

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: BVIHCR2016/0009

BETWEEN:

THE QUEEN

v

PAMPHILL PREVOST

SIMON POWER

Appearances:

Mr John Black, QC and with him Mr Kael London and Ms Ashellica Foy, Counsel for the Crown
Mr Terrence Williams and with him Ms Reynela Rawlins, Counsel for the 1st Defendant
Mr Israel Bruce and with him Mr Michael Maduro, Counsel for the 2nd Defendant

2022: January 29th and 31st

RULING

- [1] **WILLIAMS J.:** A pre-trial application has been made on behalf of the two defendants, Mr Pamphill Prevost and Mr Simon Power, for an order to be made to have the testimony of the witness Mr Michael Isles excluded from the case. Counsel for the Second Defendant is also asking that the Crown be prevented from leading any evidence that may suggest that the Second Defendant, Mr Power, may have committed an offence which does not appear on the indictment and for which a formal verdict of 'not guilty' was returned at a previous trial.
- [2] Mr Pamphill Prevost and Mr Simon Power face an indictment charging the defendants with one count of conspiracy to steal and six counts of theft.
- [3] On the 19th of January 2022, the Counsel for the First Defendant filed a 'Notice of Application not to admit the evidence of Crown Witness Michael Isles'. That Notice of Application indicated that reliance is being placed on sections 124 and 125 of the Virgin Islands **Evidence Act No 15 of 2006**.
- [4] Section 124 of the **Evidence Act** provides the Court with a discretion to exclude prejudicial evidence "where the probative value of evidence adduced is outweighed by the danger of unfair prejudice to the accused."
- [5] Section 125 of the **Evidence Act** provides the Court with a discretion to exclude improperly obtained evidence, in circumstances such as where: "Evidence that was obtained – (a) improperly or in contravention of a law; or (b) in consequence of impropriety."

- [6] At the heart of the Defendants' complaint is the fact that the witness, Mr Isles, was given a conditional immunity by the Director of Public Prosecutions. This conditional immunity it was submitted, amounts to an unfair inducement to give evidence adverse to the Defendants. It is also contended on behalf of the Defendants that the Crown "failed in its duty to fully disclose offences committed by Mr Isles contemporaneous with the factual context of the indictment".
- [7] The conditional immunity provided by the Director of Public Prosecutions in October 2014 was signed by Mr Isles on the 15th of October 2014. It stated:
- "1. That the said Michael Caesar Isles discloses to the investigators every criminal offence in which he has been involved.
- "2. That the said Michael Caesar Isles discloses the identity of all persons whom he knows or reasonably believes to have been involved in the said offence. (sic)
- "3. That the said Michael Caesar Isles makes full witness statements and/or recorded interviews in relation to each and every offence disclosed, describing in detail the parts played by each participant including himself.
- "4. That every such recorded interview and witness statement shall be true to the best of the knowledge and belief of the said Michael Caesar Isles.
- "5. That the said Michael Caesar Isles gives evidence in accordance with his witness statements and recorded interviews when required to do so.
- "This undertaking will be withdrawn in the event of a deliberate breach of any of the conditions and not otherwise."
- [8] Counsel Mr Terrence Williams noted that on the Crown's case, Mr Isles is an accomplice and a named co-conspirator. According to Counsel, Mr Isles will be giving evidence under an inducement of conditional immunity that was given to the witness by the Director of Public Prosecutions. Counsel Williams pointed out that the conditional immunity given to the witness contains a threat of prosecution if the evidence from the witness differs from the statement the witness gave to the police. Counsel also canvassed that Mr Isles was of bad character and poor credibility. Mr Williams noted that in perusing Mr Isles's witness statement and considering particular parts of the testimony the witness gave at the previous trial, Mr Isles only detailed the extent of his transgressions after receiving the immunity
- [9] Mr Williams urged that the discretion provided by section 124 of the **Evidence Act** be exercised in the Defendants' favour by refusing to admit the evidence of Mr Isles.
- [10] Counsel Williams was critical of the conditional nature of the immunity. In his view, there either ought to have been what he termed "a blanket immunity" or have the witness plea to some other offence. Mr Williams said that the Crown must not be permitted to circumvent protections and rules by technicalities.
- [11] According to Mr Williams, directions to the jury would not be sufficient to cure any defect. Directions, Counsel said, would not be adequate because: (1) it was wrong to circumvent the rules; (2) it would be difficult for a jury to appreciate the inducements; (3) Mr Isles was of poor credibility and character and given his policing background, was a "professional witness"; and (4) cross examination of Mr Isles would be difficult in the absence of details in his statement about particular events.

- [10] Mr Israel Bruce adopted and supported the submissions made by Counsel for the First Defendant.
- [11] Queen's Counsel, Mr Black, in response noted that there was no prohibition on the Crown adducing evidence from an accomplice in a criminal trial. Mr Black accepted that the Court has a statutory discretion to exclude evidence which was more prejudicial than probative. Mr Black submitted that the witness's evidence could be corroborated by independent evidence. Counsel for the Crown said that it was up to a jury properly directed to decide whether to accept or reject Mr Isles' testimony.
- [12] Mr Black, QC, contended that there was no prosecutorial misconduct. Queen's Counsel was of the view that the case advanced by the Defendants, **Regina v Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 AC 42 (HL)**, was not applicable.
- [13] Mr Black noted that at the previous trial, the Defendants did not object to the evidence from Mr Isles.
- [14] Mr Bruce raised the issue of whether the Crown was seeking to re-litigate a charge from which the Second Defendant, Mr Simon Power, was already acquitted. Mr Bruce said that he filed submissions in March last year and the Crown responded. However, he was concerned that if the Crown leads evidence referred to as "the Cane Garden Bay incident", it would place before the jury that the Second Defendant received money and that the money was applied to construction of his house. Mr Bruce expressed the view that since Mr Power was acquitted of being in possession of criminal proceeds, then such evidence would be more prejudicial than probative.
- [15] Counsel for the Crown, Mr Black, QC, noted the evidence from Mr Isles was relevant to the charge of conspiracy to steal. Counsel also stated that it was the intention of the Crown to lead all the relevant parts of the conspiracy to steal charge.

Application

- [16] The fact that the Defendants did not raise the issue of excluding the testimony of the witness Mr Michael Isles at their previous trial does not mean that they are estopped from doing so at the present trial. A defendant must be entitled to canvass a point or principle that has a basis in law. Additionally, where a defendant has had the benefit of fresh advice, the Defendant cannot be bound by a course of conduct that was pursued without having had the benefit of an alternative course of action. The First Defendant has engaged new Counsel; Mr Prevost therefore cannot be confined to what was done at the previous trial.
- [17] A decision to exclude evidence in the Virgin Islands has a statutory basis. The starting point is that any evidence which tends to show that a defendant may have committed an offence is not prejudicial but probative. The consideration however is whether it is more prejudicial than probative. If it is more prejudicial than probative, then the court is likely to refuse to admit that evidence. Similarly, if there is impropriety or a contravention of the law, that evidence will only be admitted if the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.
- [18] A number of things ought to be borne in mind before determining whether the testimony that is being impugned should be admitted or the application to suppress the evidence sustained. For example, is the evidence supported in any respect? Consideration ought to be given to the public interest and the interest of justice. Fairness has always been a cornerstone of the legal system. Then, the question should be asked whether sensible and intelligible directions could be given to the fact finding forum to assist in analyzing the facts and issues.

- [19] In circumstances where a conditional immunity is given to a witness, it may be necessary to look at the terms and wording of that conditional immunity. If the wording of the immunity restricts the witness to testifying only in keeping with their statement, (which may have been false in some respects) then the discretion to exclude may gain heightened currency, since the objective ought to be getting to the truth rather than securing self-serving testimony which incriminates the defendant

Conclusion

- [20] In the circumstances, the Defendants' application to exclude the evidence of the witness Mr Michael Isles is not sustained. Counsel for the Defendant will have ample opportunity to canvass all the relevant issues. And, it is possible to give adequate directions to a jury on the issues concerning Mr Isles's testimony.
- [21] With regard to the other evidence, the test of relevance stands. All evidence probative of the charges on the indictment may be lead – subject to the proviso that the probative value outweighs any prejudice to the defendant.

Colin Williams
High Court Judge

By the Court

Registrar