

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal Case 18 of 2024

Criminal Case 1017 of 2024

BETWEEN:

THE KING

and

SHEMAR RICHARDSON

SHAMEEK GRANT

AKEEM HOPKINSON

K'SHOY ALEXANDER

RICHARD HARIPERSAD

JORDAN JACKSON

Appearances: Mrs. Kellee-Gai Smith, Principal Crown Counsel with her Mr. Sherman Mc Nicolls,
Senior Crown Counsel

Mr. Stephen Daniels for the First Accused
Mrs. Valerie Gordon for the Second Accused
Ms. Stacy Abel for the Third Accused
Mr. Michael Maduro for the Fourth Accused
Ms. Ruthilia Maximea for the Fifth Accused
Mr. Valston Graham for the Sixth Accused

2025: January 15th 17th 21st and 24th

RULING ON APPLICATION TO EXCLUDE EVIDENCE AND TENDER FURTHER EVIDENCE

[1] **PERSAD J:** At the beginning of this trial, Counsel on behalf of the accused filed a number of preliminary objections in relation to some of the evidence being relied upon by the Crown. The Court has had the benefit of submissions from Counsel for the accused and the Crown, both in writing and by oral submissions.

[2] The issues to be determined may be summarized as follows:-

- a. Whether the use of warrants in 2021 signed by the magistrate to search the phones of the accused and also to seize a DVR and then search the contents of the DVR was lawful.
- b. Assuming that the Court makes a finding that the use of the magistrate signed warrants in 2021 was unlawful, should the Court exercise its discretion under Section 125 of the Evidence Act and exclude all the evidence derived from those warrants.
- c. The Court is also asked to exclude several applications by the Crown to lead further additional evidence.
- d. Also, a decision is required on an application by the Crown for the use of technology in relation to the witness, David Moore, who is a critical witness for the Crown that the defence is objecting to.
- e. Finally, if the Court takes the view that the evidence derived from the DVR should be excluded, then Counsel for Jackson, Alexander and Haripersad invite the Court to review the depositions and determine whether there is any evidence in support of the count on the indictment and invite this Court to quash count four which relates to possession of a firearm.

Issue 1 - Legality of 2021 Warrants

[3] This Court is of the view that in relation to the warrants derived by the police in 2021 and used as part of the investigative process such warrants being firearm and ammunition warrants, and issued under the hand of a magistrate could not be lawfully used for the following reasons:-

- a. such warrants could not have been used to search the phone of any of the accused because they were not:
 - i. in the right form as the law requires that any warrant for the use of searching materials stored on a phone had to be sought under section 14 L under the Computer Misuse and Cybercrime Act (as amended).

- ii. signed by a High Court judge who is best placed to do the balancing exercise when it comes to competing constitutional rights such as the right to privacy which is engaged when the police seek a warrant to search a citizen's phone.
- b. that in relation to the seizure of the DVR, the **actual seizure** of the DVR at the home of the accused is prima facie lawfully based on the dicta in **R v Vu**¹ which held as follows:

'The second issue is whether the warrant authorized the search of the computers and cellular telephone. Section 8 of the Charter — which gives everyone the right to be free of unreasonable searches and seizures — seeks to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement.

This balance is generally achieved in two main ways.

First, the police must obtain judicial authorization for a search before they conduct it, usually in the form of a search warrant.

Second, an authorized search must be conducted in a reasonable manner, ensuring that the search is no more intrusive than is reasonably necessary to achieve its objectives.

The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer. Computers potentially give police access to an almost unlimited universe of information that users cannot control, that they may not even be aware of, may have tried to erase and which may not be, in any meaningful sense, located in the place of search.

¹ [2013] 3 R.C.S.

The numerous and striking differences between computers and traditional receptacles call for distinctive treatment under s. 8 of the Charter. The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it — simply cannot apply with respect to computer searches.

In effect, the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place. Prior authorization of searches is a cornerstone of our search and seizure law. The purpose of the prior authorization process is to balance the privacy interest of the individual against the interest of the state in investigating criminal activity before the state intrusion occurs.

Only a specific, prior authorization to search a computer found in the place of search ensures that the authorizing justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search.

*This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. **If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer and do what is necessary to ensure the integrity of the data.***

If they wish to search the data, however, they must obtain a separate warrant. In this case, the authorizing justice was not

required to impose a search protocol in advance with conditions limiting the manner of the search. While such conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required.'

- c. However, any search of the contents of the DVR is prima facie unlawful as in order to do that the police would have to secure a warrant under 14 L of the Misuse of Computers and CyberCrime Act.

Issue 2 - Discretion to Exclude

- [4] Section 125 of the Evidence Act clearly affords a discretion to this Court to exclude evidence on the basis that is illegally obtained and provides guidance on the matters that the Court should have regard to in exercising its discretion to exclude any illegally obtained evidence.
- [5] The Court in making this determination must take into consideration among other things a number of factors such as (a) the probative value of the evidence; (b) the importance of the evidence in the proceeding; (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; (d) the gravity of the impropriety or contravention; (e) whether the impropriety or contravention was deliberate or reckless; (f) whether any other proceeding, whether or not in a Court, has been or is likely to be taken in relation to the impropriety or contravention; and (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.
- [6] In this case there is no question that the warrants were not lawfully obtained in 2021.
- [7] The evidence being objected to are:
 - a. the call log records and the call mapping records; and
 - b. the DVR and the contents of the DVR showing the footage that the police wish to rely upon.
- [8] In making my decision I have taken into account the following matters:-
 - a. the probative value of the evidence;
 - b. the importance of the evidence;

- c. the nature of the offence;
- d. the gravity of the impropriety or contravention;
- e. whether the impropriety or contravention was deliberate or reckless; and
- f. the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.

[9] The Court has also taken into account that the Crown and the Police have opted to take steps prior to the start of the trial to “cure” the defect in the 2021 warrants by seeking to secure warrants from a judge of the High Court in November 2024 to cover both the DVR and a warrant to CCT to secure the raw information for the call logs and call mapping.

[10] In this Court’s view, the seeking of processes to remedy what may be described as a defect in the search warrant procedure is not in the circumstances of this case, objectionable.

[11] There has clearly been a practice in this jurisdiction of the police securing the wrong type of warrants to search items which under the Computer Misuse and Cybercrime Act requires a specialize warrant.

[12] The Courts in this jurisdiction have on at least three occasions, culminating in a recent decision in October 2024 in **R v Benjamin and others**² ruled that the warrant seeking process before a magistrate was wrong as it related to items which fell under the Computer Misuse and Cybercrime Act.

[13] In this matter, I am of the view that although the initial 2021 warrants were illegal, I am not minded to exercise my discretion under Section 125 of the Evidence Act to exclude the evidence derived from the DVR and the call data records having regard to the fact that the Crown has indicated they are no longer relying on the evidence of Mr. Moore in relation to the call data and mapping nor am I prepared to exclude the evidence of the DVR since the Crown has made applications for Additional Evidence before the appropriate judicial officer for a warrant to properly search the phone records and contents of the DVR.

Issue 3 – Further Additional Evidence

² BVIHCR 11 of 2023

- [14] The Crown has filed several Applications for Further Evidence in relation to witnesses that speak to matters that relate to the securing of warrants/production Orders in November 2024.
- [15] The question that therefore arises is, if the police become aware that the process that they have employed is or may be illegal, does that preclude them from trying to get other evidence to put before the Court in order to remedy the process before the date of trial.
- [16] I can see no reason why not. Of course, the defence Counsel is always entitled to raise issues as to whether there has been an abuse of process, including a misuse of the Court process or undue prejudice to the accused and of course the Court will take those arguments into account.
- [17] The question that clearly arises is whether the police can do this? Having heard the submissions from Counsel for the defendants, I am of the view that there is nothing that prohibits the police officers before the trial begins, to adapt or make changes to the evidence and even seek to rely on pieces of evidence that were not raised before the magistrate in the preliminary inquiry.
- [18] I have invited Counsel to research and to provide me with any cases that suggests that the Crown and police in a criminal trial, prior to the trial beginning, cannot seek to rely on evidence either through the additional statements being filed.
- [19] Aside from a bare statement that the police cannot seek a second warrant as suggested by Mr. Justice Astaphan in **Robin**³, there is no other statement that supports such a proposition.
- [20] My starting point on this analysis is that there is no requirement on the prosecution to lead **all the** evidence at the preliminary inquiry. All that is necessary is the need to provide enough evidence to establish a prima facie case to warrant a committal. See in this regard **Herbert Fergusson 57 WIR 403**. Once there is timely disclosure such a course of action is permissible.
- [21] In some jurisdictions, the requirement to adduce further evidence requires the need for the Crown to establish that the evidence was not available at the time of the committal.
- [22] It is in my view of course absolutely permissible for evidence that is “fresh” within the meaning of the case of **Cadogan v R**⁴, that is “not being available at the time of the PI” to be admitted at the trial, usually if the evidence became available after the PI it can be adduced once sufficient notice is given to the defendants.

³ BVIHCR 4 OF 2023

⁴ TT 1963 CA 41

- [23] So the prosecution is not obligated to lead all their evidence at a committal process, but only enough to make out a prima facie case. If they have evidence that becomes available after the committal that is fresh evidence and would usually be admitted once it is provided with sufficient notice.
- [24] The Prosecution can of course try to rely on material that was in their possession prior to committal and not relied upon at the committal but the Court will have the discretion to evidence which is not “fresh” evidence to admit it subject to fairness principles.
- [25] The point remains that for a host of reasons, the prosecution before trial can adapt its case. One of the key factors to be taken into consideration is the amount of notice that the defence is to be afforded of this new information and the opportunity for them to take instructions and to factor in this new information in their case strategy.
- [26] There are many instances in which, the prosecution may wish to adapt its case prior to trial, a key witness may have died or no longer be available, the prosecution may become aware in developments in the local case law that raises admissibility questions in relation to certain types of evidence on which may require the prosecution to rethink some of the evidence is has gathered and proposes to adduce before the jury.
- [27] Whatever the reason may be, each case will turn on its particular circumstances. Suffice it to say, in this particular matter further statements dealing with matters arising as a consequence of an application for production orders in November 2024 appears to this Court to be “fresh evidence” since it was not admissible at the preliminary inquiry and that is a sufficient basis to allow this evidence in.
- [28] Of course, the Court will afford Counsel for the accused sufficient time to take instructions on to consider the purport of this new material that the Crown wishes to put before the Court.
- [29] It goes without saying the closer to trial that the Crown chooses to adduce new evidence the less likely a court might be willing to grant such an application, the court will have to address its mind to issues such as the nature of the material, why it was not made available before, whether the defence had had enough time to absorb and take on board the further evidence.
- [30] Also important, is the likelihood that the decision of the Crown to seek to adduce further evidence will impact on a trial that has been fixed to go on will be an important issue. Criminal litigation

must now be seen through the lens of case management which is a process by which the Criminal Court with the input of Crown and Defence are able to manage the process towards the setting of a matter for trial so that there is date certainty for trials to start.

[31] When a matter on the list is actively managed, counsel on both sides are required to fill out forms and attend hearings before a matter is set for trial to ensure that all outstanding matters are resolved. That presupposes that both sides have addressed their minds to all what they need to do in terms of what evidence they need to rely upon. The Courts by case management will expect as case management becomes more entrenched, the need for the Crown to adduce applications for further evidence, at the doorstep of trial will become less frequent with active case management.

[32] The Court is therefore minded in the circumstances of this case where the evidence being sought to be adduced in January 2025 as the trial is about to start to allow the applications by the Crown for such evidence filed as additional evidence to be admitted since they relate to events of November 2024 and certain things done between November and January 2025. The material being adduced by the Crown was known to the defence prior to committal so this is not material that was unknown to the defence.

Issue 4 - Use of technology Application David Moore

[33] The Crown has made an application for certain witnesses to give testimony by use of virtual link. Counsel for the accused have not objected to the majority of these applications, but Mrs. Gordon has articulated a basis by which she has invited the Court not to grant that application having regard to the critical nature of Mr. Moore's evidence.

[34] The Crown on the other hand has taken the position that they require him to give evidence by virtual link as he is in the United Kingdom taking care of his ailing father and that at this particular point in time it is more convenient for him to give evidence by the virtual link.

[35] That having been said, this matter has also been rendered academic and the Court does not need to make a decision as the Crown has indicated by email to the Court after submissions were closed that they no longer rely on David Moore as a witness.

Issue 5 - Application to Quash Indictment

- [36] Mr. Graham on behalf of his client, Mr. Jackson, as well as the defendants involved in count four invited this court that should it take the view that the seizure of the DVR evidence should be excluded, then it would follow that the count on the indictment would not be sustainable.
- [37] Having regard to the Court's finding in relation to the admissibility of the DVR evidence, any issue in relation to sustainability of the count now becomes academic.
- [38] I wish to commend and thank Counsel for their thorough submissions and assistance in this matter.

**Rajiv Persad SC
Judge (Ag)**



By the Court

Registrar