finally, in *Crawley* [2014] EWCA Crim 1028 Sir Brian Leveson, giving the judgment of the Court of Appeal of England and Wales, said (at [17]-[18]):

“[T]here are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put it another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and

applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential unfairness of the trial itself.
...[T]here is a strong public interest in the prosecution of crime and ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort.”

13. The defence bear the burden of establishing abuse on the balance of probabilities: *Telford Justices, ex parte Badham* [1991] 2 QB 78.

The prosecution case

14. On the evening of 13 September 2022 there was a reception at the Ritz Carlton Hotel in West Bay to welcome delegates attending a conference of the Caribbean Tourist Organisation. Among those attending was the Respondent, AC and MLM. AC was a Radio Cayman News Director, MLM a government employee. The Respondent, who was considerably affected by drink, was alleged indecently to have assaulted AC and MLM. The case in respect of AC was that while in the process of being persuaded to leave, the Respondent took hold of her hand, ultimately giving her a love bite (a ‘hickey’) on her arm or wrist, leaving the shallow impression of teeth marks. The case in respect of MLM was that earlier that evening the Respondent hugged her and then kissed her on the shoulder. The allegations of common assault were lesser alternatives to those of indecent assault.

Events following the incident

15. In order to understand the basis of the allegation of abuse of process, it is necessary to refer to some of the subsequent events.
16. The fact that something had happened at the reception entered the public domain through social media. The police, among others, became aware of it.
17. At 9.24PM on 13 September 2022 AC sent a WhatsApp message to Norma McField, the director of broadcasting at Radio Cayman, AC’s employer. It stated that:
“McKeeva bit me. By accident. But still...Tried to miss [sic] my hand and bit me. He was completely drunk. I told Sam [Samuel Rose, the Cabinet Secretary]. I didn’t take pictures. It’s faded now but wanted you to know. Tried to kiss my hand.”

18. That message was disclosed to the defence on 20 February 2024 (the second day of the trial) in circumstances we shall come to.
19. On 14 September 2022 the police began a formal investigation. Superintendent Barrow telephoned AC, who:
- “...informed me she has no intention of making a formal complaint to the RCIPS [Royal Cayman Islands Police Service], had this been her intention she would have done so already on her way home after the event...[She] stated that in her opinion the [Respondent]...was highly intoxicated to the state of incoherence so much so that most of what he said to her was not making sense. [She]...further stated that the conduct was indeed inappropriate but not to the level where it warranted a formal report being made to the police. There was no indecent assault according to...[AC]...[original emphasis]. The only physical contact mentioned was a ‘kissing of the hand.’...[AC] also stated her intention was to provide a formal written statement to her employers...at a time when she had gathered her thoughts and made sense of the whole occurrence.”*
20. An email setting out the conversation was disclosed to the defence on 14 August 2023.
21. On 14 September 2022 AC wrote to or emailed Ms McField. She said:
- “I have given this incident a great deal of thought and when the police called me today, I was honest in that I do not feel this rises to the level of a crime and I am not comfortable pursuing it as such. I do not believe Mr Bush intended to cause me any harm; however; [original emphasis] his public behaviour did and does concern me and I was very uncomfortable with the entire situation. I did not want to make a scene nor did I want to escalate the situation in the moment. I had been working all day and into the evening and still had work to do for the morning news.”*
22. AC provided Inspector Morrison with the letter on 20 February 2024, when it was disclosed to the defence. She informed the inspector that her superiors had requested she write down what she recalled for internal purposes and did not expect it to be used in court.
23. On 16 September 2022 AC wrote in identical terms to Franz Manderson, the Deputy Governor and Samuel Rose, the Cabinet Secretary. AC also contacted Mr Barrow, stating:
- “...she was desirous of providing a formal account to RCIPS, albeit not for judicial proceedings; it was her intention of having her account documented.”*
24. A note of that conversation was disclosed on 9 August 2023.

25. In his witness statement of 27 February 2024 Superintendent Barrow stated:
- “...based of [sic] the nature of the investigation I made the decision that the most effective method of obtaining [AC’s]...account was by means of the ABE [Achieving Best Evidence] interview process. I would have informed [AC]...that the ABE interview process entailed a video recording of her account. [AC]...agreed the process mentioned. I would not have provided any further information...I would have told [AC] the interview will be conducted by members of the Multi-Agency Safeguarding Hub (MASH)...On...29th September 2022 [AC]...contacted me and confirmed her availability to conduct the ABE interview on the same day...”*
26. The ABE interview took place on that day. It was conducted by Detective Constables Sevik and Badoo-Harrison. Their brief notes (disclosed on 9 August 2023) stated that they explained the procedure to AC. In her interview, which was not challenged by the Respondent, AC explained what happened. Among other things, she described the Respondent swaying in his chair and being left with a red hickey on her hand. She said that what happened was:
- “...bizarre...I don’t think it’s a crime, I don’t know if it’s a crime or not but it’s definitely inappropriate and it definitely is a risk where government is concerned...I didn’t call the police because...I’m not sure that that’s a crime to be a drink [sic] old dude...putting a hickey on the hand...I didn’t feel like embarrassed per se, at the moment, but all of the people who – from either side of this equation- it’s like they- I feel like I’m getting harassed by people who are just asking me how I’m doing because they all seem to have an agenda of some kind, which makes it really difficult.”*
27. AC said she thought the Respondent was trying to kiss her hand. She said:
- “I was uncomfortable...there’s lines that you shouldn’t be crossing...people shouldn’t be drunk in public like that and they shouldn’t be groping people...it was just my hand but that was kind of, I mean, inappropriate.”*
28. On 7 October 2022, DC Sevik, in response to DI Morrison’s observation that AC had not stated she wished to be part of the investigation, indicated that MASH’s view was that ‘once a person agrees to have an ABE done, they are consenting to the police investigation.’ DC Sevik also indicated that AC spoke of discussing the matter with her husband soon and that she would give her decision.
29. On 17 October, in response to DI Morrison’s query if she was willing to have the police conduct the investigation on her behalf, AC said there was no need because the incident did not amount to indecency, although it was inappropriate. She said she was not afraid of repercussions. She

said she only gave the ABE interview because she was asked to. AC said she would speak to her husband and let Mr Morrison know.

30. On 24 November 2022 AC contacted DI Morrison. She said:

“I have given the matter a great deal of thought and some time and remain of the belief, that while the incident involving...[the Respondent] was inappropriate, it does not rise to the level of prosecution and I am not interested in pursuing the matter as such.

I have no problem cooperating with authorities in any fashion...

The initial request for an interview came from the police and while I was initially hesitant, believe it is important for investigators to have my version of events on record should it be needed in the future. Had I believed a crime was committed, I would have called the authorities myself at the time of the incident or the next morning at a minimum. If you have any questions or concerns, please let me know.”

31. The note of the conversation of 17 October 2022 was disclosed on 9 August 2023; the email of 24 November 2022 on 16 August 2023.

32. Also on 24 November 2022, DI Morrison informed AC that Superintendent Barrow had ‘agreed that with your present position, there is no need at this time to download your cell phone.’ The email to this effect was disclosed on 16 August 2023. Nothing thereafter was done in respect of downloading the phone until 20 February 2024, when the WhatsApp message to Norma McField was disclosed.

33. On 20 January 2023 the case file was sent to the DPP. On 23 February the DPP was sent the note of 7 October 2022 and the email of 24 November 2022. On 6 March the charging decision was made.

34. On 14 July 2023 AC emailed the witness care unit, stating:

“To be clear, I am not supportive of the prosecution in my case but simply provided the information so there was a record of the incident. The police are aware of this. I’m also a member of the media which poses additional challenges. Just want to ensure that all parties are aware of the situation.”

35. On 2 February 2024 AC was contacted about the forthcoming trial. She responded:

“I don’t mean to be obtuse, but why am I being advised? Is there something I’m supposed to do with this information?”

36. In an email of 6 February AC stated that she had no idea what was expected of her.

37. On 19 February 2024 AC told someone from the DPP’s office,
“*I have made it clear I’m not pressing charges...*”
38. The emails of 14 July 2023, 2 February and 6 February were disclosed on 27 February 2024, as was the note of 19 February 2024.
39. Before the trial was due to start, a witness summons was issued to AC with the conventional warning that a failure to attend would result in arrest.
40. We have referred to the different times when material was disclosed. Unfortunately, due to some confusion in Mr Brady’s office, the disclosure of 16 August 2023 was not provided to either Ms Bennett-Jenkins or him before the trial began.
41. All the disclosure set out above was available to the defence prior to cross-examination of AC.

The submissions to the judge on abuse of process

The written submissions

42. We shall try and summarise.
43. In the main skeleton argument, it was submitted that:
“The only proper construction of...[the] chain of events is the following-
- i) the police were aware that...[AC] did not support a criminal prosecution
 - ii) the DPP himself was aware of this
 - iii) no steps were taken to obtain her consent
 - iv) ...[AC]-having been ‘asked’ to provide an ABE-was misled as to the purpose to which it would be put by the prosecution
 - v) Her position-known to the prosecution throughout- is that there was no indecent assault.”
44. In support of the submission regarding AC’s view of the incident and her attitude to a prosecution, documents referred to in paragraphs 17-38 above were relied on.

45. There was complaint about how the ABE interview was conducted. It was submitted that AC was not asked, nor did she confirm, that her account could be used for a prosecution. She had made it plain that she was only giving her account so that there was a formal account of the events, not for the purpose of judicial proceedings. DC Sevik's contention that 'once a person agrees to have an ABE done, they are consenting to the police investigation' was not sustainable. The defence should have been informed of the full circumstances in which the ABE interview was recorded before it was introduced as evidence in chief: it should not have been introduced as it was. It was in the circumstances wholly inappropriate to issue a witness summons with its threat of arrest.
46. In the context of complaints about late disclosure, it was said (at [26] of the skeleton argument) that:
- "...vital information withheld by a senior member of the DPP's department against the background of non-disclosure extending over almost 18 months, raises a clear issue of mala fides. There has been a deliberate decision (by whom we ask) that there will be material non-disclosure of important material as to the mindset of the witness to the impending criminal prosecution prior to her cross-examination."
47. There undoubtedly were problems with late disclosure, as our summary of events above illustrates. However, the failure by Mr Brady's office to provide the disclosure of 16 August 2023, does appear to have resulted in the skeleton argument overstating the position.
48. At [27] complaint was made of the late disclosure of the WhatsApp message.
49. At [23]-[25] it was said:
- "...on any view there has been manipulation of the process to achieve the placing before the jury in a criminal trial, material which was never authorised to be used in this way by the witness, and this was done with the full knowledge of the prosecution (indivisible as to whether they are RCIPS/DPP or associated officers or counsel).
...The mischief is this: public faith in the integrity of the prosecution system is damaged by the deliberate withholding of the material that would establish this chain of events.
...A witness has been misled as to not only the status of her interview but her obligation to attend as a 'witness.'

...A charging decision in a grave crime was made in abrogation of the witnesses [sic] position.”

Ms Bennett-Jenkins' oral submissions to the judge

50. In her oral submissions Ms Bennett-Jenkins did not hold back. She submitted the police were from the beginning driving the prosecution on ‘a frolic of their own.’ AC never complained. The police knew she did not wish for or consent to a prosecution, or believe that what had happened amounted to an offence. They rode ‘roughshod’ over AC’s views.
51. Ms Bennett-Jenkins was highly critical of the way in which the ABE interview was provided. She submitted the police lied to AC and misled her about the use to which the interview might be put. They did not tell her it might be used as part of a prosecution. AC was never asked if she wished the interview to be treated as evidence in the case.
52. There was also severe criticism of the introduction of the interview into the proceedings at a time when, as Ms Bennett-Jenkins submitted, neither the defence nor the court knew the full circumstances in which it had been taken. Ms Bennett-Jenkins was also critical of the fact that a witness summons had been issued, with its possible sanction of arrest should AC not attend.
53. Ms Bennett-Jenkins also spoke of relevant evidence being concealed: of there being deliberate non-disclosure. She was particularly critical of the late disclosure of the WhatsApp message of 13 September 2022.
54. Ms Bennett-Jenkins further submitted that when the DPP took the decision to charge the Respondent he knew AC’s view of what happened and her attitude to a prosecution. He knew, she submitted, that AC had not made a witness statement and the circumstances in which she had agreed to an interview, which, accordingly, had no evidential status.
55. It was submitted the DPP had acted as a creature of the RCIPS as it was driving the prosecution. Ms Bennett-Jenkins referred in that context to the case of *Milton Keynes Magistrates Court, ex parte Roberts* (1995) Crim.LR 224, the commentary to which stated:

“If a prosecutor makes himself a creature of private interest in exercising his powers, then the conduct would at least *prima facie* be abusive.” (see transcript of 27 February 2024 at 71/1)

56. Later, Ms Bennett-Jenkins later spoke of ‘the prosecution indivisibly’ having acted abusively. (see 73/1-7 of the transcript of 27 February 2024).

57. A flavour of Ms Bennett-Jenkins’ submissions is apparent from the following:

“I would like to go back to basics please and to individuals being misled. [AC]...was misled about firstly, the format of the ABE by a senior member of the constabulary...[She] was not told that the intention of the RCIPS was to take a recorded interview of her which she had specifically said was not for use in judicial process. She is entitled to say that. And to then use that to incorrectly treat her as a witness in a criminal case. Abuse as we have identified in its second limb, involves whether the public confidence in the criminal justice system will be undermined and bring the criminal justice system into disrepute. What clearer, I ask rhetorically, example of undermining confidence in the criminal justice system and bringing it into disrepute, can there be but that a private individual who has not alerted the police to any issue, who believes there is no issue, is lied to about the purpose for which the ABE interview is being conducted...

What clearer example can there be of converting [sic] an individual who says I do not want to give evidence about this in judicial proceedings into somebody who is brought to court because she is threatened with being arrested on a document? How much more can the criminal justice system be undermined?...

The Court was presented with the ABE...as if it were properly recorded, consented to, giving of evidence by a witness as opposed to somebody that Detective Superintendent Barrow said well, the best way of getting this is to record it, thereby concealing from her, concealing from the Court the methodology by which the material was obtained.”

(See transcript of 27 February 2024 from 66/2 and following)

58. As we were told by counsel, these serious allegations were not put to the police witnesses, a topic to which we shall return.

The judgments below

The extempore judgment of 28 February 2024

59. At [1]-[5] the judge said:

- “1. On the morning of Monday, 25th February 2024, a request was made by the Defence to the Prosecution for the disclosure of certain information in the form of emails and other documents.*
- 2. The matter was ventilated in court, and the Court directed that the information sought be provided. Most of what was required was delivered late Monday evening.*

3. *Yesterday, 27th February 2024, further disclosure was made to the Defence, and that was followed in the afternoon by the hearing of an application to stay the proceedings.*
4. *Courts do have an inherent power to stay proceedings in certain situations. That power must be exercised within “NARROW CONSTRAINTS” and must not be used as a tool for disciplining the police or the Prosecution.*
5. *My decision is based solely on the disclosure information provide [sic] to the Defence, and the submissions of both Counsel, written and oral.”*

60. At [6] and [7] the judge referred to *Maxwell* and *Crawley*.

61. At [8]-[13] he went on to say:

8. *The Court is therefore concerned with process, and I stress, process by which the decision to prosecute was made.*
9. *I pose this question rhetorically. Would a right-minded citizen hearing the process used to have the Defendant brought before the Court...[sic] not have serious concerns?*
10. *Additional disclosure was made to the Defendant yesterday afternoon. The contents of the disclosure documents have been seen by the Court and now form part of the Court’s records.*
11. *This entire process has caused a level of disquiet.*
12. *I, therefore, uphold the application and will, accordingly, stay the proceedings.*
13. *Detailed reasons will be given at a later date.”*

62. Mr Lynch drew to the court’s attention that the original transcript refers to the judge saying:

“...the court is therefore concerned with the process...And I stress the process used by the prosecution to have [AC]...attend court.”

63. Although the judgment does not make it entirely clear under which category of abuse of process the decision was made, in the light of the defence submissions it is agreed to be the second category. The judge’s concern appeared to be the ‘process by which the decision to prosecute was made.’ The judge did not explain what it was about that process that caused him such serious concern or disquiet as to justify the staying of the proceedings.

The written judgment of 11 April 2024

64. As we have said, the judge himself wrote the headnote to the judgment. As material, it reads:

“...During the trial, the Defence applied for a stay. The Defence contended that due to the conduct of the Prosecution, there was an abuse in relation to counts two (2) and four (4); that is to say, the evidence involving the allegations relating to...[AC]. The entire proceedings were stayed with reasons to follow.

Held: *The prosecutorial system was being misused by person/s with their own agenda. Counts Two (2) and Four (4) should be stayed. The manner in which the Prosecution was conducted in relation to...[AC] caused the Court a great deal of disquiet, and the Court invoked its inherent jurisdiction to stay the proceedings to prevent any abuse of process. The Court was wrong to stay the entire case as the submissions were premised solely on the issues that led to the preferment of the indictment against the Defendant in respect of...[AC]. The Court rescinds the Order of Stay in respect of counts one (1) and three (3)."*

65. At [2] and following, the judge said:

- "2. After hearing submissions on the application, I upheld the submissions and directed that the entire proceedings be stayed.*
- 3. Upon reflection, I have concluded, as I set out in some detail in this Judgment, that I was wrong to stay the entire case and that the Order of the Court should reflect that only Counts Two (2) and Four (4) should be stayed and in consequence, there is no bar to the Crown seeking to try the Defendant on Counts One (1) and Three (3).*
- 4. To understand the circumstances that led to the abuse application, it is necessary to dilate on the facts."*

66. The judge, at [6] to [10] set out the prosecution case, some parts of the evidence relating to AC and the evidence of some of the police officers.

67. As to AC, the judge referred, among other things, to her WhatsApp message of 13 September 2022 to Norma McField (paragraphs 17, 18 and 32 above), her comments to DI Morrison on 24 November 2022 (paragraphs 30-1 above), the fact that AC did not think that what the Respondent did 'rose to the level of a crime, that she had no intention of making a formal complaint to the police, that she spoke of 'being ambushed by people who have an agenda: I don't recall giving any consent to anyone for anything,' and that at the time she 'wanted to have recorded my account of what took place...to set the record straight.'

68. Although it may not matter, our reading of the transcript suggests that AC did not say she was being 'ambushed' but spoke of being 'harassed.' In the ABE interview she said she was 'getting harassed by people who are just asking me how I'm doing because they all seem to have an agenda of some kind, which makes it really difficult.'

69. As to Detective Superintendent Barrow, the judge referred to his conversation with AC of 14 September 2022 (paragraphs 19 and 20 above).

70. The judge referred to AC at different times making it plain to Detective Inspector Morrison that she did not wish to be part of, or consent to an investigation and that when in March 2023 he spoke to her, AC was surprised the charges involved her. The judge also referred to Mr Morrison first realising AC was part of the investigation when the DPP preferred charges relating to her.
71. At [13] the judge set out in full Ms Bennett-Jenkins' skeleton arguments seeking disclosure. He did not refer (if he knew) to the confusion regarding the second tranche of disclosure in Mr Brady's office.
72. At [15] and [16] the judge said:
- “...I heard the application on the grounds of abuse of process. Following upon submissions from both Counsel and after careful consideration of the same, I stayed proceedings on the grounds of abuse of process.
...In her application for the stay of proceedings, Mrs [sic] Sally Benet-Jenkins [sic] submitted there was an abuse in relation to counts two (2) and four (4); that is to say, the evidence involving the allegations relating to...[AC].”*
73. It is agreed the judge was wrong about that. There were submissions, both written and oral, in which it was argued that the case regarding MLM should be stopped on the basis that the jury might wrongly use the allegations in AC's case as support for the allegations in MLM's case.
74. At [17]-[23] the judge quoted from a number of authorities on abuse of process. Under the heading 'Analysis,' he said [24]-[31]:
- “24. As set out in...it is well established that the Court has a power to stay the proceedings in two categories of cases, namely, (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the Court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. As I said in ex tempore Ruling on 28 February 2024, the decision to stay the proceedings was based solely on the disclosure information provided to the Defence during the course of the trial and the written and oral submissions of both Counsel.*
- 25. The Court has an inherent duty to protect the integrity of the criminal justice system. In the instant case, [AC]...had, as early as September 2022, indicated that she was not interested in a prosecution and did not think that the matter rose to the level of a crime. In November 2023 [sic], in an email to DI Morrison, she said:
“I have given the matter a great deal of thought...I am not interested in pursuing this matter.”*

26. *On the second day of the trial, [AC]...forwarded an email to DI Morrison in which she stated:*

“Hello Sir, As requested, this is the letter that I sent to my superiors who requested I write down what I recalled happening as best as possible at the time. This was for internal purposes and not something I expected to be used in court. I simply wanted them to be aware of the issue and advise on how situations like this should be addressed as well as how personnel should respond.”

27. *In an email to Superintendent Barrow from Samuel Rose on 10 February 2023, he wrote as follows:*

“Dear Superintendent Barrow, after much contemplation and consultation with my family, I wish to inform you that I will not be providing a statement on the matter. Above all else, I have been concerned about confidentiality in this matter. I have been approached by three separate individuals who are not RCIPS officers about providing a statement on this matter which only confirms my apprehensions/concerns. As you are aware, I was not at the Ritz Carlton on the evening in question. I fail to see how the strength of this case rests on anything I say when I was not present. I trust this clarifies my position on this matter.”

28. *In light of the foregoing, I formed the view that the prosecutorial system was being misused by person/s with their own agenda. It is imperative that public confidence in the administration of justice must always be maintained, and the Court must never be seen to be abdicating that duty.*

29. *The manner in which the Prosecution was conducted in relation to [AC]...caused me a great deal of disquiet, and I invoked my inherent jurisdiction to prevent any abuse of process.*

30. *In granting a general stay, however, it is clear that I fell into error.*

31. *The submissions made by Mrs. Sally Bennet-Jenkins KC were premised solely on the issues that led to the preferment of the indictment against the Defendant in respect of...[AC]. No submissions were made in respect of ...[MLM], and nor could they have been.*

32. *The error is regretted, and the Court is satisfied that Counts One (1) and Three (3) ought not to have been stayed and should be tried if the Prosecution choose to proceed. I, therefore, rescind the Order of Stay in respect of those Counts.”*

75. In [25] the reference to November 2023 should be to November 2022 (see paragraphs 30 and 31 above). [26] appears to be a reference to the provision by AC on 20 February 2024 to Mr Morrison of her email to Norma McField of 14 September 2022 (see paragraph 21 above).
76. It is agreed, the judge was wrong not only regarding the absence of submissions regarding MLM, but in assuming he had the power to rescind the stay he had made. By the time of the judgment, he was clearly *functus officio*.
77. In [27] there is a reference to Samuel Rose, the Cabinet Secretary. He was not present at the time of the incident. The email was disclosed on 23 August 2023. No submissions appear to have been made regarding him.

Discussion

78. As the authorities cited above make clear, the determination of whether an abuse of process of the second category has been made out involves the judge performing a balancing exercise between two public interests: on the one hand, the importance of prosecuting those who have committed criminal offences, on the other, the integrity of the criminal justice system. The circumstances in which it is appropriate to stay a criminal trial for such an abuse of process are likely to be rare and exceptional and are a last resort, for such an order will bring to an end proceedings in which there may be cogent evidence of criminality which will never be tried. Deciding whether there has been abuse of process requires the judge, firstly, to set out what, on the balance of probabilities, he finds has been proved, secondly, whether in his view the integrity of the justice system has been compromised to an unacceptable degree and, thirdly, how, in all those circumstances, the balancing exercise should be resolved, always bearing in mind that a stay must be a last resort. As Professor Choo indicated, resolving the balancing exercise is likely to involve taking into account such factors as the seriousness of any violation of the defendant's rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.
79. Mr Lynch, in sensible and well balanced submissions, accepted the written judgment could have been fuller. He submitted however, that on proper analysis the concerns of this very experienced judge were clear. They encompassed such things as the unacceptable late

disclosure of significant material, the knowledge of the police and the DPP that AC did not consent to or agree to participate in a prosecution, her view that no offence had been committed, her reference to being ‘ambushed’ (or ‘harassed’), the circumstances in which the ABE interview was taken, the reliance placed upon it in court and the issue of the witness summons. It is also clear, submitted Mr Lynch, that the judge took into account the submissions made to him. Mr Lynch emphasised that this court should be slow to interfere with what was the exercise by this very experienced judge of his judicial discretion. He would not without reason, he submitted, have been disquieted or referred to the views of right thinking or right minded people.

80. Mr Lynch was right to concede that the judgment could have been fuller. We would go further. As it seems to us, there is nothing in the judgment to suggest the judge reached his decision in the structured way set out in paragraph 78. He did not set out in necessary detail what in his view had been proved or explain how that compromised the criminal justice system to an unacceptable degree and said nothing about his resolution of the balancing exercise. Indeed, there is nothing to suggest he carried out any balancing exercise. Merely to say that ‘the prosecution system was being misused’ based on the ‘foregoing,’ without specifying and explaining what it was of the ‘foregoing’ which justified his conclusion was not in our view sufficient. It was similarly insufficient simply to speak of being disquieted or of the views of right thinking or right minded people. Moreover, we are unable to identify in the ‘foregoing’ any fact or matter which could reasonably be considered as sufficient to amount to an abuse of process of the second category.
81. The submissions finally made by Ms Bennett-Jenkins were serious. At their heart was the suggestion that a number of different police officers, in order to prosecute the Respondent, and with the consent of the DPP, decided, in the absence of AC’s consent and contrary to her wishes and her view that no offence had been committed, instigated and continued with this prosecution for (unexplained) reasons of their own. In order to achieve that end, they lied to AC and tricked her into providing an ABE interview, ran roughshod over her wishes and, notwithstanding AC’s lack of consent, caused her to be summoned to attend court and give evidence by the threat of arrest. Additionally, they sought to conceal or not disclose relevant evidence.
82. It is impossible to know from the judgment whether the judge accepted Ms Bennett-Jenkins’ final submissions in whole or in part or not at all. Mr Lynch, rightly, did not seek to argue that the evidence could sustain the sort of wrongdoing finally alleged by Ms Bennett-Jenkins, not

least because, as basic fairness required, the allegations were not put to the relevant witnesses, if necessary, by recalling them.

83. The written judgment raises further problems.
84. The reliance on the Samuel Rose email ([27] of the written judgment) is difficult to understand. It seemingly is intended to indicate that Mr Rose was in some way complicit in malign conduct, something which was never suggested and in respect of which there was, as we understand it, no evidence.
85. At [13] of the written judgment, the judge reproduced '*seriatim*' the defence disclosure skeleton argument. It was highly critical of the Assistant Director of Public Prosecutions regarding disclosure. However, it appears not to have taken into account that one tranche of disclosure went astray in Mr Brady's office. If the judge was aware of that, he did not refer to it. If the inclusion of the skeleton argument in the judgment was intended to support the defence allegations of concealment of documents, it in those circumstances loses some of its force. Moreover, as paragraphs 16-38 above illustrate, considerable material going to AC's reluctance to become involved in a prosecution, her view of the incident and her provision of the ABE interview was disclosed well before trial. As to the WhatsApp message, the circumstances in which it was not originally disclosed do not, it seems to us, suggest concealment but incompetence: see paragraphs 17, 18 and 32 above.
86. Finally, underlying the submissions of abuse of process and the judge's decision appears to have been a belief that in the absence of a complainant's consent there is something improper in bringing a prosecution. That is not so. The public interest may justify, particularly in the context of allegations of sexual misconduct, that a prosecution be brought, even in the face of the contrary wishes of a complainant. Furthermore, the fact a complainant may not think what happened amounted to an offence is not determinative of whether or not it does.

Conclusion

87. While we readily accept that this court should be slow to interfere with the exercise of a judicial discretion, we have concluded that we are bound to set aside the judge's order for a stay for the reasons we have set out. As we are required to under section 28(4) of the Act, we remit the case to the Grand Court. However, whether in all the circumstances the DPP considers that a re-trial is now in the public interest is a matter for him. No doubt he will want to bear in mind, among other things, that a considerable time has now passed since these events.