

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

**BVIMCRAP2021/0004
(formerly BVIMCRAP2019/0001)**

BETWEEN:

STARCY HUGGINS

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Trevor Ward

Justice of Appeal

Appearances:

Mr. Michael Lashley KC with him Ms. Akilah Anderson and Ms. Tracy Francis-Smith for the Appellant

Ms. Tiffany R. Scatliffe, Director of Public Prosecutions for the Respondent

2022: October 7;

2023: April 25.

Criminal appeal – Appeal against conviction – Restraint of appellate court to interfere with findings of fact – Abuse of power – Nature of judgment entered by learned magistrate – Breach of trust by a public officer – Elements of offence – Mens rea – Admissibility of audiovisual recordings into evidence – Whether adducing evidence improperly or unfairly results in an unfair trial or miscarriage of justice – Whether entrapment serves as a full defence – Section 81G of the Criminal Code of the Virgin Islands

On November 29th 2013, the Commissioner of Police organized a covert operation code-named CUMBRIA to verify information received that the appellant, a member of the Royal Virgin Island Police Force at the time, was tipping off persons about police operations by

passing on information to the subjects of investigations. To facilitate operation CUMBRIA, another operation code-named BOWFIN was fabricated where the appellant was to assist other officers in executing search warrants at the premises of Mr. Kemuel Berry and Mr. Cliff Williams. The appellant was collected by fellow police officers in a police vehicle fitted with audio and video recording equipment. The appellant was left alone in the vehicle and was recorded making phone calls to Mr. Berry and Mr. Williams, the subjects of the search warrants of operation BOWFIN. The appellant was subsequently convicted and sentenced to two years imprisonment suspended for a two-year period.

Dissatisfied with the finding of guilt, the appellant appealed. The issues arising on appeal may be summarized as follows: (i) Whether the elements of the offence of breach of trust by a public officer as set out in section 81G of the Criminal Code of the Territory of the Virgin Islands ("the Criminal Code") were satisfied on the evidence; (ii) Whether the learned judge erred in admitting the audio-visual recordings into evidence; and (iii) Whether the nature of the evidence and the manner in which the evidence was adduced was unfair and resulted in an unfair trial or miscarriage of justice.

Held: dismissing the appeal and affirming the conviction and sentence of the learned magistrate, that:

1. An appellate court should not interfere with a judge's findings of primary fact unless they are 'plainly wrong', which connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of evidence, or the finding was one that no reasonable judge could have reached. The reasons for such appellate restraint are not limited to the advantage enjoyed by the trial judge of having seen and heard the witnesses. They include the recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate.

Kwok Kin Kwok v Yao Juan [2022] UKPC 52 applied.

2. Section 81G of the Criminal Code provides that a public official who, in the discharge of his duties, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, commits an offence. The Criminal Code does not outline the elements of the offence. However section 81G is in similar terms as section 122 of the Criminal Code of Canada. The Canadian courts have held that the offence is committed where (a) a public official; (b) in the course of or connected to his public office (c) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty; (d) without reasonable excuse or justification; and where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects. The elements of the offence were satisfied in this case as the appellant was a police officer who misconducted herself in connection to her public office without reasonable excuse or justification. Further, the appellant's misconduct may be deemed serious as police officers are placed in a

position of trust to maintain law and order. An officer calling and alerting the subjects of an operation clearly represented a serious and marked departure from the standards expected of an individual in the appellant's position.

R v Boulanger 2006 SCC 32 applied; **R v Quach** [2010] VSCA 106 applied.

3. The test for admissibility is relevance. For evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. A tape recording is admissible provided that: (i) its accuracy could be proved; (ii) the voices were properly identified and, (iii) that the evidence was relevant and otherwise admissible. Ultimately the admissibility of evidence is a matter for a judge and there was sufficient evidence at trial for the learned magistrate to determine that the audio-video evidence was reliable.

R v Maqsd Ali [1966] 1 QB 688 applied.

4. The Court's jurisdiction is limited to assessing whether the conviction is safe. Not every departure from good practice renders a trial unfair. The fairness of a trial can only be assessed in the factual context of the particular case. It is for the appellant to show that the absence of the exhibit produced a disadvantage at trial. **Patrick Lovelace v The Queen** Saint Vincent and the Grenadines HCRAP 2009/017 (delivered 27th February 2012, unreported) considered; **Kuruma, Son of Kaniu v R** [1955] AC 197 applied.
5. The law states that entrapment is not a complete defence but where an accused can show entrapment, the court may stay the proceedings as an abuse of the court's process or may exclude the evidence. If there is no evidence to show that the appellant was forced, coerced or encouraged in any way but acted in her own dishonesty, the defence of entrapment cannot prevail.

R v Loosely Attorney General's Reference (No. 3 of 2000) [2001] UKHL 53 considered; **Williams and another v Director of Public Prosecutions** [1993] 3 All ER 365 applied.

JUDGMENT

[1] **PRICE-FINDLAY JA:** This is an appeal from the decision of the learned magistrate where the appellant was found guilty of the offence of breach of trust by a public officer contrary to section 81G of the **Criminal Code** 1997.¹

[2] The brief facts are as follows.

¹ No.1 of 1997, Laws of the Territory of the Virgin Islands.

Background

- [3] On 29th November 2013 a covert operation was undertaken which was authorised by the Commissioner of Police. The operation was code-named CUMBRIA. The purpose of the operation was to verify information received that the appellant was tipping off persons about police operations by passing information to the subjects of the investigations.
- [4] To facilitate operation CUMBRIA, an operation called BOWFIN was fabricated where the appellant, who was on active duty as a police officer, was to assist fellow officers in executing search warrants at the premises of two persons, Mr. Kemuel Berry and Mr. Cliff Williams.
- [5] In pursuance of operation CUMBRIA, the appellant was collected by fellow officers in a police vehicle which was fitted with video and audio recording equipment. The appellant was left alone in the vehicle and was taped making phone calls to the persons on whom the search warrants were to be executed during operation BOWFIN.
- [6] The appellant was subsequently arrested and charged with the relevant offence of breach of trust.
- [7] She was convicted by the learned magistrate and sentenced to two years imprisonment suspended for a two-year period.

Appeal

- [8] The appellant has by way of an amended notice of appeal set out 8 grounds of appeal as follows:
- (i) The decision of the learned magistrate in coming to a finding of guilt for the offence charged, was wrong in law in that there was insufficient

evidence to support a conclusion that all of the elements of the offence were made out.

- (ii) The conviction was unsafe because of the unreliability of the audio-visual evidence upon which the learned magistrate expressly relied in coming to her finding of guilt. This was not limited to, but includes, the fact that the audio-visual recordings which were admitted into evidence were edited and alternatively there was no sufficient evidence as to the editing so that the learned magistrate could be properly satisfied that what was shown and heard conveyed a true, complete and accurate depiction of the appellant's words and actions.
- (iii) The admission of the audio-visual material into evidence was improper for want of the proper laying of the evidential foundation for its admission and in particular in relation to the editing of the material.
- (iv) That the nature of the evidence and further the manner in which the evidence was adduced was unfair and/or improper and/or resulted in an unfair trial alternatively a miscarriage of justice.
- (v) There was a miscarriage of justice when the learned magistrate permitted the trial to continue on the presentation of the case for the defence when it became apparent that the exhibit containing the audio-visual evidence which the court relied on for its ruling on the defence's no case submission and ultimately for its finding of guilt, could not be found.
- (vi) There was a missing exhibit that was not equally available to the defence in its presentation of the appellant's case as it was to the prosecution and this was manifestly unfair.
- (vii) Additionally, there was a complaint during the course of the trial by the appellant that the audio-visual evidence was incomplete and this was not addressed in the judgement of the learned magistrate. A conviction in

which the reasoning of the learned magistrate does not appear to treat with this apparent discrepancy is unsafe particularly given the importance of this evidence, which was a reference point against which the learned magistrate assessed the defence witnesses' evidence and the matter overall.

- (viii) Whether the use of the audio evidence and/or the trial of the matter were manifestly unfair to the appellant and injurious to her right to a fair trial.

[9] The grounds of appeal overlap and therefore may be summarised as follows:

- (i) Whether the elements of the offence of breach of trust by a public officer were satisfied on the evidence.
- (ii) Whether the learned judge erred in admitting the audio-visual recording into evidence.
- (iii) Whether the nature of the evidence and the manner in which the evidence was adduced was unfair and resulted in an unfair trial or miscarriage of justice.

Issue 1: Whether the elements of the offence of breach of trust by a public officer were satisfied on the evidence

[10] This appeal challenges findings of fact of the learned magistrate. Accordingly, it engages the established principles of appellate interference with respect to such findings and I set them out below for applicable guidance.

[11] In **Kwok Kin Kwok v Yao Juan**,² the Board of the Privy Council observed that:

“40. An appellate court should not interfere with a judge’s findings of primary fact unless they are “plainly wrong”, which in this context connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no

² [2022] UKPC 52.

reasonable judge could have reached (or, as it is sometimes put, “outside the bounds within which reasonable disagreement is possible”).

41. The appellate court will be rarely justified in overturning a finding of fact which turns on the credibility of the witnesses. It should not do so unless it is satisfied that any advantage enjoyed by the trial judge by having seen and heard the witnesses could not be sufficient to explain or justify his conclusions.

42. The inhibition on interfering with the trial judge’s findings of fact extends to his evaluation of the facts and any inferences to be drawn from them: see e.g. *Beacon Insurance* at para 17.

43. The reasons for such appellate restraint are not limited to the advantage enjoyed by the trial judge of having seen and heard the witnesses. They include the recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. The judge will be totally familiar with the evidence at trial, and is likely to gain a far deeper insight from living with the case over several days than the appeal court, whose view of the case will be circumscribed by the issues raised on appeal.”

[12] The offence of breach of trust by a public officer is contained in section 81G of the **Criminal Code** 1997. The section provides:

“A public official who, in the discharge of his duties, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, commits an offence and is liable:

(a) On summary conviction to imprisonment for a term not exceeding three years; or

(b) On conviction on indictment to imprisonment to a term not exceeding seven years.”

[13] The Criminal Code does not outline the elements of the offence and to this end, it is imperative to examine the common law authorities on the issue. Indeed, the true scope and the elements of this offence have been subject to both judicial and scholarly discussion yet seemingly remain undefined. Nonetheless, to best resolve the issues before the Court, it is prudent to surmise the genesis of the offence. In **R v Boulanger**³, the Canadian Court of Appeal made judicial pronouncements on the

³ 2006 SCC 32.

offence which is contained in section 122 of the Criminal Code of Canada which is similar to the offence in the BVI. Section 122 of the Canadian Criminal Code provides that:

“122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.”

[14] Of note, the court described the nature of the offence as follows:

“1. The crime ... is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power...

52. The purpose of the offence...can be traced back to the early authorities that recognize that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be.”

[15] After an extensive charter of the history and development of the offence, the court concluded that the elements of the offence are:

- (1) The accused is an official.
- (2) The accused was acting in connection with the duties of his or her office.
- (3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office.
- (4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and

- (5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.

[16] Recently, in **R v Quach**,⁴ the Victorian Court of Appeal was tasked with determining the elements of the offence of misconduct in public office (from which it is accepted that the offence of breach of trust by a public officer is a derivative). In answering the question, the court built on similar formulations such as **Shum Kwok Sher v HKSAR**⁵; **Attorney General's Reference (No. 3 of 2003)**⁶ and **Boulanger**.

[17] The court concluded that the elements of the offence are:

- (1) a public official;
- (2) in the course of or connected to his public office;
- (3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

Public officer

[18] The meaning of “public officer” is largely dependent on the specific context in which it arises. **Henly v The Mayor and Burgesses of Lyme**,⁷ classified a public officer as: ‘every one who is appointed to discharge a public duty, and receives

⁴ [2010] VSCA 106.

⁵ [2002] 2 HKLRD 793 at [84].

⁶ [2005] 1 QB 73 at [61].

⁷ [1828] 130 ER 995 at 1001.

compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer’.

In the course of or connected to his public office

[19] In **Quach**, the court demonstrated the expansive scope of this element of the offence. The court noted at paragraphs 40 to 41 that:

“40...the relevant misconduct need not occur while the officer is in the course of performing a duty or function of the office. Certain responsibilities of the office will attach to the officer whether or not the officer is acting in the course of that office. Where the misconduct does not occur during the performance of a function or duty of the office, the offence may be made out where the misconduct is inconsistent with those responsibilities. It may be connected to a duty already performed or to one yet to be performed or it may relate to the responsibilities of the office in some other way. The misconduct must be incompatible with the proper discharge of the responsibilities of the office so as to amount to a breach of the confidence which the public has placed in the office, thus giving it its public and criminal character. Accordingly, use of knowledge or information acquired by the office holder in the course of his or her duties for a private or other impermissible purpose may be inconsistent with the responsibilities of the office and calculated to injure the public interest. If the misuse of the information is of a serious nature and is likely to be viewed as a breach of the trust reposed in the office so as to bring the office into disrepute, the conduct will fall within the ambit of the offence whether or not it occurs in the course of public office. It will in such circumstance have the necessary connection to that office.

41 I consider that the proper formulation of the offence requires the element to be expressed so that it encompasses the circumstance in which the offender’s misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office. Whether the misconduct was so connected will turn upon the facts of the case.”

Willful misconduct by act or omission

[20] It is established that the offence requires a guilty mind, the precise nature of which will vary according to the particular type of alleged misconduct. In **Boulanger**, the Supreme Court of Canada discussed the mental element of the offence (specifically excluding cases of wilful neglect of duty) in the following general and non-exhaustive terms:

“56 ...In principle, the mens rea of the offence lies in the intention to use one’s public office for purposes other than the benefit of the public. In practice, this has been associated historically with using one’s public office for a dishonest, partial, corrupt or oppressive purpose, each of which embodies the non-public purpose with which the offence is concerned.

57 As with any offence, the mens rea is inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of improper intent. Similarly, the receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. However, the fact that a public officer obtains a benefit is not conclusive of a culpable mens rea. Many legitimate exercises of a public authority or power by a public servant confer incidental advantages on the actor... Conversely, the offence may be made out where no personal benefit is involved”

Without reasonable excuse or justification

- [21] The ‘without reasonable excuse or justification’ qualification has recently been identified as a general element of the offence in Attorney-General’s Reference (No 3 of 2003). It however still appears to have little practical application.

Seriousness

- [22] The court in **Boulanger** was also minded to clarify that not all conduct can fall within the purview of the offence. The court instructed:

“ 52...perfection has never been the standard for criminal culpability in this domain; “mistakes” and “errors in judgment” have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour.”

- [23] It is now firmly established, with the following formulation from **Quach** building upon leading authorities from around the world, including **Boulanger**, that:

“[The] misconduct [must be] serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.”

[24] It must firstly be noted that the learned judge relied on **Boulanger** which applied the case of **R v Perreault**.⁸ Counsel for the appellant fell into error by listing the applicable authority as **Boulanger** yet crouching the elements of the offence as per Perreault that:

“i. The accused is an official; ii. Who commits an act or omission in connection with the performance of his or her duties, and that act or omission; iii. Is contrary to a duty imposed by law or regulation, by the accused’s contract of employment or by a guideline connected with the accused’s duties; and iv. Results, directly or indirectly, in a personal benefit or a derivative benefit.”

[25] This judgment proceeds based on the elements of the offence as set out in **Quach**.

[26] The first element of the offence is easily satisfied in this case. It is undisputed that at the time of the offence, the appellant was a police officer in the Virgin Islands Police Force. The appellant was therefore a public officer.

[27] As it pertains to the second element, it is also clear that the appellant was in the course of her public office at the material time of the offence. The allegation is that the appellant provided information to certain persons relating to an investigation or operation pertaining to the said persons. The appellant was informed that Mr. Merry and Mr. Williams were suspects on whom search warrants were to be executed regarding possession of cannabis and that she was to be part of the team to execute these warrants. The information was obtained by the appellant in her capacity as an officer of the police force. Furthermore, the evidence given indicates that the information that is the subject of an operation is confidential and is not to be shared; although it may be shared with other members of the force. There is a sufficient nexus between the appellant’s alleged misconduct and her office as a police officer. The fact that there was no real operation is of no material consequence to this point and does not prevent a finding that this element of the offence is made out. This point was clearly addressed by the learned magistrate in her decision. Indeed, it is also accepted that where the misconduct does not occur during the performance of

⁸ Perreault v R (1992) 75 CCC (3d) 425, Que CA.

a function or duty of the office, the offence may be made out where the misconduct is inconsistent with the responsibilities entrusted into the officer by virtue of his or her office. The divulging of confidential information is one such form of misconduct which is wholly inconsistent with the responsibilities entrusted into a police officer by virtue of their office.

[28] In relation to the third element of the offence, that the appellant willfully misconducted herself or the mens rea element of the offence, the appellant's argument is that the prosecution's case hinged on a segmented portion of the appellant's conversation as noted at paragraph 208 of the learned magistrate's decision: 'aye, aye, Starcy, Starcy, ay say y'all owe me big this time, they coming, uh hmmm, uh hmmm'.

[29] The basis of this third element seems to be using one's public office for a dishonest, partial, corrupt or oppressive purpose, each of which embodies the non-public purpose with which the offence is concerned. It is also accepted that an attempt by the accused to conceal his or her actions may often provide evidence that the accused acted in his or her own interest. Additionally, the receipt of a personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. This is not however fully probative of a culpable mens rea. In this case however, it is clear that the appellant acted with the intention of receiving a benefit. This can be gleaned by her saying 'y'all owe me big this time'. In any event, the appellant clearly used the information for a partial or corrupt purpose even if no benefit is obtained per se.

[30] It is established on the record that the appellant was acquainted with Mr. Merry and Mr. Williams. It is also established that she called them while on the operation of which they were the subject of. The appellant claims to have gotten into contact with Mr. Merry after failing to successfully contact Mr. Williams. She asserted that she called Mr. Williams to ascertain whether there was property in Josiah's Bay. Her evidence is further that when the accompanying officers left the car, she

remembered she had to call Mr. Merry in respect of doing Thanksgiving goodies for him and to seek his assistance to pull her husband's boat. However, at no point did the appellant inquire as to any property in Josiah's Bay. Further, the video evidence which was played before the appellant, shows her looking around seemingly to ascertain where the other officers went. Her evidence is that she was upset that they had gone on their personal errand. She indicated that she did not tell the officers she had gotten into contact with Mr. Merry because it was none of their business. At no point did the appellant indicate to the officers that she had to do baked goods for Mr. Merry. To my mind, it is highly unlikely that the appellant, during a live operation, would call the subjects of the operation to discuss Thanksgiving goodies and to pull her husband's boat. The appellant in her own evidence said she believed that the information was not confidential based on the fact that it was not given by a senior officer. Additionally, the evidence shows that the call between Mr. Merry and the appellant lasted 34 seconds. It indeed seems extraordinary that what the appellant and Mr. Merry averred was the subject of their discussion could have taken place in 34 seconds.

- [31] It is highly unlikely, that in light of all these circumstances, the appellant did not divulge to Mr. Merry and Mr. Williams information in relation to the search warrants.
- [32] Insofar as a finding that the appellant wilfully misconducted herself, there is no good justification.
- [33] At this juncture, it is also clear that the actions of the appellant are serious and are not merely mistakes. The short point of this is that generally, police officers are placed in a position of trust, they are placed to maintain law and order. That an officer on duty would call the subject of an operation and alert them of the police's operation certainly satisfies this element of the offence. Her conduct clearly represented a serious and marked departure from the standards expected of an individual in the appellant's position.

- [34] Upon an assessment of the evidence and the learned magistrate's decision, it is pellucid that the learned magistrate did not commit such an error of law or fact in her finding that the elements of the offence were made out.

Issue 2: Whether the learned judge erred in admitting the audio-visual recording into evidence

- [35] This issue covers grounds two and three of the appellant's notice of appeal.
- [36] It is trite law that the test for the admissibility of evidence is relevance. Indeed, for evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable.
- [37] The common law position regarding the admissibility of tape recordings is summarized in **R v Maqsud Ali; R V Ashiq Hussain**⁹. In that case, the police detained two suspects, A and M, to assist them in a murder enquiry. They were taken into a room in which was hidden a microphone secretly connected with a tape recorder in another room. None but the police knew of the presence of the microphone. The tape recorder was switched on for approximately an hour during which time it recorded a conversation between the two men in a Punjabi dialect. The tape recording was imperfect in that the microphone did not always pick up what was being said and the recording was overlaid from time to time by extraneous noises. A. and M. were charged on June 13th and 15th, respectively, with the murder of A.'s wife. In the course of the trial it became apparent that, apart from the tape recording, there was no direct evidence of an incriminating nature implicating the defendants. The defence strongly objected to the admissibility of the tape recording, the transcripts and the translations.
- [38] It was held that a tape recording is admissible provided that: (i) Its accuracy could be proved; (ii) the voices properly identified; and, (iii) that the evidence was relevant and otherwise admissible.

⁹ [1966] 1 QB 688.

- [39] This issue can be disposed of shortly. Ultimately, the admissibility of evidence is a matter for the judge. In this case, the appellant argues that there was no detailed consideration given as to the origin, form and chain of custody of the audio-visual evidence. Counsel for the appellant averred that the learned magistrate in her decision did not appear to consider the potentially prejudicial effect of the admission of the evidence admitted against the appellant.
- [40] In as much as the reliability of the recording is challenged, this can easily be countered based on the evidence which was before the learned magistrate. In her judgment, the learned magistrate noted the evidence given by Mr. Marlon Primo. Mr. Primo's evidence sufficiently clarifies the chain of custody of the audio-visual evidence and also validates its authenticity. From all accounts, the recording device was fitted in the vehicle by him on 29th November 2013. His evidence was the recording device was well functioning prior to its instalment. He thoroughly explained the functionality of the recording device. Mr. Primo gave evidence that he made copies of the recording and initialized them and signed them. One was a master copy and the other was a working copy. Furthermore, there was no dispute that it was the appellant's voice which was heard on the recording. This fact is corroborated by the evidence of Mr. Mark Hughes who while listening to the live recording, did not recognize the appellant's voice, later did so. The evidence of Mr. Hughes also corroborates that of Mr. Primo.
- [41] It is noteworthy that there was never any objection to the admission of the video evidence itself as being unreliable. The evidence was played in court, the appellant explained her actions in relation to the evidence. Instead, the only objection of note by learned counsel for the appellant during the trial was on the basis that he was not provided with an operational order for CUMBRIA in the same way as BOWFIN. His argument was that the information in relation to the CUMBRIA may raise the grounds for objecting to the DVDs being placed in evidence. After hearing both sides, the learned magistrate admitted the DVDs into evidence.

Issue 3: Whether the nature of the evidence and the manner in which the evidence was adduced was unfair and resulted in an unfair trial or miscarriage of justice

- [42] This issue encapsulates the last five grounds of appeal proffered by the appellant.
- [43] In **R v Beckford**¹⁰, the Court of Appeal held that the absence of an exhibit does not necessarily lead to an abuse of process. More specifically, the court ruled that the court had the power to stay proceedings in cases where it concluded that the defendant could not receive a fair trial or where it would be unfair for the defendant to be tried. Each case had to be considered on its own facts.
- [44] In the case at bar, the submissions on behalf of the respondent on this immediate point prove most persuasive. While the appellant contends that there was a missing exhibit, it does not aptly represent what transpired during the trial. The record shows that when the defence case was being put, the video portion of the audio-visual evidence was not being played. The learned magistrate explained that the video which was viewed in Court on the Crown's case was now not available. She asked counsel for guidance on how to proceed. The learned magistrate even suggested to the appellant's counsel that the crown could re-open their case and tender a copy, to which counsel for the appellant objected to. The appellant's counsel rejected the learned magistrate's suggestion to remedy the problem. As observed by the respondent, it was then acknowledged and agreed that the appellant when she gave her evidence explained why she was looking around and other actions she did in the vehicle as captured in the video.
- [45] The learned magistrate also took account of the fact that the video did not play during the defence's case in the written decision. The learned magistrate clearly addressed her mind to the fact that she was minded to remove the video evidence from consideration, however the appellant elected to refer to it. It is on that basis

¹⁰ [1996] 1 CR. App. R 94.

that the learned magistrate referred to the video evidence and took it into consideration as part of her deliberations.

[46] It was for the appellant to show that she was disadvantaged at the trial. Certainly, a disadvantage cannot be a finding of guilt, albeit an inconvenience for the accused. Upon traversing both the record and learned magistrate's decision, it can hardly be said that the learned magistrate committed an error of fact or law which warrants a disturbance by this Court in allowing the trial to proceed as she did notwithstanding the video was not available to be played in the defence's case.

[47] Section 16(1) of the **Virgin Islands Constitution Order 2007** provides that:

"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."

Further section 16(2) provides that:

"Every person who is charged with a criminal offence shall-

(e) be entitled to examine in person or by his or her legal practitioner the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

[48] The right to a fair trial of a criminal defendant was judicially pronounced in the case of **Randall v R**¹¹. There, the Board held that:

"The right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."

[49] In **Patrick Lovelace v The Queen**¹², the Court of Appeal also provided useful obiter in this area. The Court at paragraph 32 held that:

¹¹ [2002] 1 WLR 2237.

¹² Saint Vincent and the Grenadines HCRAP 2009/017 (delivered 27th February 2012, unreported)

“This court's jurisdiction is limited to assessing whether the conviction is safe. Not every departure from good practice will render a trial unfair. The fairness of a trial can only be assessed in the factual context of the particular case. The purpose of the trial process is to give the prosecution a fair opportunity to establish guilt and to give the defence a fair opportunity for the defendant to advance his defence.”

[50] In **Kuruma, Son of Kaniu v R**¹³ the privy council noted that other than with respect to confessions, there is generally no discretion in a court to refuse to admit evidence on the basis that it was obtained by illegal or improper means. In this case, the appellant was convicted of being in unlawful possession of two rounds of ammunition and was sentenced to death. According to the provisions of reg. 29 of the Emergency Regulations there was no power in any police officer under the rank of assistant inspector to search the appellant. Neither of the two police officers who conducted the search as a result of which the ammunition was found on the appellant was of or above the rank of assistant inspector. It was submitted on behalf of the appellant that the evidence was illegally obtained and therefore could not be given. Lord Goddard C.J. held that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

[51] In **R v Sang**,¹⁴ two defendants were indicted on counts of conspiracy to utter forged banknotes and unlawful possession of forged banknotes. They pleaded not guilty and counsel invited the trial judge to allow a trial within a trial to determine whether the activities referred to in the indictment came about as a result of incitement by an agent provocateur. Counsel hoped that having established the facts, he would persuade the judge to exercise his discretion to exclude any prosecution evidence of the commission of offences so incited. The judge, doubting the existence of any such discretion, invited counsel to argue the point on the assumption that the necessary facts had been established. After argument, the judge ruled that he had no such discretion. Thereupon the defendants changed their pleas, and each

¹³ [1955] AC 197.

¹⁴ [1980] AC 402.

pleaded guilty to one count and was sentenced. The Court of Appeal upheld the judge's ruling.

[52] On appeal by one defendant, the House of Lords held:

“(1) that a judge in a criminal trial always had a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect outweighed its probative value.

(2) That, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, the judge had no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means, the court not being concerned with how it was obtained, and it was no ground for the exercise of the discretion to exclude evidence that it was obtained as the result of the activities of an agent provocateur.”

[53] Authoritatively, in **Khan v United Kingdom**,¹⁵ the House of Lords dismissed the appeal for the following reasons:

“Under English law, there was in general nothing unlawful about a breach of privacy and the common law rule that relevant evidence obtained by the police by improper or unfair means was admissible in a criminal trial, notwithstanding that it was obtained improperly or even unlawfully, applied to evidence obtained by the use of surveillance devices which invaded a person's privacy. Accordingly, even if the right to privacy for which the appellant contended did exist (which was doubtful) the tape recording was, as a matter of law, admissible in evidence at the trial of the appellant subject, however, to the judge's discretion to exclude it in the exercise of his common law discretion. The fact that evidence had been obtained in circumstances which amounted to a breach of the provisions of art 8 of the convention was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under s 78 of the 1984 Act.”

[54] The judge's discretion had to be exercised according to whether the admission of the evidence would render the trial unfair, and the use at a criminal trial of material obtained in breach of the rights of privacy enshrined in art 8 did not of itself mean that the trial would be unfair. On the facts, the trial judge had been entitled to hold that the circumstances in which the relevant evidence was obtained, even if they

¹⁵ (2000) 8 BHRC 310.

constituted a breach of art 8, were not such as to require the exclusion of the evidence.

[55] The court noted at paragraph 38 of **Khan** that:

“The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the Schenk case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the voir dire and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference.”

[56] In **R v Loosely Attorney General’s Reference (No. 3 of 2000)**¹⁶, the House of Lords reiterated that entrapment is not a complete defence but where an accused can show entrapment, the court may stay the proceedings as an abuse of the court’s process or may exclude the evidence.

[57] However, in **Williams and another v Director of Public Prosecutions**¹⁷, in the course of a vehicle crime initiative plan, plain clothes officers parked an insecure and unattended van in a busy high street where there had been a high rate of vehicle crime. The van contained a load of cigarette cartons, which were in fact dummy. The appellants were seen walking around the van and removing the cartons. They were charged with interfering with a motor vehicle or something carried in it, with intent to commit theft. They were convicted and appealed. Farquharson L.J held that the police had done nothing to force, persuade, encourage or coerce the appellants and had, therefore, not acted as agents provocateur by participating in, procuring or counselling the commission of any crime; thus the justices were right not to exclude the evidence of the police. The court noted that as the appellants had

¹⁶ [2001] UKHL 53.

¹⁷ [1993] 3 All ER 365.

voluntarily taken the goods in the absence of any pressure from the police and with full understanding of their own dishonesty, the admission of that evidence would not have any adverse effect of the fairness of the trial.

[58] It is undisputed that every accused person charged with a criminal offence has a right to a fair trial. This right is absolute and should always be enforced. However, whether there has been a fair trial or not must be assessed on a case by case basis. In this case, there has not been a single instance where there has been an error of procedure or law which prevented the appellant from adducing her defence. There was a full trial and the appellant was represented throughout the entire trial. Many of the issues raised by counsel for the appellant concern points that respectfully do not accurately reflect the true nature of the trial. Further, many of the points canvassed were electives and options which were open to counsel to address or challenge during the trial. On many occasions, they elected not to do so.

[59] Indeed, from the plethora of authorities cited above, it is clear that the fact that evidence was obtained by covert means, is not a sole ground to challenge its admissibility. Neither does it make the trial unfair. In fact, even if the constitutional right is infringed in the process, it is within the purview of the trial judge whether to exercise his discretion to admit the said evidence or not. The argument by the appellant that there was no judicial preauthorization to engage in covert operations therefore falls at this point.

[60] Furthermore, while the appellant sought to argue that the appellant was a victim of entrapment, the law expressly states that entrapment is not a complete defence but if it can be shown, the court may stay the proceedings as an abuse of the court's process or may exclude the evidence. The first hurdle therefore is to prove entrapment. In this case, without even delving too far into the crux of the offence of entrapment, it is glaring that the appellant was not entrapped. There is absolutely nothing on the record which can demonstrate that the appellant was forced, coerced

or even persuaded to act in the way she did. It appears from all accounts in any event, that the appellant acted in whichever way she thought fit in the moment.

[61] In all the circumstances, the appeal is dismissed and the conviction and sentence of the learned magistrate affirmed.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar