

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CRIMINAL CASE NO. 4 OF 2023

**IN THE MATTER OF AN APPLICATION BY MICKIEL ROBIN CHALLENGING THE CONSTITUTIONALITY
OF A SEARCH WARRANT**

AND

**IN THE MATTER OF SECTIONS 15, 19, 23 & 31 OF THE VIRGIN ISLANDS CONSTITUTION ORDER,
2007**

AND

**IN THE MATTER OF THE INDICTMENT FILED ON 21st MARCH 2023 AGAINST THE APPLICANT
MICKIEL ROBIN**

BETWEEN:

MICKIEL ROBIN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

AND

THE ATTORNEY-GENERAL OF THE VIRGIN ISLANDS

2ND RESPONDENT

Appearances: Mr. Israel Bruce, Counsel for the Applicant

Mr. Kristin Johnson, Crown Counsel for the First Respondent

**Ms. Nicosie Dummet, Principal Crown Counsel and Ms. J’Nae Hopkins, Crown
Counsel for the Second Defendant**

**2023: March 23
31**

JUDGMENT

*“Man’s capacity for justice makes democracy possible, but man’s inclination to injustice makes the
democracy necessary” – Reinhold Nieburh*

[1] **Thomas W.R. Astaphan, K.C.; J (Ag.):** On 22nd March 2023, upon the Court hearing Counsel for the Office of the Director of Public Prosecutions and Counsel for the Applicant it made the following orders:

The Attorney General's Chambers be served with questions of law set out hereunder:

1. With respect to the Search Warrant issued by the Magistrate on 1st March 2022, empowering the Royal Virgin Islands Police to do the following:
 - a) Seize and secure the said cellular telephone;
 - b) Access, inspect and check the operation of the said cellular telephone;
 - c) Collect data associated with the said cellular telephone, including, but not limited to call listings, SMS/MMS messages, recordings, GPS Data, calendar, photographs, WhatsApp messages, Facebook Messenger messages;
 - d) Use or cause to be used the relevant equipment to search any data contained in and available on the said cellular telephone;
 - e) Access any information, code or technology which has the capability of transforming or unscrambling encrypted data contained or available to a cellular telephone into a readable or comprehensive format for the purposes of your investigations...
2. Whether a Magistrate has the lawful authority to issue a warrant in respect of the matters set out aforesaid.
3. Whether section 14L (2) of the Computer Misuse and Cybercrime Act, (as amended), of the Laws of the Virgin Islands, conflicts with the Rights of an Accused under sections 19 and 23 of the Virgin Islands Constitution Order 2007.

[2] The Applicant in his submissions raised the issue of Section 14L (4) (b) contravening the applicant's Section 15 constitutional Right to remain silent by virtue of its coercive nature. That is to say, by creating an offence where the applicant refuses to comply with a request of a police officer which request is made pursuant to Section 14 L (1) of this same Act.

[3] Counsels for the Respondents in their submissions responded to the applicant's Section 15 submissions. In particular, it is the submission of the Director of Public Prosecutions that the Virgin

Islands Constitution **does not** confer the Right to Remain Silent upon persons over whom it casts its protective umbrella.

[3.1] This is, to say the least, a startling proposition. Section 9 (a) of the Constitution of The Virgin Islands states:

“(9)(a) Whereas it is recognized that those fundamental rights 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;**
[emphasis added]

[3.2] Section 15 (3) of the Constitution states: - “(3) Any person who is arrested or detained shall be informed promptly, as prescribed by law, in a language which 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 added]

[3.3] What, therefore, is the origin of this Right to which subsection (3) of section 15 refers? It is a Common Law Right against self-incrimination afforded to a person who is arrested or detained by the relevant authority of the State.

[3.4] This Right to remain silent has, over time, evolved to be fundamental to the protection of persons arrested or detained, to the point where, even in the United Kingdom where there is no written Constitution conferring any Rights, it is, in practice considered to be a fundamental right enjoyed by persons arrested or detained in the context of their Common Law right (also evolved) to a fair trial. The historical genesis of these Common Law rights in the United Kingdom find their germination in the Royal Charter of Rights of June, 1215, which is known as the Magna Carta. This Charter stated that all free men have the right to Justice, *and to a fair trial by jury.*

[3.5] Not coincidentally, persons in these Virgin Islands have an expressed Constitutional Right to a Fair Trial – see section 16(1) – and, by virtue of subsection (6) thereof, enjoy the Right not to be compelled to give evidence at his/her trial for a criminal, or quasi-criminal offence for which he/she stands charged.

[3.6] That subsection (6) Right not to be compelled to give evidence at their trial, is a Right not to be compelled to incriminate oneself – it is the State that is required to prove the case they have brought against the accused, - and, implicitly, the Right to remain silent during trial.

- [3.7] So that there is no room for contention that, during his/her trial, a person has the Right to remain silent.
- [3.8] Section 15 (3) refers to where a person is arrested or detained, which is a stage before trial and, even before being charged with any offence.
- [3.9] On the Director of Public Prosecution's submission, a person arrested or detained – but, presumably, not yet charged - may therefore be forced by the Police to not be silent – whether by speaking or providing information or documentation – and therefore be forced to incriminate himself/herself.
- [3.10] Yet, the Judges' Rules have mandated, for far too long to be doubted, that a person suspected of having committed an offence must be cautioned by being told, *inter alia*, that they do not have to say anything but, if they do it would be taken down in writing/recorded, and may be used in evidence against him/her. (A Common Law practice which has been uplifted to being itself Common Law, and a breach of which may result in any answers or statements given by the accused person being excluded at trial)
- [3.11] Is it a teleological inconsistency to argue that a person has a Right *at trial* not to be compelled to give evidence – an incidence of two overlapping and complementary protections, namely, the protection of maintaining one's silence in the face of allegations by the Crown, which must be proved by the Crown, and the protection of not being forced to give evidence in a trial of an offence for which one is charged – but that, in the pre-trial “suspicion and investigatory stage” of arrest and detention that person *does* have the Right to remain silent, but that Right is not a Constitutional Right, as is the Right at trial not to be compelled to give evidence..
- [3.12] What, therefore, is the quality of the “right to remain silent” at point of arrest or detention which “Any person” enjoys that the Constitution mandates that he/she be informed of in section 15 (3)?? Why, if it is not a Constitutional Right, is it expressly stated in section 15(3) as one of the things a person arrested or detained “shall be informed promptly” of?
- [3.13] That arrested or detained person, by virtue of the same section and subsection, shall also be promptly informed *of the reason for his or her arrest or detention*. This, like the Right to remain silent were the evolutionary products of the Common Law, finding their ancestral origins in that well-spring of Rights that the 1215 Charter of Rights; the Magna Carta.

[3.14] Is it the Director of Public Prosecutions proposition that only the reason for the detention is Constitutional Right, but the Right to remain silent is not? Or that neither is such a Right?

[3.15] Mr. Johnson for the Director of Public Prosecutions submitted that section 15 does not “declare” the Right to remain silent as a Right, ergo, it is not a Constitutional Right. That in order for it to be a Right, it must expressly be stated to be such. The Court declines to accept that proposition as being a viable proposition of Constitutional Law.

[3.16] The fact that section 15(3) refers to the “right to remain silent” *confirms* that it is an existing Right, and by its command that a person arrested or detained “shall be informed promptly of [this] Right” removes any doubt that the Right to Remain Silent is a Constitutional Right conferred upon persons in the Virgin Islands, **AND** the Court **DECLARES** that the Right to remain silent, commanded to be informed in section 15(3), is a Constitutional Right conferred upon any person in the Virgin Islands who is arrested or detained.

Warrant No. 1

[4] On 28th February, 2022, a Magistrate for these Virgin Islands issued a Warrant upon the basis of evidence on Oath being given by one Shenelca Francis, Detective Constable number 278, a Member of the Virgin Islands Police Force.

This Warrant, (hereinafter referred to as “**Warrant 1**”), stated as follows

“Evidence on oath has been given this **28th day of February, 2022** by **Shenelca Francis DC278** that there is reasonable cause to believe that certain property, to wit

Firearms and Ammunition

Alleged to have been **unlawfully kept** on certain premises, in the occupation of **Mickiel Robin** situated at **Belmont Estate, Tortola**.

You are therefore hereby commanded, with proper assistance, to enter the said premises, by force and breaking doors, if necessary, and to search for the same, and if such property as aforesaid, or any part thereof, be found therein, to bring the same, and the person or persons in whose possession the said property are, before this Court to be dealt with as the law directs.

Given under my hand this 28th day of February, 2022.

(signed & sealed)

Magistrate”

[4.1] Warrant 1 was executed at 6:20 a.m. on the morning of the 1st March, 2022.

[4.2] The (insufficient) backing to Warrant 1 states:

“This is to certify that I Shenelca Francis has (sic) executed this warrant at the residence of Mickiel Robin located at Belmont Estate on Tuesday 1st March, 2022 between 6:20 a.m. and 7:35 a.m. nothing (sic) pertaining to the warrant was found. However other items were taken into police custody.

(signed) DC278.”

[4.3] The Warrant does NOT list in its backing the “other items taken into police custody”, as is required to be done, so there is nothing to show on the face of the Warrant which authorizes the search and seizure, what was in fact seized under its authority.

[4.4] This is, in the experience of this Court in this jurisdiction, an invariable malpractice on the part of the Police. It must also be mentioned that the Police do not provide a copy of a Search Warrant which is to be executed upon the householder, or a person present in the premises. They “read” the warrant to that person and proceed to search. That happened in this case also. The Police must, when executing a Warrant, provide a copy of that Warrant to the householder, or other person present, when they are about to execute the Warrant. The Warrant is a Court authorized invasion of their property and that authorization must be provided by way of a copy to the householder, or other person who is present. It is no different to a Court Order being required to be served on a party affected. In fact, given that the Warrant is Court authorization to trench upon a Constitutional Right, it is even more important that the person affected be served with a copy of that Warrant at the time of the commencement of the search thereunder. Why would the Police not want to provide a copy of the very authority upon which they base their lawful invasion of a person’s property? This Court can think of no good, and proper, answer to that rhetorical question.

[4.5] Learned Counsel for the Director of Public Prosecutions, Mr. Johnson, offered up to the Court nearing the end of the Hearing, a copy of a Police administrative document headed “Search/Arrest/Exhibits Book”. He did so to show what is alleged to have been taken under the authority of the Warrant.

[4.6] This Book is not a substitute for the backing of the Warrant, which is a Court order. The backing requirement serves two primary purposes: firstly, it shows to the issuing Court, indorsed upon the Warrant itself, what was taken under its authority, - bearing in mind that the Warrant commands that “... if such property as aforesaid, or any part thereof, be found therein, **to bring the same, and the person or persons in whose possession the said property are, before this Court to be dealt with as the law directs.**” (*emphasis added*)- and secondly, it provides a contemporaneous record

for the benefit of the person/s whose premises was searched, and whose property was taken under the Warrant, so that there can be no dispute at a later stage as to what was taken. This latter reason is why the Warrant should be backed at the scene, and the householder, or someone other than the police who is present, should sign the list of items taken to confirm that those items were in fact taken under power of the warrant. It also protects the Police from subsequent allegations of taking property and not accounting for them.

- [4.7] In any event, backing the Warrant with a detailed list of items taken is required to be done at the scene and time of the search.
- [4.8] Bearing in mind that the search for firearms and ammunition commenced at 6:20 a.m., the next significant act occurred two minutes later, *at 6:22 a.m.* – that is, two minutes into a search lasting one hour and fifteen minutes - when Mr. Robin was arrested *on “suspicion of murder/suspicion of possession of a controlled drug.”* See: Royal Virgin Islands Police Force Custody Record exhibited by the Applicant, Mickiel Robin, as the last – un-numbered – exhibit to his Submissions.

Warrant No. 2

- [5] The next act in this saga is the issuance of another Search Warrant on the 1st day of March, 2022, by a Magistrate. Though the Warrant does not state a time of its issue, its contents show that it was issued after Warrant 1. This Warrant, (Warrant 2) which is revealing, reads as follows:

“Evidence on oath has been given this 1st day of March, 2022 By Calvin George of Road Town Police Station that there is reasonable cause to believe that stored data, which is necessary for the purposes of an investigation, namely, but not limited to, files, documents, accounts, and other records used in cellular telephone communication whether those records are in written form or any other form of electronic data retrieval mechanism, inter-accounts transfers, or correspondence with other parties are on certain property, to wit, Cellular phones and computers found at the residence of Mr. **Mickiel Robin**, namely, one rose gold iPhone and one gray iPhone and is presently in police custody at Road Town Police Station, Road Town Tortola, BVI;

And having found probable cause for the issuance of this Search Warrant, you are therefore hereby commanded, with proper assistance to:

- a. Seize and secure the said cellular phone;
- b. Access, inspect and check the operation of the said cellular phone;

- c. Collect data associated with the cellular telephone, including, but not limited to call listings, SMS/MMS messages, recordings, GPS Data, calendar, photographs, WhatsApp messages, Facebook messages;
- d. Use or cause to be use the relevant equipment to search any data contained in and available on the said cellular phone:
- e. Access any information, code or technology which has the capability of transforming or unscrambling encrypted data contained or available to a cellular telephone into a readable or comprehensive format for the purposes of your investigations;

And if such property as aforesaid or any part thereof be found to bring the same and the person to whom it belong before this court to be dealt with as the law directs.

Given under my hand this 1st day of March 2022

(signed & sealed)

Magistrate “

(Note that all errors are in the original)

- [5.1] Warrant 2 is backed thusly: “This is to certify that I Calvin George have (sic) executed this Search Warrant on Mickiel Robin on the 1st March, 2022 at the West End Police Station at 14:45 hrs. (2:45 p.m.) The Warrant was read to him and he refused to surrender his password for his cellular phones.”
- [5.2] This refusal is the basis of the two counts charged on the indictment referred to below.
- [5.3] The Court notes that the language in Warrant 2 save for the use of the words “computer” in sub paragraphs (a) (b) (c) and (e) of the section is identical to the wording of that Section 14L (2) of the Computer Misuse and Cybercrime (Amendment) Act, 2019. The Warrant substitutes the words cellular phone, call listings”, “SMS/MMS messages”, “recordings”, “GPS data”, “calendar”. Thus it is clear, that the Warrant purports to have been issued for and in pursuit of the investigation of a criminal offence under the Computer Misuse and Cybercrime Act 2014 as amended in 2019.
- [5.4] The Applicant was arrested and in custody of the police not for any offence under this Act but the alleged offences of murder under the Criminal Code and possession of a controlled drug under the Drugs (Prevention of Misuse) Act, Chapter 178 as amended.

[5.5] Section 7 (1) of the Drugs (Prevention of Misuse) Act reads:

“Subject to any regulations made under section 9, it shall not be lawful for a person to have a controlled drug in his or her possession and subject to –

- a) subsection (4);
- b) any regulations made under section 9; and
- c) section 32,

it is an offence for a person to have a controlled drug in his or her possession.

Warrant No. 3

[6] There is a third Warrant, issued on 1st March, 2022, (Warrant 3) which states as follows:

“Evidence on oath has been given this 1st day of March, 2022 By Calvin George of Road Town Police Station that there is reasonable cause to believe that stored data, which is necessary for the purposes of an investigation, namely but not limited to, files, documents, accounts, and other records used in cellular telephone communications whether those records are in written form or any other form of electronic data retrieval mechanism, inter-accounts transfers, or correspondence with other parties are on certain property, to wit, the Cellular telephones and computers found on the persons of **Ms. Yamika George**, namely, one grey iPhone and is presently in police custody at Road Town Police Station Tortola BVI;

And having found probable cause for the issuance of this Search Warrant, you are therefore hereby commanded, with proper assistance to:

- a. Seize and secure the said cellular phone;
- b. Access, inspect and check the operation of the said cellular telephone;
- c. Collect data associated with the said cellular telephone, including, but not limited to call listings, SMS/MMS messages, recordings, GPS Data, calendar, photographs, WhatsApp messages, Facebook Messenger messages;
- d. Use or cause to use the relevant equipment to search any data contained in and available on said cellular telephone;
- e. Access any information, code or technology which has the capability of transforming or unscrambling encrypted data contained or available to a cellular telephone into a readable or comprehensive format for the purposes of your investigations;

And if such property as aforesaid or any part thereof be found to bring the same and the person to whom it belong before this court to be dealt with as the law directs.

Given under my hand this 1st day of March 2022

(signed & sealed)

Magistrate “

(Note that all errors are in the original).

[6.1] Warrant 3 is backed:

“Code is 271615

This is to certify that I Kelleen London executed this search warrant on Yamilka George re her grey iPhone. The warrant was read and explained to her. She was given the opportunity to speak to her lawyer and surrendered her code as 271615. Occurrence took place on 1st March 2022 at 11:30 a.m. at RTPS in presence of WDC Richards. (signed)” (errors in original).

[6.2] The Court notes that the language in the Warrant 3 save for the use of the words “computer” in sub paragraphs (a) (b) (c) and (e) of the section is identical to the wording of that Section 14L (2) of the Computer Misuse and Cybercrime (Amendment) Act, 2019. The warrant substitutes the words cellular phone, call listings”, “SMS/MMS messages”, “recordings”, “GPS data”, “calendar”. Thus it is clear, that the warrant purports to have been issued for and in pursuit of the investigation of a criminal offence under the Computer Misuse and Cybercrime Act 2014 as amended in 2019.

[6.3] Apparently, for it is unclear, Ms. George was also arrested and in custody of the police not for any offence under this Act but the alleged offences of murder under the criminal code and possession of a controlled under the Drugs (Prevention of Misuse) Act, Chapter 178 (as amended).

Consequently

[7] Warrant 2, and its execution, is the foundation upon which the Applicant, Mr. Mickiel Robin was charged upon indictment by the Learned Director of Public Prosecutions on two Counts of “**FAILING TO COMPLY WITH A REQUEST OF A POLICE OFFICER: Contrary to section 14L (4) (b) of the Computer Misuse and Cybercrime Act (as amended)** – for his declining to provide the passwords requested pursuant to this warrant.

[7.1] What was the result of the execution of the three Warrants?

(i) Under Warrant 3 Ms. George gave up the password for her grey iPhone.

(ii) Under Warrant 2 Mr. Robin, the Applicant, declined to give up the password for (allegedly) “one grey iPhone and one rose gold iPhone”. [For this he was charged with two offences under section 14L (4) (b) of the Computer Misuse and Cybercrime (Amendment) Act, 2019.]

(iii) Under Warrant 1 the items listed hereafter were taken.

The Computer and Cybercrime (Amendment) Act 2019

[8] Section 14L reads:

“(1) Where a police officer has reason to believe that stored data would be relevant for the purposes of an investigation or the prosecution of an offence, the police officer may apply to a court for the issue of a warrant to enter any premises to access, search and seize that data.

(2) In the execution of a warrant under subsection (1), the powers of a police officer shall include the power to

- a) Access, inspect and check the operation of a computer;
- b) Use or cause to be used a computer to search any data contained in or available on the computer;
- c) Access any information, code or technology which has the capability of transforming or unscrambling encrypted data contained or available to a computer into readable and comprehensible format or text for the purpose of investigating any offence under this Act or any other offence which is disclosed in the course of the lawful exercise of the powers under this section;
- d) Require a person in possession of the decryption information to grant the police officer access to such decryption information necessary to decrypt data required for the purpose of investigating the offence;
- e) Seize or secure a computer.

(3) In the execution of a warrant under subsection (1), a police officer may be accompanied by professionals or experts as necessary to carry out the technical aspects of the search and seizure of the data.

(4) A person commits an offence if he or she knowingly or without lawful excuse

- (a) obstructs a police officer in the exercise of the police officer’s powers under this section;
- or

(b) Fails to comply with a request made by a police officer under this section.”

(5) A person who commits an offence under subsection (4) is liable on conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year, or both.

[8.1] A perusal of the Computer Misuse and Cybercrime Act (as amended) reveals that it creates the following offences:

- (i) “unauthorised access to computer material” – Section 4(1)
- (ii) “access with intent to commit or facilitate the commission of an offence” – Section 5
- (iii) “unauthorised modification of computer material” – Section 6
- (iv) “unauthorised use or interception of computer service” – Section 7
- (v) “unauthorised obstruction of use of computer” – Section 8
- (vi) “unauthorised disclosure of password, access code etc.” – Section 9
- (vii) “acting unlawfully in relation to access given to a computer, programme or data” – Section 10
- (viii) “unlawfully making available device or data for commission of offence – Section 11
- (ix) “offences including protected computer” – Section 12
- (x) “publication of computer programme or data without lawful authority” – Section 13
- (xi) “using a computer for child pornography” – Section 14
- (xii) “inciting, aiding etc. the commission of an offence under this Act” – Section 15
- (xiii) “offence of a body corporate” – Section 16
- (xiv) “electronic defamation” – Section 14B
- (xv) “electronic forgery” – Section 14C
- (xvi) “electronic fraud” – Section 14 D
- (xvii) “misuse of encryption” – Section 14 E
- (xviii) “electronic stalking” – Section 14 F
- (xix) “spoofing” – Section 14 G
- (xx) “violation of privacy” – Section 14 H
- (xxi) “obstructing a police officer in the exercise of the police officer’s powers under this section” – Section 14 L (4) (a)
- (xxii) “fails to comply with a request made by a police officer under this section” – Section 14L (4)(b) – (under which the Applicant is charged). See paragraph 8 above for Section 14L in full.

[8.2] The Applicant was not arrested for any of the offences under the Computer Misuse and Cybercrime Act. He was arrested on suspicion of murder, and on suspicion of possession of controlled drugs as stated before at paragraph [5.4].

[8.3] Neither murder or unlawful possession of a controlled drug is an offence under the Computer Misuse and Cybercrime Act, 2014, as amended.

[8.4] Warrants 2 and 3 were clearly issued pursuant to Section 14L of that Act although **as is required**, the warrants do not state on their faces what offence predicated their issue – as for example in Warrant 1 which states that it is for the search and seizure of firearms and ammunition “unlawfully kept” at the premises in occupation of the Applicant. The Magistrate’s Code of Procedure Rules, Form 8, requires by necessary logical implication that this information be on the face of the Warrant. That Form reads (as far as is material) as follows:

“Evidence on oath has been given this ... day of 20.., by ..., that there is reasonable cause to believe that certain property, to wit**alleged to have been**..... is on certain premises, to wit,” (underlining and bold added)

[8.5] This information is required because the foundation of the issuance of a Warrant is “that there is reasonable cause to believe that certain property ...” is on certain premises **and** that property is required in relation to the commission of an offence. Otherwise, there would be, and cannot legally be any basis for the issuing of the Warrant.

[8.6] Thus it is that the Warrant (like Warrant 1 did) must indicate the offence which predicates the issuance of the Warrant.

Analysis

[9] Under section 14L (2) (a) a police officer in the execution of a Warrant issued under subsection (1) of that section has the power to “access, inspect and check the operation of a computer;”

[9.1] Under section 2 (1) of the parent Act (Computer Misuse and Cybercrime Act, 2014), the definition of the word “computer” is broad enough to include a cellular phone, and, section 2 (a) of the Amendment Act defines “mobile phone tracking” without providing a definition of “mobile phone”, which suggests that the broad definition of “computer” referred to above does include a cellular phone. In any event, no objection

was taken by the applicant with respect to whether or not a cellular phone is or is not a computer, so for the purposes of this Judgment, a cellular phone is included in that definition.

[9.2] Under Warrant 1, the following items “were taken” (to use the words of DC Shenelca Francis on the backing of the Warrant) – source: the Search/Arrest/Exhibits Book:

- i. Two clear ziplock bags with green vegetable matter “which appeared to be cannabis”;
- ii. One grey Iphone;
- iii. One green & Khaki Virgin Islands bag with an undisclosed amount of cash;
- iv. Grey Iphone i3;
- v. Silver aluminum container containing clear plastic with green vegetable matter suspected to be cannabis;
- vi. White Ipad in purple case;
- vii. Assorted snack bags containing an undisclosed amount of cash;
- viii. Sebastian Hotel key #38;
- ix. IPhone i3 pro max in black phone case;
- x. Two keys vehicle;
- xi. Bunch of keys (2), pepper spray (black & white case);
- xii. Black wallet - \$241.00;
- xiii. Various Cards;
- xiv. 3 grinders;
- xv. Two silver protecto keys;
- xvi. One black jacket;
- xvii. Clear plastic with assorted storage pouch;
- xviii. One black helmet with graffiti;
- xix. One black scooter key;
- xx. One Sat phone box, white, and Inmersat sim card housing;
- xxi. One black hoodie with cartoon design;
- xxii. Multicoloured sneakers; and,
- xxiii. One Black key (gate) Lift Master;

- [9.2] The Court reminds itself that DC Francis stated on the backing of the Warrant that: “nothing pertaining to the warrant was found”. Yet, all of the foregoing items, not pertaining to the Warrant “were taken into police custody.” (ibid)

Was the taking into custody of items I to xxiii above lawful?

- [10] Warrant 1 authorized the search and seizure of “Firearms and Ammunition” from the home of the Applicant.

- [10.1] After a close examination of each and all of those items the Court finds it impossible to discern any of them to be either a “firearm” or “ammunition”, or anything related thereto.

- [10.2] Apart from the items at i, which the Police could legitimately seize under Warrant 1 because of their suspicion that they could be the prohibited drug, cannabis, none of the other items seized was remotely related to firearms or ammunition, and none were illegal items per se. The Police were not allowed to ‘throw fly to catch bait’. The Warrant did not authorize the seizure of those items, and the Police went beyond the express and implied terms of the Warrant and seized these items belonging to the Applicant. There was no “incidental basis” to seize those items.

- [10.3] In the case of **The Queen v St. Elmore Garraway, Criminal Case No. 1 of 2021** Justice Floyd at paragraph 20 of his Judgment says 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.

- [10.4] This Court adopts the foregoing as a true statement of the law.

- [10.5] In this case, where the Warrant specifically authorized the search for firearms and ammunition and within two minutes of its commencement the applicant was arrested on suspicion of murder and

possession of a controlled drug, it strongly suggests to the Court, that the dominant purpose was to search not for firearms and ammunition as authorized, but for evidence in relation to the suspected murder.

[10.6] That is not incidental to the authorized search, and it may well be that the Police, in applying for the warrant to search for firearms and ammunition, which the warrant says are “alleged to have been **unlawfully kept** on certain premises, in the occupation of **Mickiel Robin** situated at **Belmont Estate, Tortola**.”, misrepresented to the Magistrate who issued the warrant the purpose for which the warrant was sought.

[10.7] Except for one clear ziplock bag with vegetable matter which was seized at 6:22 a.m., the time of the arrest of Mr. Robin, all of the items seized by the Police were seized after Mr. Robin had been arrested on suspicion of murder, and on suspicion of being in possession of controlled drugs. To put it into perspective, the Warrant authorized the search for, and seizure of firearms and ammunition; “unlawfully kept” in the applicant’s house; no firearms or ammunition were found. While it is true that suspected cannabis was seized for which the Applicant was then immediately arrested, (as well as on suspicion of murder, neither of which was related to the authorization to search and seize), the seizure of the suspected cannabis in both instances were lawful seizures.

[10.8] All the other items seized at ii to xxiii were without the ambit of the stated purpose of the warrant and were not relevant or incidental to the investigation of unlawful possession of firearms and ammunition.

[10.9] **So in the premises, this Court finds and DECLARES THAT the seizure of the said items from ii to xxiii was unlawful, and IT IS ORDERED THAT the said items are to be returned forthwith to the applicant, and to Ms. George, respectively.**

Re: Warrants 2 and 3 and the Constitutionality of Section 14L (4) (b)

[11] It is pellucid to this Court that warrants 2 and 3 were applied for and issued pursuant to the Computer Misuse and Cybercrime Act 2014 (as amended), for the language in the Warrants, mutatis mutandis, is the same language as set out in the Section 14 (L) of the Act (as amended).

- [11.1] It must therefore be that the application to the Magistrate for these Warrants were predicated on the said Act. If they were not so predicated, the Magistrate erred in law in issuing them in the form in which she did. If they were so predicated, the Warrants themselves fail to state what offence under the Computer Misuse and Cybercrimes Act, 2014 (as amended) was being investigated. The applicant had been arrested on suspicion of murder, and on suspicion of possession of a controlled drug. Not for any offence under that Act.
- [11.2] The Applicant was under arrest and in custody of the police along with the subject phones at the time of the application and issuance of said Warrants. He was in custody “on suspicion of murder and controlled drugs”. There were no allegations or suspicions that either himself or Ms. George had committed any offence, or were suspected of having committed any offence under the Computer Misuse and Cybercrime Act 2014 (as amended).
- [11.3] Assuming therefore, that the underlying application for the Warrants comported with the requirement of 14 (L), (as this Court finds them to have been), then clearly the police would have misled the Magistrate who heard the application. This would remove the underlying “legitimacy” of the issuing of the Warrants.
- [11.4] Under a proper reading of this Act, as amended, it is clear that Section 14(L) confers powers in relation to investigations of offences **created by that Act**, and that section cannot be transported out of that Act into any other statute. In other words, this section cannot be used as a basis for the issuing of Warrants in respect of offences not created by the Act, for the Act does NOT expressly, or by necessary implication permit that to be done.
- [11.5] Perhaps this is why the Warrant was crafted as it was; to give the impression that it was an offence under that Act that was being investigated, and not offences under the Criminal Code and the Firearms Act. This, if it is indeed the case, is a manifest misrepresentation made to the Magistrate, who ought to as is required by law have interrogated the applicant police officer in order to be satisfied that the stated “probable cause” set out in the application for the Warrants existed before issuing the warrant.
- [11.6] On that basis alone, this Court is minded to strike out both Warrants as being unlawfully obtained. However, it does not end there.

[11.7] The said Warrants purported to authorize the seizure of cellular phones already unlawfully taken under Warrant 1. There can be no retroactive validation of these unlawful seizures.

[11.8] The offence with which the applicant is charged is that he failed to comply with a request of a police officer, in that, when the police officer requested the passwords for two cellular phones he declined to do so. An offence contrary to section 14 L (4) (b) of the Act.

In otherwords, his refusal to admit the police into the realms of his private cellular phone data by the provision of passwords constitutes an offence under the said charging section.

[11.9] This therefore implicates the applicant's constitutional Right to remain silent as recognized by Section 15 (3) of the Constitution, and his Section 23 protection of freedom of expression guaranteed to the applicant by the Constitution. At this point, it is noteworthy to quote directly from the submissions of the learned Attorney General of the Virgin Islands at paragraphs 36, 37 and 38 on page 11.

"36. This section is not ambiguous. Accordingly, a literal interpretation of **section 14L (3)**, we suggest, provides that when the computer is seized, the Police Officer is lawfully empowered to access and to secure the information from the device by the use of professionals and experts. ***The section does not provide that the accused person is obliged to provide the Police with assistance to access the device. Any attempt to coerce an arrested/accused person to provide their access code is unlawful*** [emphasis added].

37. In our respectful view, that **section 14L (3)** is not unconstitutional as police officers are not lawfully authorized to compel **the Applicant** to provide his access code as so to do would unlawfully derogate from the Applicant's Constitutional Rights pursuant to **s15(3)** of the Constitution.

"38. **Section 14L (4)(b) of the Computer Misuse Act is not lawful authority and cannot be interpreted to mean that an offence has been committed by the Applicant where he has failed to provide his access code/pin. Section 14L only provides for the commission of an offence if the Applicant/person of interest fails to hand over the actual device to the RVIPF when the demand so to do has been made by the RVIPF to the Applicant/person of interest.**"

[11.10] In **Ronald A.K.A. "Ron" Green v Petter Saint Jean et al Dominica Civil Claim No. 6 of 2010**, Justice Thom in her ruling at paragraphs 32 and 33 on page 15, and paragraph 36 on page 16, said the following:

[32] It is settled law that a person has a Right to silence. This Right is protected as a fundamental Right in the Constitution of Dominica. **A person cannot be compelled to produce evidence which may have the potential to incriminate him.**

[33] In Halsbury Laws Vol 17 4th ed. At paragraph 240 the Learned Author stated:

“Incrimination of witnesses; in any legal proceedings other than criminal proceedings, a person may refuse to answer any questions or produce any document or thing if to do so would tend to expose him in proceedings for an offence or for the recovery of a penalty. The privilege applies only as regards criminal offences under the law of any part of the United Kingdom and penalties provided by such laws and includes a similar Right to refuse to answer question or produce any document or thing if to do so would expose the husband or wife of that person to proceeding for any such criminal offence or for the recovery of any such penalty.

[36] In the **Rank Film Distributors** case the House of Lords held that the defendants were entitled to rely on the privilege against self-incrimination in relation to discovery or by answering interrogatories since if they complied with orders of that nature there was in the circumstances a real and appreciable risk of criminal proceedings for conspiracy to defraud being taken against them. The House of Lords also considered Section 21 of the Copyright Act of 1956. The offences created under Section 21 were ancillary remedies for breach of Copyright. Lord Wilberforce noted that the offences under Section 21 covered almost precisely the same ground as the basis for civil liability under the Act and stated at p.674:

“I would be reluctant to hold that in civil proceedings for infringement based on specified acts the defendants could claim privilege against discovery on the ground that those same act establish a possible liability for a petty offence.”

And Lord Fraser stated at p.678:

“The risk of prosecution under Section 21 of the Copyright Act 1956 is theoretically greater because acts which are infringements of copyright, including the making of unauthorised copied (Section 13(5) and knowingly importing, or selling infringing copies (Section 16(2) and (3)(a) are very likely also to be offences under Section 21(1). But the offences created by Section 21 are only ancillary remedies for breach of copyright was appears from the cross-heading to Part III of the Act, and they are treated as comparatively trivial with a maximum penalty (as amended) of £50. It would in my opinion, be unreasonable to allow the possibility of incrimination of such offences to obstruct disclosure or information which would be of much more value to the owners of the infringed copyright than any protection they obtain from Section 21. “

This Court adopts the foregoing, mutatis mutandis.

[11.11] With respect to the said Warrants - “Warrants 2 and 3” - based on the foregoing, the Court FINDS that they were improperly issued, as there was no investigation being undertaken in relation to any offence under the Computer Misuse and Cybercrimes Act, 2014 (as amended), and therefore **DECLARES** them to be unlawful, null and void and they are hereby quashed.

[11.12] With respect to Section 14L (4)(b) the Court accepts the submissions of the Attorney General “...that it is not lawful authority and cannot be interpreted to mean that an offence has been committed by the applicant where he has failed to provide his access code/pin...”

[11.13] If the court finds, in agreement with the Attorney General, that that section cannot provide lawful authority for the commission of an offence, it must be that that section which trenches upon the applicant’s Right to remain silent, which is confirmed by Section 15 of the Constitution, is infringed by him being charged with an offence for failing to comply with the request of the police officer under the section.

[11.14] For the avoidance of doubt, if as is stated in Green, where the Honourable Justice Thom, said “it is settled law that a person has a Right to silence, this Right is protected as a Fundamental Right in the Constitution of [The Virgin Islands]. A person cannot be compelled to produced evidence “which may have the potential to incriminate him”, it follows that any section which criminalizes the exercise of that Right – in this case the refusal to provide the pin – must contravene the applicant’s Right to remain silent guaranteed by the Constitution, and that Section must therefore be unconstitutional, null, void and of no effect.

[11.15] **The Court therefore FINDS and DECLARES that Section 14L (4)(b) of the Computer Misuse and Cybercrimes Act, 2014 (as amended) is unconstitutional, null, void and of no effect, and it is hereby struck down.**

[11.16] **In the result, the Indictment against the applicant must, as a matter of law, be quashed, and he must be released from this Indictment and its charges forthwith, as the charges upon which he was indicted were based upon an unconstitutional, null and void section of the Act.**

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),

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.

[12.4] **In the premises, IT IS HEREBY DECLARED THAT Warrants 2 and 3 were issued by the Magistrate without lawful jurisdiction and in contravention of Section 31 of the Constitution, and ARE FURTHER DECLARED NULL & VOID AND OF NO EFFECT.**

Orders

[13] **IT IS HEREBY DECLARED** that items ii – xiii seized under Warrant 1 were unlawfully seized and it is **HEREBY ORDERED** they be returned to the Applicant, and to Ms. George forthwith.

[13.1] **IT IS HEREBY DECLARED** that Warrants 2 and 3 were improperly issued by the Magistrate who ought not to have issued them because they were issued under and pursuant to the Computer Misuse and Cybercrimes Act, 2014, (as amended), when the real purpose for their issue was to investigate an alleged murder offence which is not an offence under the said Act, and which Act does apply to offences not created by it, **AND THEY ARE HEREBY QUASHED.**

[13.2] **IT IS HEREBY FURTHER DECLARED** that said Warrants 2 and 3 were issued in contravention of Section 31 of The Constitution, in that, it is only the High Court of Justice that has the Constitutional jurisdiction to issue warrants under the Computer Misuse and Cybercrime Act 2014 (as amended), **AND THEY ARE DECLARED NULL, VOID AND OF NO EFFECT.**

[13.3] **IT IS HEREBY DECLARED THAT** Section 14L (4)(b) of the Computer Misuse and Cybercrime Act, 2014 (as amended) contravenes the Applicant's Right against self-incrimination encompassed by his Right to remain silent guaranteed and secured by Section 15 of the Constitution, **AND IT IS THEREFORE UNCONSTITUTIONAL, NULL, VOID AND OF NO EFFECT.**

[13.4] Consequent upon 13.4 above **IT IS HEREBY DECLARED THAT** the indictment Criminal Case No. 4 of 2023 filed on 21st March 2023 and the charges therein are **UNCONSTITUTIONAL, NULL, VOID AND OF NO EFFECT**, and they are hereby quashed, and the Applicant is to be released from custody with immediate effect.

[13.5] **IT IS HEREBY DECLARED AND AFFIRMED THAT** the Right to Silence mandated to be promptly informed to a person arrested or detained by section 15(3) of the Constitution of the Virgin Islands IS a Constitutional Right afforded to the people of these Virgin Islands.

[14] The Court wishes to thank all Counsels for their extremely comprehensive and helpful written and oral submissions, and intends no disrespect by not repeating their contents in this judgment. They were fully considered in arriving at this judgment.

[15] This is the Judgment of the Court.

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly" –
Dr. Martin Luther King, Jr.

Thomas W. R. Astaphan K.C.
High Court Judge (Ag.)

By the Court

Registrar