

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal Case 11 of 2023

BETWEEN:

THE KING

and

**DAJSHON BENJAMIN
EDWARD CROOKE
MICAH ORMOND
K'VAWN CHOUCOUTOU**

Appearances:

Ms Khadija C.V. Beddeau, Senior Crown Counsel with her Mr Jamal Bridgewater, Crown Counsel

Mr Michael Maduro for the First Accused

Mr Stephen Daniels for the Second Accused

Mrs Valerie Gordon for the Third Accused

Mr Valston Graham for the Fourth Accused

2024: September 17th 18th 20th

RULING ON APPLICATION TO EXCLUDE EVIDENCE

- [1] **Persad J:** At the beginning of this matter, Counsel for the Accused indicated that they wished to raise a preliminary point, relative to some of the evidence that the Crown proposed to lead in the course of the trial. The defence's position was that it was asking the Court to rule on the admissibility of the evidence since the Court's decision would impact how the trial proceeded. Senior Crown

Counsel indicated that she was aware of the position of the Accused and had no objection to this issue being resolved as a preliminary issue.

- [2] The Accused in this matter are indicted on a charge of murder contrary to section 163 of the Criminal Code 2013 (as amended) of the laws of the Virgin Islands. The particulars of the offence are as follows: on 10 September 2020, DAJSHON BENJAMIN, EDWARD CROOKE, MICAH ORMOND and K'VAWN CHOUCOUTOU together in Spring Ghut on the island of Tortola in the Territory of the Virgin Islands murdered Matthew David Daly.
- [3] On behalf of the Accused, objection was taken to a range of search warrants relied upon by the prosecution in order to gather the evidence upon which the Crown wishes to rely in this trial. The defence deployed various arguments in order to persuade the Court that the warrants being relied upon by the Crown were unlawfully obtained.
- [4] Counsel for the Accused also argued that if this Court found that the warrants were unlawfully obtained, then as a consequence, the Crown should not be able to rely on any evidence obtained pursuant to those unlawful warrants. Specifically, the defence raised issues in relation to the seizure and search of the contents of the mobile phones taken from the Accused.
- [5] On behalf of the Crown, it was argued that the warrants issued in this matter were not unlawful and that even if this Court found that the warrants were unlawfully issued, that does not entitle this Court to exclude such evidence, as the defence has not been able to establish a proper basis for exclusion in the circumstances of this case.
- [6] The Court in adjudicating upon this issue will address the following issues:-
 - a. Whether the warrants issued under the hand of a magistrate were lawfully obtained?
 - b. If the Court finds that the warrants were unlawfully obtained, what approach should this Court take in relation to the admissibility of any evidence being derived directly from the unlawful warrants?

- c. If unlawfully obtained, what options are open to the Court? Does the seizure and search of the cell phones infringe the Constitutional rights of the Accused?
- d. If unlawfully obtained, what other options are open to this Court to exclude such evidence?

Review of the warrants

- [7] There appears to be three categories of warrants for the Court to review for the purposes of these submissions.
- [8] Counsel for the Crown began the submissions by outlining the chronology of some of the key events which related to the obtaining and execution of the various warrants in this matter. On 10 September 2020, the body of the deceased was found. From the scene of the crime, 18 or 19 spent shells were recovered along with a mobile device belonging to the deceased.
- [9] Between 12 September 2020 and 12 October 2020, certain warrants were sought which can be described as “firearm and ammunition warrants”. There was no dispute as to the following matters in relation to these warrants:
 - a. The warrants were issued under the hand of a magistrate;
 - b. The warrants were collectively executed on 13 October 2020;
 - c. The mobile devices were seized under these warrants; and
 - d. All persons were interviewed on 13 October 2020.
- [10] Thereafter, four warrants were obtained on 16 October 2020 under the Misuse of Computer and Cybercrime Act in relation to the Accused. These warrants were also issued under the hand of a magistrate.
- [11] On 19 October 2020, warrants were sought under the Telecommunications Act, 2006 to various service providers referred to as the “Third Party Service Providers Warrants” including Cable and

Wireless Tortola, CCT Boat Phone and Digicel. These warrants were also issued under the hand of a magistrate.

[12] One year later, around 11 and 12 October 2021, another set of “firearm and ammunition” warrants were issued in relation to the Accused and their family members. Based on these warrants, additional mobile devices were seized. On 13 October 2021, four more warrants under the Misuse of Computer and Cybercrime Act were issued under the hand of the Magistrate.

[13] On that same day 13 October 2021, all the Accused were charged with the offence of murder.

[14] It is the Crown’s position that they are reliant on the evidence derived from an analysis of these mobile devices and that as part of their case, they propose to rely on witnesses who have carried out analyses of these mobile devices.

Whether these warrants were unlawfully obtained?

[15] As noted above, there are three categories of warrants under consideration. Firstly, there are the “Third Party Warrants” executed on the service providers. Secondly, there are what may be described as the “firearm and ammunition” warrants executed on the Accused and others in the course of the investigation. Finally, there are the warrants pursuant to the Misuse of Computers and Cybercrime Act.

The “firearm and ammunition” Warrants

[16] Objection to the use of these warrants are made on essentially two bases:

- a. The seizure of the mobile phones was inappropriate and unlawful, having regard to the fact that the warrant authorized a search for firearms and ammunition.
- b. The seizure of mobile phones using this type of warrant was inappropriate and unlawful having regard to the fact that there was an express provision under the Computer Misuse and Cybercrime Act that allowed for such seizure.

- [17] A review of the warrants in question shows that the police, in applying for the warrant to search for firearms and ammunition, represented that these items were alleged to have been “unlawfully kept” on the premises. The purpose of the warrant therefore was to allow the police to search for any firearms or ammunition. The warrant was not to allow the Police to “throw fly to catch bait” as has been suggested by Mr Justice Astaphan KC in the **Mickiel Robin Case No 4 of 2023**.
- [18] Mr Graham reminded this Court that the mobile phones seized under these warrants were not illegal items per se. Any seizure by the police of the mobile phones in the circumstances of this case must therefore be objectionable, since the warrant was issued on the understanding that firearms and ammunition were “unlawfully kept” on the premises.
- [19] This Court accepts that the police may enter premises searching for firearms and ammunition under a warrant obtained for that purpose and seize other items on the premises, once the materials seized are relevant to an investigation. It seems to this Court that the test is whether the dominant purpose of the warrant was to find the items listed in the warrant.
- [20] In the case of **The Queen v St. Elmore Garraway, Criminal Case No. 1 of 2021** Justice Floyd at paragraph 20 of his judgment espoused as follows:

“let us assume, however, that the search warrant was properly obtained by the police for its stated purpose. Did the warrant allow the police to seize the video equipment and download the video recordings? Certainly, those items were not enumerated in the search warrant. The warrant was granted in relation to firearms and ammunition.

It is generally accepted that the police can go outside the named items in a search warrant but there are parameters to that. The material must be relevant to an investigation. It is noted in Archbold Criminal Pleading, Evidence and Practice 2015 at 15 - 93 that items can be seized even though they are outside the scope of the warrant being executed. In this regard, the police are not required to adopt “tunnel vision” when carrying out searches.

However, at 15 - 88 of Archbold, it is confirmed that a search is not unlawful if it achieves some collateral police advantage, provided that the dominant purpose is to find the items listed in the warrant (emphasis added).

In this case, none of the listed items were found and it is questionable whether the dominant purpose was to search for firearms and ammunition or to locate Nyron Erickson. It certainly seems to be the latter.”

- [21] This Court in reviewing the procedure by which these “firearm and ammunition” type warrants were issued and executed in the circumstances of this case, is concerned with the use of these types of warrants to validate the seizure of mobile phones.
- [22] Firstly, in the Court’s view, there appears to be a predisposition towards seeking these types of warrants to allow access to a citizen’s property in order to search for items outside the scope of the warrant.
- [23] I have no doubt that the police would have had reasonable cause to seek a warrant for firearms and ammunition in October 2020, considering that they had been conducting a murder investigation since September 2020.
- [24] The fact that in October 2021 the same type of “firearm and ammunition warrants” were being sought and issued by a magistrate to secure the seizure of mobile phones, not only in relation to the Accused prior to charge but also to their family members, suggests to this Court that the police appear to have a predisposition to use this type of warrants to carry out searches for mobile phones.
- [25] Secondly, the Court is concerned by the use of these types of warrants primarily because at the time that these warrants were issued in October 2020 and October 2021, the police must have been aware that there was specific legislation in place to allow the police to seize and search computers and electronic devices such as mobile phones.

- [26] The law has been quite clear for some time that, because of the nature of computers and mobile phones and other electronic devices, the rules relative to seizure and search of these items require specific warrants to be obtained in order to lawfully access the information on these devices.
- [27] In this jurisdiction since 2019, the **Computer Misuse and Cybercrime Act (as amended)** has provided a procedure through which law enforcement could seek a warrant under 14 L 2e in the course of their investigations into offences.
- [28] Authority for the need for police officers to acquire specific warrants for the seizure and search of computes and mobile devices can be found in the Canadian Supreme Court decision of **R v Vu 2014 3 LRC 515:**

“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.

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.”

[29] The use of the “firearm and ammunition” type warrant in this manner is therefore, in my view, inappropriate and unlawful primarily because such a warrant does not identify computers or mobile phones as being the subject matter of the search. The nature of a “firearm and ammunition” warrant is plainly of a fundamentally different nature.

[30] The law appears to be clear that, because of the nature of mobile phones, there is a need for the party seeking the warrant to specify to the magistrate certain matters relative to the mobile phones or computers that the judicial officer must consider when determining whether to issue a warrant. Such issues do not arise when seeking a warrant for firearms and ammunition.

[31] There also appears to be a predisposition to use the firearms and ammunition warrant to carry out searches, and allow the police to seize other items under such a warrant, when there are express provisions under the **Computer Misuse and Cybercrime Act (as amended)** that would allow police officers to properly seize and search electronic devices such as computers and mobile phones once they have satisfied the appropriate judicial officer that the search should be allowed. For these

reasons, I am minded to find that the use of the “firearm and ammunition” type warrants as a basis to seize the cell phones being relied upon by the Crown in this matter was unlawful.

Third Party Warrants and Warrants under the Misuse of Computers and Cybercrime Amendment Act

[32] For the purpose of dealing with these Warrants, it is convenient to deal with them together.

[33] There appears to be no dispute that on 19 October 2020, warrants were issued pursuant to section 18 of the **Telecommunications Act** in relation to several third-party service providers for material that was later seized pursuant to the warrant.

[34] Section 18 of the Act provides as follows:

“18. (1) A public supplier shall maintain the confidentiality of, and refrain from using or disclosing, any

(a) confidential, personal and proprietary information of any user or licensee, or

(b) information regarding usage of the service or information received or obtained in connection with the operation of the network or provision of the service,

for any purpose other than a purpose specified in subsection (2), except as otherwise permitted by the user or licensee, as the case may be, or as required by warrant, Court order or other government agency with competent authority.”

[35] Section 18 mandates that a public supplier shall maintain confidentiality of and refrain from disclosing any users’ confidential personal or proprietary information. This section goes on to say **except** where otherwise permitted or as required by warrant or Court order.

- [36] It is patent that authorities may seek a warrant to get confidential personal or proprietary information of a user, but that is subject to a proper procedure in which an appropriate judicial officer determines whether the balance of competing interests is in favour of granting the warrant.
- [37] Equally on 15 October 2020 and on 13 October 2021, the day the Accused were charged for murder, the police sought a number of warrants pursuant to section 14 L of the **Computer Misuse and Cybercrime Act (as amended)**.
- [38] All these warrants were issued under the hand of a magistrate. On behalf of the accused, it has been submitted that warrants under the **Telecommunications Act** as well as under the **Computer Misuse and Cybercrime Act (as amended)** required authorisation from a High Court judge and that the authorisation from a magistrate was not sufficient.
- [39] It is necessary to reinforce the dicta in **Vu 2014 3 LRC 515**, where the Supreme Court in Canada noted as follows:
- “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.**”
- [40] In putting forward their submissions, Counsel for the Accused invited this Court to have regard to the recent decisions from this jurisdiction on this very said issue. Reference is made to the case of **Mickiel Robin Case No 4 of 2023**. In particular the Accused relied upon paragraphs 12 -12.4 of that judgment where Mr Justice Astaphan KC dealt with the issue in the following way:

“Who has the power to issue Warrants under the Computer and Cybercrime Misuse Act as amended

[12] As stated before, this Act and the Telecommunications Act 2006 of the Virgin Islands are sister Acts, and complement each other in that, compendiously, they make provision for the regulation of telecommunications, and telecommunications methods and mechanisms in The Virgin Islands.

[12.1] This Court has held in *Rex v Vicardo Farrell et al*, Criminal Case No. 21 of 2020 that under Section 18 of that Act any warrant issued must be issued by a Judge of the High Court for the reasons stated in Farrell as follows:

[3.1] Given that the Act sets out the regime for all aspects of telecommunications in the Virgin Islands, and given that section 18(1) is designed to enact a permissible derogation from the Fundamental Rights secured by sections 19 and 23 of the Constitution, I find that section 18(1) must be construed in the context of the Act itself, and in the context of sections 19, 23 and 31 of the Constitution. In doing so it must be interpreted for the intend purpose – that of enacting a permissible derogation to guaranteed Rights – and narrowly. It cannot be interpreted widely, but must be focused on its intendment. It cannot be seen as a wide net to be cast helter-skelter, wildly and blindly, to catch anything in any circumstance at any time. It must be construed contextually.

[3.9] The Code is a general Act which creates the Magistracy and the jurisdiction of Magistrates, among other things, none of which deals with, or addresses that which is the subject matter of section 18(1) of the Act. It is recognized that when Magistrates issue “ordinary” search warrants in criminal investigations under section 37/38, those warrants are permissible derogations from section 19 Rights, and section 25 Rights – Protection from deprivation of property – permissible pursuant to subsection (3)(ix) of section 25, insofar as the property being sought is not the subject matter of a specialized Act, like the Telecommunications Act, which sets out its own specific regime for the obtaining of that specialized property/information.

Thus there is no inconsistency in the premise that a Magistrate has no jurisdiction under the Telecommunications Act to issue a warrant with respect to non-section 71 matters, but yet has the jurisdiction to issue warrants to search real estate for property in permissible derogation of sections 19 and 25 of the Constitution. Such search warrants are issued in respect of criminal offences committed under either the Common Law, or the Criminal Code of the Virgin Islands, and not under the Telecommunications Act which sets out its own process for the obtaining of protected information in section 18(1). There are therefore two separate and distinct jurisdictions involved, and the commanding Law with respect to Telecommunications information ("property") is that set out in the Act; not the Code.

[3.10] Thus, the maxim "Generalia Specialibus Non Derogant" applies, given the conflict between the general power given to the Magistrates by the Code with respect to the issue of Search Warrants generally, and that of the Act where powers are expressly given to the Court (defined in the Act as the High Court), within its existing Constitutional jurisdiction, by section 18(1), and to the Magistrate in the very specific circumstances set out in section 71, after the Commission has issued a Notice under section 70, which resides under the rubric "General power to request information", and sections 70(1)(a) and (b) which set out the narrow confines within which, and what information can be requested, and it is to be noted that, under section 71 (1), 22 the only offence referred to is an offence committed "under this Act [section 49], or the Regulations) and that Notice has not been complied, or fully complied with, in which case the Magistrate can issue a Warrant upon an application being made by the Commission relating specifically to the matters set out in sections 70 and 71, and section 49 offences, and to nothing else including the Criminal Code. Thus is limited the very narrow jurisdiction given to the Magistrate by the Act in relation to telecommunications. Absent, therefore, a specific statutory power given to the Magistrate in respect of the data sought from the telecommunications companies, the Magistrate has neither the jurisdiction nor the power to issue section 18(1) warrants."

[12.2] The above reasoning applies, mutatis mutandis, to Section 14L of the Computer Cybercrime Misuse Act 2014, (as amended), and is applied in this case.

[12.3] This Act does not define what “a Court” is, and Section 14L (1) authorizes a Court to issue warrants. Therefore, in keeping with Sections 15, 16, 19, 23 and 31 of the Constitution of these Virgin Islands and consistent with the decision in Farrell, any warrant issued for the derogation of any of the Rights set out in Sections 15, 19 and 23 must, and can only be issued by the High Court of Justice in which the Constitution vests sole jurisdiction for the determination and protection of Fundamental Rights.”

[41] This Court having considered the two decisions in Mickiel Robin and Vicardo Farrell is prepared to adopt the reasoning of Mr Justice Astaphan KC as it relates to the need for warrants under the **Telecommunications Act** and the **Computer Misuse and Cybercrime Act** to require a High Court judge to grant any such warrant.

[42] This Court takes the view that the issuance of the warrant under the hand of a magistrate in the circumstances of this case was unlawful and not in compliance with the law.

The relationship between “unlawfully obtained” evidence and admissibility

[43] It does not follow that because evidential material was obtained by some unlawful mechanism, such material will automatically be open to exclusion by a Court. Much depends on the basis upon which the party seeking exclusion anchors their argument.

[44] As a general rule, it is understood that where the police utilizes a process in securing evidence which impacts upon the accused’s constitutional and fundamental rights, then the criminal trial Court has a discretion to exclude such evidence if appropriate.

[45] Authority for this proposition can be found in the case of Mohammed v The State (Trinidad and Tobago) [1998] UKPC 49 (9th December, 1998) where at paragraph 29 the Board of the Privy Council noted as follows:

“29. It will be recalled that in *King* Lord Hodson observed that it matters not whether the right infringed is enshrined in a constitution or is simply a common law right (or presumably an ordinary statutory right). Their Lordships are satisfied that in *King*, which was decided in 1968, the Board took too narrow a view on this point.

It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right.

The narrow view expressed in *King* is no longer good law.

On the other hand, it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed.

By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity.

In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession.

In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case.

Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the Courts. The qualification is that it would generally not be right to admit a confession where the police have deliberately frustrated a suspect's constitutional rights.”

[46] Secondly, it is also open for an application to be made to the criminal Court to exclude evidence on the basis of the common law relating to illegally obtained evidence.

[47] Authority for this proposition is found in the decision of the Privy Council in **Warren v The State 2018 UKPC 20** where at paragraph 33 the Board noted as follows:

“It should, however, be added that even if there had been any of the suggested irregularities in the issue or execution of the search warrant, it would not follow that the evidence of the contents of the appellant’s computer would thereby have become inadmissible. In English law, the admissibility of evidence depends in the first instance on its relevance. Irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility: see *Kuruma, son of Kaniu v The Queen* [1955] AC 197, *Jeffrey v Black* [1978] QB 490, *R v Sang* [1980] AC 402, and a great many other cases. Prosecution evidence may of course be excluded if its effect on the trial would be unfair: this has been the rule since at least *Noor Mohammed v The King* [1949] AC 182 and it now has statutory endorsement in section 78 of the Police and Criminal Evidence Act 1984.

But the test of exclusion is not the nature of any irregularity in obtaining the evidence, but rather the extent of any unfairness caused thereby. The Board did not understand counsel for the appellant to differ from those very well-established propositions.”

[48] Thirdly, in this jurisdiction one of the particular features of the **Evidence Act** is Section 125, which gives a Judge a discretion to exclude illegally obtained evidence in appropriate circumstances. This section provides:

“Discretion to exclude improperly obtained evidence

125. (1) Evidence that was obtained—

(a) improperly or in contravention of a law; or

(b) in consequence of an impropriety, shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

(3) For the purposes of subsection (1), the Court shall take into account, among other things, the following matters—

(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;

(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.”

[49] This codified discretion appears somewhat wider than the common law test, which primarily focuses on the issue of relevance.

[50] The Court will, of necessity, have to examine its discretion under each of these headings to determine whether in the circumstances of this case the unlawfulness or illegality of the warrants obtained in this matter is sufficient to trigger the Court’s exclusionary discretion in relation to the evidence derived from the warrants.

Whether the finding that the Warrants were “unlawfully obtained” necessarily infringes any of the Accused’s Constitutional Rights?

- [51] Counsel for the Accused has vigorously submitted that the effect of the unlawful warrants infringes on their clients’ constitutional rights. Specifically, they drew the Court’s attention to the right of each of their clients to privacy, as well as their clients’ right to remain silent, which they have submitted is interchangeable with the right not to self-incriminate.
- [52] On behalf of the Crown, it has been submitted that when this Court looks at the individual rights of the Accused, it is necessary to do so having regard to the provisions of the Constitution, primarily section 9 as well as the individual rights under consideration.
- [53] The Crown has argued that none of the rights have been infringed by virtue of the issuance of the unlawful warrants, and that the Court must strike an appropriate balance when examining each right identified by the Accused.
- [54] Finally, the Crown has relied on a number of authorities to establish that the Accused’s individual rights have not been infringed.
- [55] Any discussion on the fundamental rights and freedoms of an individual in the Virgin Islands must first begin with an appreciation of section 9 of **the Constitution**, which provides as follows:

“Fundamental rights and freedoms of the individual

9. Whereas every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual; Whereas those fundamental rights and freedoms are enjoyed without distinction of any kind, such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations, economic status, disability, age, birth, sexual orientation, marital or other status, subject only to prescribed limitations;

Whereas it is recognised that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, equality, liberty, security of the person and the protection of the law;

(b) freedom of conscience, expression, movement, assembly and association; and

(c) protection for private and family life, the privacy of the home and other property and from deprivation of property save in the public interest and on payment of fair compensation;

Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

- [56] This provision establishes the need for the Court to appreciate the delicate balancing exercise that must be carried out, to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. In other words, the Court cannot presume that all the rights are absolute in nature.

The Right to Privacy

- [57] Counsel for the Accused has argued that individually they are entitled to a right to privacy and that right extends to their property, inclusive of their mobile phone. In this case, they argue that the issuance of the unlawful warrants, and the consequent retention and search of their mobile phones had the effect of amounting to an infringement of their constitutional right to privacy.

- [58] The Crown in response has suggested that these Accused do not have an absolute entitlement to privacy and that any right to privacy that the Accused may be able to rely upon is subject to the

express limitation under the Law of the Virgin Islands. Further, the police are entitled to derogate from this right to privacy in order prevent or detect offences against the criminal law.

[59] Under article 19 of **the Constitution** under the rubric “Protection of private and family life and privacy of home and other property” the following provision is made:

“19.—(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.

(2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

(a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such manner as to promote the public benefit;

(b) for the purpose of protecting the rights and freedoms of other persons;

(c) to enable an officer or agent of the Government of the Virgin Islands, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of the Virgin Islands or that authority or body corporate, as the case may be;

(d) to authorise, for the purpose of enforcing the judgment or order of a Court in any proceedings, the search of any person or property by order of a Court or the entry upon any premises by such order; or

(e) for the prevention or detection of offences against the criminal law or the customs law.”

[60] There can be no doubt that under the legislative regime in the Virgin Islands, there are statutory instruments which allowed the police to seek a warrant under section 14 L of the **Computer Misuse and Cyber Crime Act (as amended)** and that under a warrant issued by an appropriate judicial officer, the police can both seize and search a mobile device.

[61] This Court is also mindful of the learning of the Court of Appeal in the case of **David Brandt MNIHCVAP2019/0009**. The Court of Appeal held as follows:-

“Notwithstanding that the search of Mr Brandt’s cell phones was unlawful, his constitutional right to privacy guaranteed by section 9 of the Constitution of Montserrat was not breached. The issue of a search warrant under the Criminal Procedure Code to search Mr Brandt’s premises and seize certain items connected to the suspected offences is clearly reasonably justifiable in a democratic society for the prevention or detection of offences against the criminal law. The fact that the police went outside the scope of the warrant did not make their actions unconstitutional.

Harrikissoon v Attorney General (1979) 31 WIR 348 applied”

[62] In the course of oral arguments, there was a general consensus by defence counsel that under this particular article, the police were entitled to place limitations on the individual right to privacy in order to detect offences against criminal law. Notwithstanding the fact that the warrant was issued by the wrong judicial officer in this case, the Court does not take the view that this unlawful conduct was sufficient to infringe upon the individual’s constitutional right to privacy having regard to the balancing of the needs which must take place.

The Right to Remain Silent and the Right against Self-Incrimination

[63] On behalf of the Accused, it was submitted that under the **Constitution of the Virgin Islands** each person charged with this offence has the unfettered right to silence or not to incriminate themselves.

- [64] The core of this submission is that as a consequence of these unlawfully obtained warrants, the police have been able to access the mobile devices of each of the Accused and extract material which the prosecution now relies upon in support of their case.
- [65] On behalf of the Accused, it was submitted that unlike the right to privacy, the right to remain silent is an unfettered absolute right. It was highlighted that none of the Accused were prepared to give their password or pin number. In fact, three Accused overtly refused (save and except one of the Accused who when presented with a warrant on the threat of prosecution for not disclosing this information, provided the information against his will according to his counsel).
- [66] The Crown on this issue relied heavily on the Privy Council decision in **Procurator Fiscal v Brown (Scotland) [2000] UKPC** and argued that these rights were not in themselves absolute, and that if the Court were to find that the securing of warrants in this case was unlawful, such a finding in the circumstances of this case was not sufficient to amount to a breach of this right.
- [67] In any event, the Crown argued that the extraction of information from the phone of the Accused persons under a warrant signed by a magistrate pursuant to the **Computer Misuse and Cybercrime Act** did not necessarily infringe the Accused's right to silence, as the nature of this right was purely testimonial and did not apply to evidence such as breathalyser samples, DNA, blood samples, documents or other real items seized under a warrant, and this logic would apply to the contents of a mobile phone.
- [68] The Court was directed to the following rights under the Constitution upon which counsel for the Accused relied to support the existence of the right to silence and the right against self-incrimination:

“Protection of right to personal liberty

15.—(1) Every person has the right to liberty and security of the person.

(2) No person shall be deprived of his or her personal liberty, save as may be authorised by law in any of the following cases—

(a) in execution of the sentence or order of a Court (whether of the Virgin Islands or otherwise) in respect of a criminal offence of which that person has been convicted or in respect of any other order of the Court;

(b) for the purpose of bringing that person before a Court in execution of the order of a Court;

(c) upon reasonable suspicion of that person having committed or of being about to commit a criminal offence under any law;

(d) in the case of a minor, under the order of a Court or in order to bring that person before a Court or with the consent of his or her parent or legal guardian, for his or her education or welfare;

(e) for the purpose of preventing the spread of an infectious or contagious disease;

(f) in the case of a person who is, or reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;

(g) for the purpose of preventing the unlawful entry of that person into the Virgin Islands, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from the Virgin Islands, or for the purpose of restricting that person while he or she is being conveyed through the Virgin Islands in the course of his or her extradition or removal as a convicted prisoner from one country to another.

(3) Any person who is arrested or detained shall be informed promptly, as prescribed by law, in a language that he or she understands, of the reason for his or her arrest or detention and of his or her right to remain silent.” (emphasis mine)

[69] Under provisions to secure Protection of Law Section 16 provides as follows:

“16.—(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

(2) Every person who is charged with a criminal offence shall— a-g.....

(3) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(4) No person who shows that he or she has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence, save upon the order of a superior Court in the course of appeal or review proceedings relating to the conviction or acquittal.

(5) No person shall be tried for a criminal offence if he or she shows that he or she has been granted a pardon for that offence, either free or subject to lawful conditions.

(6) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

[70] It is clear to this Court that the nature of the right to silence and right against self-incrimination is not expressly stated as a freestanding right. It manifests itself as an entitlement of a person who is arrested or detained to be informed promptly of his right to silence, among other things under the right to personal liberty, and also manifests itself in the protection of the law provision which mandates that no person who is tried for a criminal offence shall be compelled to give evidence at trial.

[71] Be that as it may, this Court does not doubt the existence of the right and is guided by the learning of the Judicial Committee of the Privy Council in **Procurator Fiscal v Brown (Scotland) [2001] 2 ALLER 97 at 120** where Lord Steyn stated the following:

“It is well settled, although not expressed in the Convention, that there is an implied privilege against self-incrimination under article 6. Moreover, section 172(2) undoubtedly makes an inroad on this privilege. On the other hand, it is also clear that the privilege against self-incrimination is not an absolute right. While there is no decision of the European Court of Human Rights directly in point, it is noteworthy that closely related rights have been held not to be absolute.

It is significant that the basic right of access to the Courts has been held to be not absolute: *Golder v. United Kingdom* (1975) 1 EHRR 524. The principle that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law is connected with the privilege against self-incrimination. Yet the former has been held not to be absolute: *Salabiaku v. France* (1988) 13 E.H.R.R. 379. The European Court has also had occasion to emphasise the close link between the right of silence and the privilege against self-incrimination: *Murray v. United Kingdom* (1996) 22 EHRR 29. In *Murray* the European Court held that the right of silence is not absolute.

In these circumstances it would be strange if a right not expressed in the Convention or any of its Protocols, but implied into article 6 of the Convention, had an absolute character. In my view the right in question is plainly not absolute. From this premise it follows that an interference with the right may be justified if the particular legislative provision was enacted in pursuance of a legitimate aim and if the scope of the legislative provision is necessary and proportionate to the achievement of the aim.”

[72] Counsel for the Accused have argued that when one looks at the way these rights are expressed within the **Constitution of the Virgin Islands**, they are to be coupled with section 9 which reads as follows:

“Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, **subject to such limitations of that protection as are contained in those provisions**, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

- [73] They submit that the absence of limitations on these two rights is sufficient for the Court to conclude that the right is absolute in nature.
- [74] This Court is not inclined to construe the provisions of the Constitution as narrowly as is being suggested. It is this Court’s view that the right to remain silent or the right not to incriminate oneself is not absolute, and may be justified if a particular legislative provision was enacted in pursuance of a legitimate aim, and if the scope of the legislative provision is necessary and proportionate to the achievement of the aim.
- [75] Even if I am wrong about this, the Court takes the view that the nature of the right to remain silent is testimonial in nature. This means it allows for an accused person to remain silent and not say anything in the investigatory stage. At his trial, the person accused cannot be compelled to give evidence. In other words, the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent.
- [76] The right to silence and the right not to self-incriminate does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspects, such as inter alia documents acquired pursuant to a warrant, breath samples, blood or urine samples or bodily tissue for the purpose of DNA testing.
- [77] Support for this proposition is found in **Procurator Fiscal v Brown (Scotland) [2001] 2 ALLER 97 at 111** where Lord Bingham noted as follows:

"This decision was shortly followed by that in *Saunders v. United Kingdom* (1996) 23 EHRR 313, an authority on which the respondent particularly relied before the High Court and the Board. Suspicion of an unlawful share support operation in the shares of Guinness plc had led to the appointment of inspectors, who had found evidence of criminal conduct and had thereafter interviewed Mr Saunders, formerly a director and the chief executive of Guinness, on nine occasions. He was charged with numerous offences, and the prosecution sought to rely on the transcript of his interviews by the inspectors. The admissibility of such transcripts was challenged, but the judge ruled that under the relevant statute the inspectors were entitled to ask witnesses questions that tended to incriminate them, that the witnesses were under a duty to answer such questions and that the answers were admissible in criminal proceedings. The judge did however exclude the transcripts of the last two interviews, conducted after Mr Saunders had been charged, applying section 78 of the Police and Criminal Evidence Act 1984. The issue before the European Court did not concern the propriety of compelling answers to the inspectors' questions at the investigatory stage but the propriety of admitting the evidence of those answers, compulsorily obtained, in the criminal proceedings. The Court ruled in Mr Saunders' favour:

"68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.

69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in

criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.”

[78] On this analysis, it would seem to this Court that the extraction of material from a computer or mobile phone under a warrant would not in the normal course of things be sufficient to constitute a breach of the Accused’s constitutional right to remain silent or not incriminate themselves. In this Court’s view, the fact that the warrant was unlawfully obtained is not sufficient in itself to constitute an infringement of these rights.

[79] Having regard to the abovementioned analysis, this Court is not minded to agree that the Accused’s rights under the **Constitution of the Virgin Islands** have been infringed. This Court therefore declines to exclude the evidence derived from the mobile phones on this basis.

Right to Exclude under the Common Law

[80] The Judicial Committee reminds us in Warren that in English law, the admissibility of evidence depends in the first instance on its relevance. Irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility: see **Kuruma, son of Kaniu v The Queen [1955] AC 197**, **Jeffrey v Black [1978] QB 490**, **R v Sang [1980] AC 402**, and a great many other cases.

[81] These cases clearly establish the principle that it does not matter how evidence is obtained; once it is relevant, it is admissible.

[82] This English common law position is well-entrenched in the United Kingdom. However, in the Commonwealth Caribbean, the effect of Constitutions containing fundamental rights and freedoms has seen the development of jurisprudence where evidence obtained in a manner capable of amounting to an infringement of fundamental rights and freedoms may in appropriate matters be excluded on the basis of cases such as **Mohammed v. The State (Trinidad and Tobago) [1998] UKPC 49 (9th December, 1998)**.

[83] Counsel for the Accused in this matter have not made any submissions to this Court under the common law power of exclusion open to the Court. In those circumstances, this Court will not express a view on whether it is open to this Court to exclude the evidence of the warrants on this basis.

Section 125 of the Evidence Act

[84] Part XXII of the **Evidence Act** allows for the Exclusion of Evidence in Exercise of a Judicial Discretion. Section 123 grants a Judge a general discretion to exclude evidence. Section 124 gives a Judge the discretion in criminal proceedings to exclude prejudicial evidence, and Section 125 gives a Judge a discretion to exclude illegally obtained evidence in appropriate circumstances.

[85] From the wording of this provision, this discretion to exclude improperly obtained evidence requires two (2) hurdles to be established. Firstly, the Court must find the Evidence was obtained improperly or in contravention of a law, or in consequence of an impropriety.

[86] Secondly, if the first hurdle can be established, the Court must move on to determine whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

[87] 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.

[88] This Court is of the firm view that the Evidence obtained pursuant to the warrants were obtained improperly and in contravention of a law for the reasons mentioned above.

[89] The Court in carrying out this exercise has addressed its mind to the matters outlined in section 125 (3) (a) to (g) and factored those matters therein into its decision. That having been said the Court

feels it necessary to make some observations relative to the manner in which the evidence in this case under the warrants were secured, and its relationship with this Court's determination of the desirability of admitting the evidence as opposed to the undesirability of admitting evidence that has been obtained in this manner.

- [90] This Court takes no issue with the initial use of the firearms and ammunition warrant to the extent that it was obtained between 12 September and 12 October 2020 and the execution on 13 October 2020 to search for firearms or ammunition unlawfully kept on the various premises. What the Court has a difficulty with is in the use of such warrant to seize the mobile phones of the Accused. As such, this seizure raises questions about whether the police had reasonable cause to seize the mobile devices.
- [91] Presumably, if the police in carrying out their investigations had reasonable cause to believe that an examination of the mobile phones was necessary in order to investigate the murder, then why did the police not avail itself of the specific legislative processes that expressly allowed them to in the first instance to seize the mobile phones and also search the phones as part of the investigative process?
- [92] Such a process existed in law and was available with the 2019 amendment to the **Computer Misuse and Cybercrime Act**. The police should have been aware of this process as it was the law, but what is clear is that the Police must have been aware of this process, because on the 16 October 2020 the Police sought warrants under the Act albeit under the hand of a Magistrate.
- [93] It is clear that this approach by the police of deliberately choosing not to get a warrant under the appropriate legislation and opting instead to use the "firearms and ammunition" type warrants was plainly unlawful.
- [94] The situation is further aggravated by the fact that 12 months later, there was a repeat of this conduct where "firearm and ammunition" warrants were once again on the 11 and 12 October 2021 obtained by the police, searches were conducted and mobile phones were seized on 13 October 2021.

- [95] The Accused were arrested and detained and then charged for the offence of murder on that date. Later on that same 13 October 2021, after the “firearms and ammunition” warrants are executed, the police secured proper warrants under the Computer Misuse and Cybercrime Act.
- [96] Such conduct illustrates a clear pattern of behaviour, where the police deliberately choose not to pursue the legislative processes existing in law to allow them to seize and if necessary, search a mobile phone under section 14 L of the **Computer Misuse and Cybercrime Act** preferring instead to use the “firearms and ammunition” type warrants.
- [97] The question which obviously arises is whether this is fair. I think such conduct is unfair for two reasons. The learning clearly suggests that computers and mobile phones and or electronic devices are of a different nature from the search of a house.
- [98] The case law has developed in that, should the police wish to use a warrant process to investigate computers mobile devices or electronic devices, the warrant must specifically state that. In short, a general warrant will not suffice. Nor is it appropriate to say that you are going to search for firearms and ammunition because you reasonably believe they have been unlawfully kept at the premises, and then use the fact that you have permission to enter the premises to carry out a search for computers, mobile phones and other electronic devices.
- [99] Certainly, one of the reasons that such a course is unfair and inappropriate is that if the police had reasonable cause to suspect that there are computers, mobile devices or electronic devices that are relevant to the investigation, then there is a clear and express mechanism in law in the Virgin Islands that allows the police to get the necessary warrant.
- [100] The second reason why this is unfair and objectionable, and why this Court is troubled by what has transpired in this case, is that as mentioned above, in the case of **Vu** 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.
- [101] It is only when a specific, prior authorisation to search a computer found in the place of search, ensures that the authorising 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.

[102] This means according to Vu that if police intend to search any computers or mobile phones found within a place they want to search, **they must first satisfy the authorising justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for.**

[103] In this case, this critical weighing up process was not carried out by the appropriate judicial officer, and the police were able to access information on the Accused's mobile devices and secure its use in this matter for the Crown in circumstances where a critical stage in the process of determining whether to grant the warrant, having regard to the balancing process between the individual's right and the reasonable cause of the police to secure a warrant on the basis of their information at the time, was simply not done before the appropriate judicial officer.

[104] This Court wishes to make clear that the investigation of criminal offences and the balance of respecting the rights of individuals in ensuring that persons charged with criminal offences receive a fair trial, mandate that the Court is required to get this balance correct.

[105] It follows that where processes exist that relate to the investigation and prosecution of criminal offences, processes which on occasion will give the police certain entitlements that may conflict with individual rights, such as the right to interview where the individual is suspected of a crime or the power to secure a warrant that allows the police to enter an individual's private property in order to carry out investigations, there is a critical need for the police in carrying out those functions to ensure that the process employed is procedurally correct and compliant with the law. The need for this is patent as the conduct and procedures adopted in order to investigate crimes require strict compliance with the requirements of the law.

[106] The Court has a responsibility to ensure that accused persons are afforded a fair trial, and where the conduct of the police falls short of what is expected, then the Court has a responsibility to ensure an appropriate balance is struck in every case.

[107] In the circumstances of this case, this Court finds that the undesirability of admitting evidence that has been obtained in relation to the three sets of warrants used in this matter significantly outweighs the desirability of admitting the evidence.

[108] Accordingly, all evidence relating to these three types of warrants are excluded under the Court's discretion under Section 125 of the **Evidence Act**.

Rajiv Persad SC

Judge (Ag)

By the Court

Registrar