**[2023 Gib LR 589]**

# CORNELIO, PEREZ and SANCHEZ v. R.

SUPREME COURT (Dudley, C.J.): August 8th, 2023

2023/GSC/029

*Criminal Procedure—charges—nolle prosequi—costs—where applicants charged with offences but Attorney-General entered nolle prosequi, Supreme Court may award costs pursuant to Criminal Procedure and Evidence Act, s.589(2) if charges not made in good faith*

The applicants were charged with various offences.

The applicants were jointly charged with one count of conspiracy to defraud. In addition, the first applicant was charged with computer misuse offences and the third applicant was charged with misconduct in public office and aiding and abetting unauthorized access to computer material. The indictment was preferred in December 2020. The applicants applied for dismissal. Subsequently, the Attorney-General, in the exercise of powers conferred on him by s.59 of the Gibraltar Constitution Order "and all other enabling powers," entered a nolle prosequi discontinuing the criminal proceedings against the applicants. The applicants sought their costs in the total sum of £388,401 pursuant to s.589(2) of the Criminal Procedure and Evidence Act ("the CPEA").

The Governor had set up an inquiry into the retirement of the former Commissioner of Police. One of the issues to be considered by the inquiry touched upon the investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and an alleged conspiracy to defraud. These were the allegations which underpinned the prosecution of the applicants. The Attorney-General and the applicants had been granted "core participant" status in the inquiry.

In advance of the substantive costs hearing, the applicants sought an order that the respondent provide disclosure, including documents showing the reasons for the entry of a nolle prosequi and documents showing that the respondent had knowledge of the matters which led to the entry of a nolle prosequi.

Section 589(2) of the CPEA provided for the award of costs "if a person committed or sent for trial is not ultimately tried, in which case the Supreme Court has the same power to order the payment of costs as if the examining magistrates had not committed the defendant for trial." The power of examining magistrates was contained in s.588(5), which provided: "If examining magistrates decide not to commit the defendant for trial on the

ground that the evidence is not sufficient to put him upon his trial, and are of opinion that the charge was not made in good faith, they may order the prosecutor to pay the whole or any part of the costs incurred in or in relation to the defence."

The applicants submitted *inter alia* that (a) they "were sent for trial," they were "not ultimately tried" and therefore the court had the same power to award costs "as if the examining magistrates had not committed the defendant for trial," *i.e.* costs could be awarded if the court was of the opinion that the charge was not made in good faith; (b) s.589(2) of the CPEA made clear that its effect endured beyond the conclusion of the substantive proceedings; and (c) the applicants relied on the court's common law powers to order disclosure.

The respondent submitted *inter alia* that (a) if, prior to the case being sent to the Supreme Court, the Attorney-General either entered a nolle prosequi under s.59 of the Constitution or entered a notice of discontinuance under s.231 of the CPEA, s.588(5) would not apply and the examining magistrates would have no jurisdiction to award defence costs, it was only in cases where the magistrates examined the evidence at committal and found no case to answer and were of the opinion that the charging decision was not made in good faith that there was a jurisdiction to award costs against the prosecutor; (b) the effect of s.223(1) of the CPEA, which provided that "the Attorney-General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings are not to continue," was to bring the proceedings to an end, and consequently the court did not have jurisdiction to award costs; (c) as the application for costs was made under the CPEA, it was to that Act that the issue of jurisdiction to make an order for disclosure must be directed; (d) s.4(1) of the CPEA was to be read subject to the provisions of the Act and therefore the present application for disclosure must fall within the statutory scheme, as the old common law rules were expressly disapplied by s.266(2) of the CPEA; and (e) the prosecution's disclosure obligations under Part 12 of the Act were focused and directed to the alleged offence and the disclosure now sought was not directed at that or otherwise provided for by Part 12.

**Held,** ruling as follows:

(1) The natural and ordinary meaning of s.589(2) accorded with the applicants' submission, namely in the context of the present case, the applicants were sent for trial, they were not ultimately tried, and therefore the Supreme Court had the same power to award costs "as if the examining magistrates had not committed the defendant for trial," *i.e.* costs could be awarded if the Supreme Court was of the opinion that the charge was not made in good faith. Section 589(2) was engaged on a defendant not being tried. Where a defendant was not ultimately tried, determining evidential sufficiency was not a procedural step that was required of the Supreme Court, the only matter for the court to consider was whether the charge was not made in good faith (paras. 13–16).

(2) The court was not *functus officio* following the nolle prosequi. It retained the jurisdiction to make an award of costs (paras. 19–20).

(3) The Attorney-General had no obligation to give reasons when entering a nolle prosequi. To seek any such reasons from knowledge which might have been acquired by the D.P.P. would be to subvert the statutory provisions and the Attorney-General's right not to provide them. That said, at such stage as all the evidential material fell to be considered, it might be proper to draw inferences from the failure to provide the reasons (paras. 21–23).

(4) The applicants could properly seek to rely upon common law duties of disclosure. Section 4(1) of the CPEA afforded the court specific powers for the purposes of the exercise of its criminal jurisdiction, but it did not derogate from the powers and jurisdiction afforded to it by s.12 of the Supreme Court Act, even in the exercise of its criminal jurisdiction. Additionally there was the caveat in s.4(1): "so far as is reasonable taking into account the circumstances of Gibraltar." Those circumstances included the fact that the Supreme Court which was established by s.60 of the Constitution established what was a single unitary court with unlimited jurisdiction (para. 27).

(5) The court would therefore hear the disclosure application, other than in respect of the reasons for entering the nolle prosequi and the D.P.P.'s knowledge of the matters that led to its entry. However, before so proceeding, mindful of the common courtesy and mutual respect this court owed the inquiry, the Registrar would be directed to provide a copy of this judgment to it. Should the Commissioner consider that orders which might be made by this court could adversely affect the progress of the inquiry or should he consider it desirable that these proceedings be stayed until the conclusion of the inquiry, the court would invite him to ask counsel to the inquiry to appear at the next directions hearing in these proceedings (para. 29).

**Cases cited:**

(1) *D.P.P.* v. *Denning*, [1991] 2 Q.B. 532; [1991] 3 W.L.R. 235; [1991] 3 All E.R. 439; (1992), 94 Cr. App. R. 272; [1991] R.T.R. 271, considered.

(2) *Khan* v. *Home Secy*., [2018] EWCA Civ 1684; [2019] Imm. A.R. 54, considered.

(3) *Mohit* v. *D.P.P. (Mauritius)*, [2006] UKPC 20; [2006] 1 W.L.R. 3343, considered.

(4) *R. (Liberty)* v. *Prime Minister*, [2019] EWCA Civ 1761; [2020] 1 W.L.R. 1193, considered.

(5) *R. (Nunn)* v. *Chief Const. Suffolk Constabulary*, [2014] UKSC 37; [2015] A.C. 225; [2014] 3 W.L.R. 77; [2014] 4 All E.R. 21; [2015] Crim. L.R. 76; [2014] 2 Cr. App. R. 22, considered.

**Legislation construed:**
Criminal Procedure and Evidence Act 2011, s.4(1): The relevant terms of this subsection are set out at para. 25.
s.223(1): The relevant terms of this subsection are set out at para. 17.
s.266(2): The relevant terms of this subsection are set out at para. 25.
s.588(5): The relevant terms of this subsection are set out at para. 13.
s.589(2): The relevant terms of this subsection are set out at para. 13.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.59: The relevant terms of this section are set out at para. 17.

Supreme Court Act, s.12: The relevant terms of this section are set out at para. 24.

Senior Courts Act 1981 (c.54), s.45: The relevant terms of this section are set out at para. 26.

*B. Cooper*, *K.C.* for the applicants;
*J. Hines*, *K.C.* with *M. Zammit* (instructed by the Office of Criminal Prosecutions & Litigation) for the respondent.

1 **DUDLEY, C.J.:** This is the judgment on four preliminary issues that arise in respect of an application for costs made pursuant to s.589(2) of the Criminal Procedure and Evidence Act ("CPEA").

**Background**

2 Thomas Cornelio ("TC"), John Perez ("JP"), and Caine Sanchez ("CS") (together "the applicants") were jointly charged with one count of conspiracy to defraud, contrary to common law; TC was also charged with 14 counts of various computer misuse offences which are to be found in Part 15 of the Crimes Act, whilst CS was charged with an additional two counts of misconduct in public office and of aiding and abetting unauthorized access to computer material.

3 The indictment was preferred on December 16th, 2020 and on January 27th, 2021 CS filed an application for dismissal pursuant to s.201 of the CPEA. On June 25th, 2021, TC and JP also filed an application for dismissal. Those applications were listed for hearing from March 1st, 2022 but in the event they did not progress to a hearing as on January 21st, 2022 H.M. Attorney-General, Michael Llamas, C.M.G., K.C. ("HMAG") in the exercise of powers conferred upon him by s.59 of the Gibraltar Constitution Order 2006 ("the Constitution") "and all other enabling powers" entered a nolle prosequi discontinuing the criminal proceedings against the applicants.

4 By an application dated February 24th, 2022 the applicants seek their costs in the total sum of £388,401.

5 On February 4th, 2022, H.E. the Governor, for the Government and at the request of the Chief Minister, set up an inquiry into the retirement of the former Commissioner of Police, with Sir Charles Openshaw, D.L. appointed the Commissioner of the Inquiry ("the inquiry"). One of the issues to be considered by the inquiry touches upon the investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and an alleged conspiracy to defraud. These are the allegations which underpinned the prosecution of the applicants. HMAG and each of the applicants have been granted "Core Participant" status in the inquiry.

6 The substantive costs hearing in these proceedings was fixed for March 21st and 22nd, 2023. However, by an application dated October 31st, 2022, which the applicants requested be dealt with without a hearing, they sought an order that:

> "(1) In respect of each category identified in paragraph 3 of this [draft] order, the respondent shall by [four weeks from the date of the order] either provide the Applicants with copies of the documents in that category, or (if it be the case) confirm in writing to the Applicant that it has no such documents under its control."

There is then very detailed particularization of the disclosure sought at para. (4), over some 20 paragraphs and sub-paragraphs, including

> "(4)(e) Any documents that tend to show a connection between the investigation into and prosecution of the Applicants and the early retirement of Ian McGrail as Commissioner of Police
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> . . .
>
> (p) any document showing the reasons for the entry of a *nolle prosequi*
>
> (q) any document, tending to show that the respondent had knowledge of the matters that led to the entry of a *nolle prosequi*
>
> (r) All correspondence or notes of any meetings relating to the retirement of the former Commissioner of Police Ian McGrail which raise the issue of the investigation into and/or prosecution or continued prosecution of the Applicants, including:
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> (i) Any record of complaints made by the Chief Minister and/or Acting Governor in May 2020
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> (ii) Any minutes of meetings between the Acting Governor, the Chairman of the Gibraltar Police Authority, and the Chief Minister in 18 May 2020
>
> (iii) Any minutes of GPA meetings in May and June 2020

(iv) Any letters from the Gibraltar Police Authority to the former Commissioner of Police Ian McGrail in May 2020

(v) Any letters from solicitors for the former Commissioner of Police Ian McGrail to the Gibraltar Police Authority in May 2020

(vi) Any letters from the Attorney General to the Chairman of the Gibraltar Police Authority in June 2020."

A caveat to the order sought is to be found at para. (5) of the draft which reads: "If the Respondent concedes liability on the Costs Application, it may not comply with paragraph 1 this order"

7 The parties were informed that I did not consider this to be an application which was capable of being dealt with without a hearing. The substantive costs hearing was vacated and the matter listed for a directions hearing on those days.

8 At this juncture the issues that require determination touch upon the jurisdiction of the court to make an award of costs, namely:

(i) the interpretation of s.589(2) when read together with s.588(5) of the CPEA; and

(ii) the effect of the nolle prosequi, and whether the court is *functus officio*.

If the court has jurisdiction, it then needs to determine whether:

(i) it has jurisdiction to make the disclosure orders sought; and if so

(ii) consider the merits of the disclosure application.

9 At the start of the hearing, I made reference to the fact that it had been reported in the *Gibraltar Chronicle* edition of that same day, that the applicants had been made core participants in the inquiry and that some of the issues that I was being invited to adjudicate upon were matters which undoubtedly will be considered by the inquiry and I expressed strong reservations as to whether I should make orders which could potentially cut across its purview. In that regard I referred counsel to *R. (Liberty)* v. *Prime Minister* (4).

10 In *Liberty,* the applicant applied for permission to appeal against a case management decision refusing its request for an urgent hearing of its claim for judicial review against the Prime Minister, based on its contention that he might act unlawfully by reference to his obligation under the European Union (Withdrawal) (No. 2) Act 2019. Supperstone, J. in the Administrative Court refused the application on paper on the basis that the Scottish courts were not only seised of the matters sought to be raised in the claimant's claim, but had decided them, the Outer House of the Court

of Session had refused to grant relief in a claim raising the same issues, with that decision upheld by the Inner House of the Court of Session, with the caveat that a further hearing had been arranged to enable the petitioners to develop further arguments arising out of intervening events. Lord Burnett of Maldon, C.J., Sir Terence Etherton, M.R., Dame Victoria Sharp, P. handing down the judgment of the court ([2019] EWCA Civ 1761, at paras. 29–31):

> "29. It is inefficient to deploy court and judicial time to dealing with the same issues. More tellingly, it would give rise to the risk of conflicting decisions and, in the field of public law, to the potential grant of multiple discretionary orders which are not in identical terms. There is an analogy with the law relating to the grant of anti-suit injunctions designed to prevent conflicting judgments in different jurisdictions arising from the same issue.
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> 30. Moreover, it is also not consistent with the principle of judicial comity for our courts to launch on an expedited and inevitably abbreviated review of precisely the same matters that were before the Scottish courts to investigate whether the Scottish courts were wrong in their decisions as to the substance of the claims prior to 19 October 2019 and to hold matters over until Monday 21 October. If it is suggested that the Scottish courts are wrong, the remedy is an application for leave to appeal to the Supreme Court. No such application was made after the Inner House delivered its opinion on 9 October.
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> 31. As to comity, in the words of Lord Donaldson in *British Airways Board v Laker Airways* [1984] QB 142 (at 185–6): 'Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' The Scottish courts are now the appropriate forum for all matters which arise in these proceedings to be litigated and respect must be paid to their decisions. If the Petitioners fail, they may seek the final ruling of the Supreme Court as the Prime Minister can if they succeed."

11 There are of course material differences between the factual matrix in *Liberty* and the present case, not least that the inquiry is an inquiry established under the Commissions of Inquiry Act. Nonetheless, it is judge led and in my judgment this court owes the inquiry "common courtesy and mutual respect." It is courtesy and respect which may extend to not making determinations of fact until the inquiry has concluded, not least given that this court is being asked to make determinations in the context of costs and therefore the inquiry, in which no doubt there will be oral evidence and cross-examination of witnesses, may be better placed to make those determinations. But at this stage, at the very least, the courtesy and respect

extends to this court not making disclosure orders which may cut across the disclosure which may be ordered in the inquiry, without first giving counsel to the inquiry the opportunity to address this court.

12 Notwithstanding, cognizant that two days had been allocated to the directions hearing and that counsel had travelled from the United Kingdom, I invited counsel to deal with the matters of law which could potentially be dispositive of the costs application or which did not impinge upon the inquiry.

**Interpretation of s.589(2) when read together with s.588(5) of CPEA**

13 Section 589(2) of the CPEA provides for the award of costs in favour of a defendant as follows:

> "589.(1) [Application of part 24 when a person is committed for sentence.]
>
> (2) The provisions of this Part apply if a person committed or sent for trial is not ultimately tried, in which case the Supreme Court has the same power to order the payment of costs as if the examining magistrates had not committed the defendant for trial."

The power of examining magistrates referred to is contained in s.588(5) which provides:

> "(5) If examining magistrates decide not to commit the defendant for trial on the ground that the evidence is not sufficient to put him upon his trial, and are of opinion that the charge was not made in good faith, they may order the prosecutor to pay the whole or any part of the costs incurred in or in relation to the defence."

If examining magistrates decide not to commit a defendant for trial on the grounds that the evidence is not sufficient to put him upon his trial and are of the opinion that the charge was not made in good faith, the court has a discretion to award the whole or part of defence costs incurred. That therefore, the jurisdiction to award costs only arises when both limbs of the subsection are met. Namely, evidential insufficiency and absence of good faith in respect of the prosecutor's charging decision.

14 Mr. Hines submits that it is beyond argument that if, prior to the case being sent to the Supreme Court, HMAG either (i) entered a nolle prosequi under s.59 of the Constitution (taken together with s.223 of the CPEA), or (ii) entered a notice of discontinuance under s.231 of the CPEA, s.588(5) would not apply, and the examining magistrates would have no jurisdiction to award defence costs. That it follows that the same is true of the application of s.589 and s.588 by the Supreme Court. Put another way, that it is only in cases where the magistrates examine the evidence at committal and find no case to answer and they are of the opinion that the charging

decision was not made in good faith that there is a jurisdiction to award costs against the prosecutor. That s.589(2) puts the Supreme Court in the same position as the examining magistrates, and the same two preconditions must be met. The dismissal application made by the applicants needed to be determined in their favour with absence of good faith established thereafter. Because in the event there has been no determination as regards evidential sufficiency an adverse costs order cannot be made against the Crown.

15 For his part Mr. Cooper advocates for a more literal reading of s.589(2). In the context of the present case, he puts it as follows: the applicants "were sent for trial," they were "not ultimately tried" and therefore the Supreme Court has the same power to award costs "as if the examining magistrates had not committed the defendant for trial," that is to say, costs may be awarded if the Supreme Court is of the opinion that the charge was not made in good faith.

16 In my judgment, the natural and ordinary meaning of s.589(2) accords with Mr. Cooper's submission. I am fortified in that view because it is the meaning which accords with its provenance. The predecessor provision to s.589(2) is to be found in s.230(3) of the now repealed Criminal Procedure Act 1952. They are in near identical terms. Prior to the enactment of the CPEA the concept of "sending" a defendant for trial was not known to the law of Gibraltar and similarly neither was there an ability for a defendant to make an application to dismiss an offence sent to the Supreme Court pursuant to the English Criminal Procedure Rules (which by virtue of s.2 of the CPEA are also our Rules of Court). In very short, the Criminal Procedure Act 1952 did not afford a defendant committed for trial by examining magistrates a statutory route to challenge a prosecution before the Supreme Court on the grounds of insufficiency of the evidence until the actual trial. Notwithstanding, s.230(3) afforded the same entitlement to costs as the present s.589(2). In my judgment, it follows that s.589(2) is engaged upon a defendant not being tried. Where a defendant is not ultimately tried, determining evidential sufficiency is not a procedural step that is required in the Supreme Court, the only matter for the court to consider is whether "the charge was not made in good faith."

**Nolle prosequi—is the court *functus officio*?**

17 The jurisdiction of HMAG is to be found at s.59(1) of the Constitution, which establishes the office with certain powers set out at s.59(2), para. (c) of which provides:

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

In relation to the exercise of that power subs. (4) provides that it is "vested in him to the exclusion of any other person or authority" whilst subs. (5) provides that in the exercise of his powers under s.59 he "shall not be subject to the direction or control of any other person or authority." In turn s.223(1) of the CPEA provides:

> "223.(1) In any criminal case, at any stage before the verdict or judgment, as the case may be, the Attorney-General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings are not to continue."

By virtue of s.223(2) the effect of a nolle prosequi is that a defendant must be at once discharged, if on bail, his recognizances discharged and if committed to prison, released.

18 Section 223 falls to be contrasted with s.232 of the CPEA which provides for the discontinuance of proceedings after a defendant has been sent for trial. The difference between the sections is that a s.232 discontinuance can only be effected before the indictment is preferred and HMAG must in his notice of discontinuance to the Supreme Court, give reasons for not wishing the proceedings to continue, albeit he need not give the defendant any indication of his reasons.

19 Mr. Hines submits that the effect of the concluding phrase in s.223(1) of the CPEA "the proceedings are not to continue" brings the proceedings to an end and that consequently the court does not have jurisdiction to award costs.

20 In *D.P.P.* v. *Denning* (1), the English Divisional Court held in the context of the English Prosecution of Offences Act and regulations made thereunder that a magistrates' court's jurisdiction as to costs survives a notice of discontinuance. Nolan, L.J. said ([1991] 2 Q.B. at 540):

> "Finally, and perhaps most cogently of all, it is inconceivable that Parliament should have intended the power to award costs to be exercisable only during the course of the proceedings in respect of which the award is to be made."

In my judgment as regards jurisdiction to make an award of costs, there is absolutely no material difference between the language of s.223(1) of the CPEA "the proceedings are not to continue" and the language of s.232(2) "they must be discontinued with effect from the giving of the notice." *D.P.P.* v. *Denning* supports a reading of those provisions which retain the jurisdiction to make an award of costs. Moreover, as Mr. Cooper cogently submits and I accept, s.589(2) of the CPEA itself makes clear that its effect endures beyond the conclusion of the substantive proceedings, since it applies only where a defendant "is not ultimately tried"—a state of affairs that can only arise once the possibility of a future trial has been extinguished by bringing the substantive proceedings to an end.

**Jurisdiction to order disclosure of the reasons for the nolle prosequi**

21 There is a second aspect to s.223(1) and s.232(2) of the CPEA which bears consideration and which relates to the specific request for disclosure of the reasons for the entering of the nolle prosequi. By virtue of s.232(3) and (4), if HMAG discontinues proceedings under that provision, he must give reasons for the discontinuance to the court but "need not give the defendant any indication of his reasons." Section 223 is silent as to the requirement if any as to the giving of reasons. Reading these provisions which are found in the same Part of the same Act, in my judgment it is clear that HMAG has no obligation to give reasons when entering a nolle prosequi.

22 I am fortified in that view by the Privy Council decision in *Mohit* v. *D.P.P. (Mauritius)* (3). The appellant tried on several occasions to bring a private prosecution against a senior politician in Mauritius on a charge of harbouring a criminal. On each occasion the Director of Public Prosecutions, in exercise of his powers under s.72(3)(c) of the Constitution of Mauritius, filed a nolle prosequi and brought the proceedings to an end. The appellant applied to the Supreme Court of Mauritius for leave to apply for judicial review of one of the DPP's decisions to file the nolle prosequi. The Supreme Court dismissed various applications, holding that the DPP's decisions to file a nolle prosequi or not to prosecute were not amenable to judicial review. The Privy Council held that the exercise by the Mauritius DPP of his powers under s.72(3)(c) of the Mauritius Constitution (which is in identical terms to the powers vested in HMAG by virtue of s.59(2)(c) of our Constitution) was amenable to judicial review. However, in the judgment of the Privy Council delivered by Lord Bingham, he said ([2006] 1 W.L.R. 3343, at para. 22):

> "It follows from that conclusion that the judgments of the Supreme Court of Mauritius of 30 September 2003 and 14 September 2004 should be set aside and the Supreme Court invited to reconsider the appellant's applications in the light of this judgment and any evidence there may then be. That evidence will include any reasons the DPP may choose to give. But it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given. The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief."

23 It follows from *Mohit* that there is no legal obligation on the part of HMAG to give reasons for the discontinuance of proceedings. To seek any such reasons from knowledge which may have been acquired by the DPP would be to subvert the statutory provisions and HMAG's right not to provide them. That said, at such stage as all the evidential material falls to be considered, it may be proper to draw inferences from the failure to provide the reasons.

**Jurisdiction to order disclosure**

24 The application for disclosure is predicated on the common law powers of this court. It is a useful exercise to examine the provenance of those powers. At its core is s.12 of the Supreme Court Act, which provides:

> "The court shall in addition to any other jurisdiction conferred by this or any other Act, within Gibraltar and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty's High Court of Justice in England."

25 However, Mr. Hines contends that as the application for costs is made under the CPEA, it is to that act that the issue of jurisdiction to make an order for disclosure must be directed. And he relies upon s.4(1) of the CPEA which provides:

> "4.(1) Subject to the provisions of this and any other Act, and to any rules made by the Chief Justice under section 696, criminal jurisdiction, as regards practice, procedure and powers, is to be exercised in conformity with the law and practice for the time being observed in England as follows—
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> . . .
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> (b) by the Supreme Court in its original jurisdiction and its criminal appellate jurisdiction—the law and practice in the Crown Court . . .
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> so far as is reasonable taking into account the circumstances of Gibraltar."

He further submits that, importantly, s.4(1) is to be read subject to the provisions of the CPEA and any other Act. That therefore the present application for disclosure must fall within the statutory scheme as the old common law rules are expressly disapplied by s.266(2) of the CPEA, which provides:

> "(2) If this Part applies as regards things falling to be done after the commencement of this Part in relation to an alleged offence, the rules of common law which—

(a) were effective immediately before the commencement of this Part; and

(b) relate to the disclosure of material by the prosecutor,

do not apply as regards things falling to be done after that time in relation to the alleged offence."

Mr. Hines argues that the prosecution's disclosure obligations under Part 12 of the CPEA are focused and directed to the alleged offence and that the disclosure now sought is not directed at that or is otherwise provided for by Part 12.

26 As regards the possible limitation on the jurisdiction of this court which s.4(1) of the CPEA arguably creates, Mr. Cooper's short but cogent answer is by reference to s.45 of the United Kingdom Senior Courts Act 1981 by virtue of which the Crown Court "in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, [has] the like powers, rights, privileges and authority as the High Court." That of itself is sufficient to dispose of the submission that when exercising its jurisdiction under the CPEA this court does not have the powers of the English High Court.

27 Moreover, s.4(1) of the CPEA is subject to not only other provisions in the CPEA but also "any other Act," which evidently includes the powers and jurisdiction afforded to the court by s.12 of the Supreme Court Act. In my judgment, s.4(1) of the CPEA affords the court specific powers for the purposes of the exercise of its criminal jurisdiction, but it does not derogate the powers and jurisdiction afforded to it by s.12 of the Supreme Court Act, even in the exercise of its criminal jurisdiction. Additionally, there is the caveat "so far as is reasonable taking into account the circumstances of Gibraltar." Those circumstances include the fact that the Supreme Court which is established by s.60 of the Constitution establishes what is a single unitary court with unlimited jurisdiction. For these reasons the applicants can properly seek to rely upon common law duties of disclosure.

28 As regards Mr. Hines' submission that the application falls outside the disclosure scheme in Part 12 of the CPEA, that is precisely why Mr. Cooper relies upon the court's common law powers. Mr. Cooper by his submissions contained in his application for directions dated October 31st, 2022 sets out in some detail the provenance of the court's common law powers to order disclosure relying upon Bray, *The Principles and Practice of Discovery* (1885). However, more recently the question of the common law powers of disclosure in the context of criminal proceedings was considered by the United Kingdom Supreme Court in *R. (Nunn)* v. *Chief Const. Suffolk Constabulary* (5) which touched upon the Crown's duty of disclosure following a defendant's conviction. The principles which are to be derived

and which are relevant to the present case are distilled in the headnote as follows ([2015] A.C. at 225):

> ". . . [F]airness was the governing principle on which the duty to disclose was based; that, although that principle informed the duty at all stages of the criminal process, having regard to sections 3 and 7A of the Criminal Procedure and Investigations Act 1996 [from which our s.240 and s.248 of the CPEA are evidently derived] and to the common law jurisprudence fairness did not require the same level of disclosure at all stages; that, although the 1996 Act imposed a statutory duty of disclosure which displaced the common law duty from the time a defendant was indicted before the Crown Court until the trial ended, the common law duty continued to exist thereafter in a modified form to meet the needs of the particular stages of the proceedings; that such a common law duty applied to pending sentencing and appellate proceedings so that prosecutors were required to disclose any relevant material which was not already known to the defendant and might assist him in relation to those proceedings; but that such disclosure did not involve a re-performance of the entire disclosure exercise; that, consistently with such principles, where the trial process was complete the common law did not recognise a duty of disclosure and inspection which was the same as that prevailing prior to and during the trial . . ."

By analogy with the position as regards sentence and appellate proceedings, in my judgment reliance may also be had upon the common law duty of disclosure in relation to costs. However, it is evidently a lesser duty of disclosure than that which applies before a trial has ended. Put another way, when considering whether to order disclosure and the extent of any such disclosure, the court must deal with the application in a way which is proportionate to the complexity of the issues and the amount of the costs sought. Those are issues which will fall to be considered when determining the merits of the application.

**Conclusion**

29 For these reasons, I shall hear the disclosure application other than in respect of both the reasons for entering the nolle prosequi and the DPP's knowledge of the matters that led to its entry. However, before so proceeding, mindful of the common courtesy and mutual respect this court owes the inquiry, I shall direct the Registrar to provide a copy of this judgment to it. Should the Commissioner consider that orders which may be made by this court could adversely affect the progress of the inquiry or should he consider it desirable that these proceedings be stayed until the conclusion of the inquiry I would invite him to ask counsel to the inquiry to appear (without the need to make a formal application) at the next directions hearing in these proceedings.

30 Finally, as a cautionary observation, as the application progresses the parties need to be mindful of the statement of Singh, L.J. in *Khan* v. *Home Secy.* (2) who, albeit in the context of civil proceedings, said ([2018] EWCA Civ 1684, at para. 50):

> "Before I address the application for costs in greater detail, I would wish to stress, as this Court has frequently done in previous cases, that costs applications must not be allowed to become in reality cases in which the underlying merits of a claim have to be determined. I would deprecate such satellite litigation. I would also stress that, inevitably, cases such as this turn on their own facts."

*Ruling accordingly.*

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[*Postscript: Following the handing down of this judgment (to which counsel need not attend) the Registry shall fix a date for a directions hearing with a time estimate of one hour, which counsel may attend by telephone. Counsel to the inquiry shall be notified of the hearing, and he may, if so directed by the Commissioner of the inquiry, also attend.*]