

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

IN THE HIGH COURT OF JUSTICE

CRIMINAL CASE No. 21 of 2020

BETWEEN:

REX

and

**VICARDO FARRELL
KAREEM DURANT
DAKHEME CHELTENHAM**

**Appearances: Mrs. Kellee-Gai Smith, Principal Crown Counsel with her Mr. Kristian Johnson, Crown Counsel for the Crown
Mr. Michael Maduro instructed by Mrs. Isis Potter, Counsel for Vicardo Farrell
Mrs. Valarie Gordon, Counsel for Kareem Durant
Mr. Jason Hamilton, Counsel for Dakheme Cheltenham**

**2022: November 14, 15
25**

RULING ON ADMISSIBILITY OF SEARCH WARRANTS

Introduction

- [1] **ASTAPHAN J:** During the course of addressing Applications made by the Crown with respect to Notices of Additional Evidence and permission to have certain witnesses give evidence via video link, and, in particular, the intended additional evidence of Mr. Rob Lyons, of DIGICEL, Jamaica, with respect to a Search Warrant issued by the Magistrate in the Virgin Islands, commanding the production of certain property, and pursuant to which Mr. Lyons produced a printout of certain cellular

towers information ("CDR'S"), and further, having noted that there were no Search Warrants on the Court's file, either in respect of the DIGICEL information or that of Cable & Wireless and CCT Boat Phone, from each of which the Crown intended to also tender evidence relating to cellular towers information, and the Prosecutor, Mrs. Smith, confirming that none were tendered at the Committal Hearing, nor served upon the Accused persons, the Court requested the Prosecutor to provide it, and Defence Counsel with copies of all such Search Warrants. This was duly done.

- (a) Upon inquiry being made by the Court, Mrs. Smith, Crown Prosecutor, informed the Court that the said Warrants were applied for, and issued under and by virtue of section 38¹ (37 in the Court's 2013 revised copy of the Magistrates Code of Procedure Act, which is identical to section 38 referred to by Counsel, hereafter, "**the Code**", and "**section 37/38**"), and section 18 (1)² of the Telecommunications Act, hereafter "**the Act**".

These Warrants are:

- (i) Issued on 9 June 2016, directed to the premises of "CCT Boat Phone, Road Town Tortola BVI", with respect to a wide array of information for telephone number "1 284-443-0652 for the period between the 1st of April, 2016 and the 9th of June, 2016" which includes text messages and calls.
- (ii) Issued on 10 June 2016 directed to the premises of "Cable & Wireless, Road Town, Tortola BVI", for a wide array of information in relation to the dealing with the accounts attached to telephone number "1 284-547-1460 for the period between the 1st of May, 2016 and the 10th of June, 2016."

¹ Magistrate's Code of Procedure Act

² Telecommunications Act, 2006

- (iii) Issued on 17 June 2016 directed to a search of the premises of "Digicel BVI Jayla Blg, Road Town, Tortola BVI", seeking a wide swath of information for telephone number "1 284-341-7150 for the period between the 1st of May 2016 and the 16th of June, 2016."
- (iv) Issued on 15 day of June 2017 directed to a search of the premises of "Digicel BVI Jayla Blg, Road Town, Tortola BVI", in respect of a wide array of information related to telephone numbers "1-284-342-0819, 342-7294, 346-5334, 340-3699 and 342-2842 for the period between the 15th March, 2017 and the 6th of June, 2017."
- (v) Issued on 30 May 2017 directing a search of the premises of "Digicel BVI Jayla Blg. Road Town, Tortola BVI", in respect of a wide array of information related to telephone numbers "...1 284-346-3873, 342-5458 and 342-5458 (sic) for the period between the 25th May, 2017 and the 30th of May, 2017."
- (vi) Issued on 30 May 2017 directed to the search of the premises of "CCT Boat Phone, Road Town, Tortola, BVI", with respect to a wide array of information in respect of telephone numbers "... 1 284-443 5533 and 443 3159 for the period between the 1st of June, 2016 and the 30th of June, 2016."
- (vii) Another of even vintage is directed to the search of the premises of "Digicel BVI Jayla Blg. Road Town, Tortola BVI" with respect to telephone numbers "1 284-346 7889 and 341 0270 for the period between the 1st June, 2016 and the 30th of June, 2016."

Yet, two further warrants were issued that were directed to the search of the premises of "Cable & Wireless, Road Town, Tortola BVI", with respect to telephone numbers "(284) 547 2685, 547 1460, 547 5440 and 542 6231 for the period between the 1st June, 2016 and the 30th of

June, 2016" and "CCT Boat Phone, Road Town, Tortola, BVI", with respect to a wide array of information in respect of telephone numbers " 1 284 443 6053, 441-2596 and 443-0652 for the period between the 1st of May, 2016 and the 10th of June, 2016."

(b) Submissions were made by Mr. Jason Hamilton, Counsel for Accused Cheltenham, with respect to the Warrants, to the effect that they were not lawfully executed, in that the Warrant issued on the 30th day of May, 2017, addressed to DIGICEL, BVI JAYLA Bldg, Road Town was said to have been received by Mr. Rob Lyons via email, when there is no statutory authority for the execution of a Search Warrant via email. Therefore, its execution was bad in Law and ought to be excluded. Mr. Hamilton further submitted that none of the Warrants were backed, evidencing what, if any, property was seized under the Warrants, and therefore there is no contemporaneous evidence of what property were actually taken under the power of any of the Warrants. He stated that the Defence had received compilations of what appeared to be phone records, but it may well be that they had not received that which was actually the fruit of the execution of the Warrants. The Defence were therefore at a disadvantage because they are unable to compare the compilations with what the backing to the Warrants would have disclosed had they been backed, as they are required to be. Mr. Hamilton further questioned whether the Magistrate had the power to issue Warrants under the Code or under the Act. The foregoing is but a synopsis of Mr. Hamilton's submissions and no disrespect thereto is meant by the abbreviated summary which is provided by the Court.

(c) Mrs. Valerie Gordon, Counsel for Accused Kareem Durant, adopted Mr. Hamilton's submissions and added that the only statement the Defence received in respect of the genesis and execution of the Warrants (all of them), is that of Police Constable Calvin George which states that he "...prepared and obtained warrants for CDR's for ..." certain phone numbers (page 98 of the

Depositions). Mrs. Gordon submitted that Officer George does not, in that statement, speak to the execution of any of the Warrants which he obtained, nor to their backing/endorsement.

(d) Mr. Michael Maduro, Counsel for Accused Vicardo Farrell, adopted the submissions of both Mr. Hamilton and Mrs. Gordon.

(e) Mrs. Kellee-Gai Smith, Principal Crown Counsel and Lead Prosecutor submitted, in essence, that:

(i) The Magistrate is empowered, *generally*, by section 37/38 of the Code to issue Warrants, and that section is sufficient to give the Magistrate the power to have issued the Warrants in question, by itself, or together with section 18(1) of the Act.

(ii) Mrs. Smith further submitted that section 18(1) of the Act also gave the Magistrate power to issue the Warrants, *by itself*, and/or in conjunction with section 37/38 of the Code.

(iii) In any event, submitted Mrs. Smith, even if the said Warrants were issued, quoting and praying in aid section 125³, "improperly or in contravention of a law; or in consequence of an impropriety..." because "the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the manner in which the evidence was obtained", section 125, as a general proposition, permits the Court to admit such evidence.

(iv) Further, submitted Mrs. Smith, that the Court must, in assessing whether or not to admit that evidence, take into account the matters set out in subsection (3) of section 125 which states:

"(3) For the purposes of subsection (1), the court shall take into account, among other things, the following matters-

³ Evidence Act of the Virgin Islands

- (a) the probative value of the evidence;
- (b) the importance of the evidence in the proceeding;
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
- (d) the gravity of the impropriety or contravention;
- (e) whether the impropriety or contravention was deliberate or reckless;
- (f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;
- (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention."

[1.1] At the end of the submissions of Counsel for the three Accused persons, and Counsel for the Crown, the Court ruled that the Warrants, and the fruits thereof were inadmissible. I now give reasons for that Ruling.

[1.2] Upon examination of the Warrants, it is notable that each of them appears not to conform with the language of section 37/38 which reads:

"Search warrant

37. (1) Where a Magistrate is satisfied on evidence on oath that there is reasonable cause to believe that any property whatsoever *on or with respect to which an offence has been committed* is in any place or places, he or she may grant a warrant to search the place or places for the property and if the property or any part of it is found, to bring the same before the Magistrate granting the warrant or some other Magistrate." [Italics supplied]

[1.3] Each of the warrants issued in this case read as follows-

"Evidence on oath has been given this [relevant date inserted], by Calvin George of Road Town Police Station that there is reasonable cause to believe that certain property to wit [and therein are set out a millennium of items] concerning any transaction in relation to the dealing with the accounts attached to telephone number [and various numbers are set out in the warrants] for the period between [various dates in 2016 or 2017 are set out in each of them]. Are on certain premises to wit

[CCT Boat Phone, Cable & Wireless and DIGICEL BVI premises in Road Town, Tortola, are the named entities and premises to be searched] ...,”

The warrants do not set out that the property authorized to be taken – phone records and information belonging to certain users’ accounts with the providers – *relates to the commission of any offence. In fact, none of the warrants mentions any offence committed at all.* I shall not interrogate this anomaly further, as it does not impact the basis of my Ruling, but it raises issues which may well be interrogated at another time before another Court.

One would have thought, as I do, that since the basis for the issue of a warrant by the Magistrate is “...property ... on or with respect to which an offence has been committed ...” being reasonably suspected to be on the target real estate, the warrant should, like presumably the Information on Oath does, as is required – the Court has not had sight of any Information related to said warrants – as the product of that Information, should itself state that the property being searched for is property “...with respect of which an offence has been committed ...”. Otherwise the warrant would not inform the person whose real estate is being searched of the legal basis for the search. The question as to whether the specific offence or offences must be set out in the warrant also arises and this too is left for another time and place.

The Statutory Framework

- [2] I have already set out the relevant section of the Evidence Act which the Crown has called to arms in support of its submission.
- [2.1] The starting point in the analysis of the issues raised in this matter would necessarily be the relevant sections of the Constitution of the Virgin Islands, the Magistrates Code of Procedure Act, section 37/38, (set out above), and section 18 (1), and other comparatively relevant sections of the Telecommunications Act.

[2.2] Section 19 of The Constitution, states as follows-

"Protection of private and family life and privacy of home and other property

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

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

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

(a) ...,

(b) ...,

(c) ...,

(d) ..., ; or

(e) *for the prevention or detection of offences against the criminal law or the customs law.*" [italics supplied]

[2.3] Section 23 of the Constitution reads as follows-

"Protection of freedom of expression

23.-(1) No person shall be hindered in the enjoyment of his or her freedom of expression.

(2) A person's freedom of expression includes freedom to hold opinions without interference, *freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence or other means of communication.*

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

(a) ...,

(b) *for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal*

proceedings or proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or *regulating telecommunications*, posts, broadcasting or public shows; or

(c) ...,

(4) ..., " [italics supplied]

[2.4] Section 18. (1) of the Telecommunications Act of the Virgin Islands reads as follows:
(Marginal Note: "Obligations of public suppliers")

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

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

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

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

(2) The purposes permitted under subsection (1) are such use and disclosure as is necessary to enable the public supplier to

(a) operate the network or service, as the case may be;

(b) bill and collect charges;

(c) protect the rights and property of the public supplier; or

(d) protect other licensees from fraudulent use of their networks or services.

(3) Nothing in subsection (1) prohibits the Commission from authorizing a public supplier to disclose lists of its subscribers, including directory access databases, for the publishing of directories or for such other purposes as the Commission may specify." [italics supplied]

It is clear that section 18(1) was enacted in the light of sections 19 and 23 of the Constitution so as to enable permissible derogations from the Rights protected therein.

[2.4] Section 49. (1) of the Act, under the heading "Offences", reads as follows –

"49. (1) A person who

(a) – (d) ...,

(e) intercepts, attempts to intercept or procures another person to intercept, without instructions from the Governor under section 90, the authorization of the provider or user, or a court order, or otherwise obtains, attempts to obtain, or procures another to obtain, unlawful access to, any communication transmitted over a telecommunications network,

(f) uses, or attempts to use, the content of any communication, knowing or having reason to believe that such content was obtained through interception or access in contravention of paragraph (e)

(g)-(o)...

Commits an offence and is liable

(A) on summary conviction to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding three years, or to both, or

(B) on conviction on indictment to a fine not exceeding two hundred and fifty thousand dollars or to imprisonment for a term not exceeding ten years, or to both, and

in the case of a continuing offence, to a further fine not exceeding five thousand dollars for each day that the offence continues after conviction.

(2) Notwithstanding subsection (1)(e), any person operating a telecommunications network or providing a telecommunications service may intercept any communication that is transmitted over its network or service *solely and as is strictly necessary*

(a) To install, maintain or test equipment used or intended for use in the operation of such network or the provision of such service;

(b) To monitor the network or service quality;

(c) To bill and collect charges from the sender or recipient of such communication;

(d) To protect such person's network or services from harm; or

- (e) To protect users or to protect other operators of telecommunications networks or providers of telecommunications services from the fraudulent use of such networks or services.” [italics supplied]

Section 70 of the Telecommunications Act sets out the General power of the Commission to request information as follows –

“70. (1) Where

- (a) It appears to the Commission that a licensee, an authorisation holder or any other *person may be contravening, or may have contravened this Act, the Regulations, the Telecommunications Code, any instructions or any term or condition of a licence or frequency authorisation, or*
- (b) *It is reasonably required for the purpose of discharging its functions or ensuring compliance with this Act, the Regulations, the Telecommunications Code or any term or condition of a licence or frequency authorization,*

the Commission may serve a notice under subsection (2).

- (2) A notice under this subsection may be served upon any person and may require that person to
 - (a) produce to the Commission at a time and place specified in the notice any documents specified or described in the notice that are in that person's possession or custody or under his control; or
 - (b) furnish to the Commission at the time and place specified in the notice the information specified or described in the notice.
- (3) The Commission may require any documents or information provided pursuant to this section
 - (a) to be provided in such form or manner as it may require; and
 - (b) to be verified or authenticated in such manner as it may reasonably require.
- (4) – (5) ...,

- (6) A person shall not be required to produce any documents or give any information under this section that he could not be compelled to produce or give as evidence in civil proceedings *in the Court*.

- (7) If a person fails to comply with a notice served under subsection (2), *the Court* may, on the application of the Commission, make such order as it

considers fit for requiring the person to comply with the notice and may make such order, whether as to costs or otherwise, as it thinks fit.

- (8) A person who without reasonable excuse fails to comply with a notice issued under subsection (2) commits an offence and is liable on summary conviction to a fine not exceeding twenty thousand dollars." [italics supplied]

Section 71 of the Act has the marginal note: "Commission may apply for a search warrant" and reads as follows-

"71. (1) Where

- (a) a person who is issued a notice *under section 70* fails to comply or only partly complies with such notice, or
- (b) the Commission is of the opinion that
 - (i) *an offence under this Act or the Regulations* has been or is being committed, or may be committed unless swift action is taken to prevent the commission of the offence,
 - (ii) there are documents, or there is information, on the premises of a person which may reveal the commission of an offence *under this Act or the Regulations*, and
 - (iii) if a notice under section 70 is issued it would not be complied with or the documents or information to which the notice relates may be removed, tampered with or destroyed,

the Commission may, *on oath sworn to on its behalf by a member of the Commission apply to a Magistrate for a search warrant.*" [italics supplied]

Section 90. of the Act states as follows:-

"90. The Governor may make written requests and issue orders to operators of telecommunications networks and providers of telecommunications services requiring them, at their expense, to intercept communications for law enforcement purposes or provide any user information or otherwise in aid of his authority."

[I wish to state, at this point, without ruling thereon for reasons which are self-evident, that section 18. (1) of the Act, where it says "...except as *otherwise permitted by the ... or licensee*, as the case may be" and section 90 of the Act which purports to vest in the Governor the power to "... *make written requests and issue orders to operators of telecommunications networks and providers of telecommunications services requiring*

them, at their expense, to intercept communications for law enforcement purposes or to provide any user information or otherwise in aid of his authority” are of suspect Constitutional virility given that each purports to give to a third party which is not the High Court, jurisdiction to derogate from the sections 19 and 23 Constitutional Rights of persons protected by Chapter 2, the Fundamental Rights and Freedoms of the Individual. The first is the licensee, a commercial enterprise, and the second is the Governor, whose office is part of the Executive Branch of Government, with neither being a part of the Judiciary, and each is purportedly given powers to do things which can only be done under the authority of a warrant, or order issued by the High Court under the Act, and pursuant to the permissible derogations provided in sections 19 and 23 of the Constitution. As will be seen later in these reasons, the power to authorize permissible, and therefore lawful breaches of Chapter 2 of the Constitution, can only reside in the High Court, and nowhere else.]

These are the three avenues under the Act for the procurement of information in relation to telecommunications. Section 18(1) provides for permissible derogations from the protections of sections 19 and 23 of the Constitution with the user's consent (or that of the licensee, which is again, in my humble view, constitutionally barren), under a warrant or a court order “ or other government agency with competent authority” (which latter quoted purported empowerment is equally constitutionally suspect); section 71 permits the Magistrate to issue a warrant upon application by the Commission with respect to its section 70 powers, and in respect of section 49 offences, and only in that limited context – basically dealing with administrative and regulatory aspects of the Commission's powers, and where an offence is perceived to have been committed under the Act or Regulations(section 49) – and; section 90 which empowers the Governor to “ ...make written requests and issue orders”, in very broad terms, including “for law enforcement purposes or [to] provide any user information or otherwise in aid of his authority.” [These section 90 powers are, in my view, in the same category as those in section 18(1) referred to above – constitutionally questionable - but, that determination is not my task in this case.]

The Crown relied upon section 18(1) of the Act in addition, (and alternatively) to section 37/38 of the Code as the legal basis for the issue of the said Warrants, and on nothing else, save for section 125 of the Evidence Act as a catch-all “insurance policy”.

My Reasons

- [3.] *“A voice said, Look me in the stars
And tell me truly, men of earth,*

*If all the soul-and-body scars
Were not too much to pay for birth.” Robert Frost: A Question*

*“Yet, Freedom, yet,
Thy banner, torn but flying,
Streams like a thunder-storm against the wind.” Lord Byron: CHILDE HAROLD’S
PILGRIMAGE*

- [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.
- [3.2] Learned Counsel for the Crown, Mrs. Smith, submitted that section 37/38 of the Code, gives the Magistrates a general power to issue Search Warrants, and that it was under this general power that the interrogated Warrants were issued. Counsel posited that, under this general power Magistrates have always issued Warrants to permit searches to be conducted of persons and/or their property, including their telecommunications data, like in this case.

- [3.3] Learned Principal Crown Counsel, Mrs. Smith, further, and alternatively, submitted that section 18(1) of the Act itself empowered the Magistrate to issue the subject Warrants.
- [3.4] And, said the Crown, conjointly, both sections empower the Magistrate to issue the Warrants in question so as to derogate from the Fundamental Rights protected by sections 19 and 23 of the Constitution, as the sections of the Code and the Act fall under the permissible derogations created by both sections 19 and 23.
- [3.5] The Crown concedes that sections 19 and 23 of the Constitution cover the subject matter of the Warrants but says that the derogations permissible under each section apply.
- [3.6] Section 37/38 vests power to issue Warrants in Magistrates within the jurisdiction given to Magistrates by the Code, and where specifically endowed, by any other statute, within Constitutional limits.
- [3.7] The Act deals with a specific subject matter – telecommunications – and, in deference to the recognition that Constitutional Rights are implicated, Parliament reiterated in section 18, the Constitutional nature of those Rights, and provided therein the mechanism for derogations therefrom. This Act is a specialized Act which enacts specific permissible derogations from the sections 19 and 23 Rights, in specific circumstances, and under specific conditions.
- [3.8] It would be different if the Act, or any other Statute gave the Magistrate express power – and therefore the jurisdiction within which to exercise that power – to issue warrants to obtain the data which section 18(1) of the Act addresses. That would be a specialized statute giving specific –as opposed to general – powers to the Magistrate. The Telecommunications Act does not give the Magistrate power, or jurisdiction, to issue warrants for the search and seizure of cellular users' data in section 18(1), or at all, and the Crown has not prayed in aid any other such statute.
- [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.

[3.11] Section 71 is the only section in the Act where jurisdiction and power are vested in the Magistracy, expressly or implicitly.

[3.12] The Crown then argued that, because the word "warrant" in section 18(1) is not qualified with the word "court" which immediately follows "warrant", the Magistrate must be able to issue a section 18(1) warrant because it is not restricted by any qualifying word, and therefore it must mean that the Magistrate can issue such a warrant, either under that section, or under section 37/38 of the Code, or under both.

[3.13] That argument is unattractive for at least four reasons.

(i) Firstly, the information which the public supplier is required to keep confidential, is information that is protected by sections 19 and 23 of the Constitution.

(ii) Secondly, in respect to Chapter II of the Constitution, the only Court with original jurisdiction in relation thereto is the High Court: see section 31 of the Constitution.

(iii) Thirdly, "Court" in the Act is defined as the High Court and, given that the derogation addressed by section 18(1) is a derogation from a Fundamental Right, it must be assumed that, *absent express powers for the Magistrate to do so*, the sanctioning of any derogation must be under and by virtue of permission of the High Court – the next word "order" in the subsection is qualified by the word "court" – and not by any other Court.

(iv) Fourthly, the Act itself, in section 71 expressly – and for the only time – confers jurisdiction upon the Magistracy to issue warrants: in, as is said before, specific and very restricted circumstances only. It is therefore clearly the intention of Parliament that section 18(1) derogations are to be conducted under the supervision of the High Court.

- [3.14] It follows that, if the parliament had intended the Magistrate to issue section 18(1) warrants, as the Crown contends, they would have said so in section 18(1) itself, like they did in section 71. And, where they have not mentioned the word "magistrate" in section 18(1) it must be inferred that their intention was to leave such permissible derogation warrants and orders with the Court which is vested by section 31 of the Constitution with the sentinel responsibility to enforce the Chapter II Fundamental Rights and Freedoms.
- [4] Section 125 of the Evidence Act is invoked by the Crown to save the evidence on the basis that the Court has a discretion to exclude improperly obtained evidence, and therefore to allow improperly obtained evidence after having taken into account the seven matters set out in subsection (3) (a) to (g).
- [4.1] It is my considered opinion that section 125 cannot inoculate the evidence obtained pursuant to the said warrants, as is argued by the Crown.
- [4.2] The issue with the Magistrate issuing the Warrants in this case is not one of the improper exercise of a power or discretion within a given jurisdiction; it is one of whether or not the Magistrate had the jurisdiction within which to exercise a vested power.
- [4.3] Since I have found that the Code does not, and indeed cannot, give the Magistrate the jurisdiction to issue section 18 (1) warrants – the *Generalia Specialibus Non Derogant* finding-; and since I have also found that section 18(1) itself does not give the Magistrate that jurisdiction to issue section 18 (1) warrants, it follows that the evidence obtained by virtue of a warrant issued without jurisdiction to do so, is not only "improperly" obtained, but is unlawfully obtained, and because the error is one of jurisdiction it cannot be remedied by section 125. A Magistrate is a creature of statute and has no inherent jurisdiction, *and is confined to whatever jurisdiction is conferred by statute*. Therefore, since I have found that section 18 (1) of the Act does not confer jurisdiction on the Magistrate, the Magistrate had no jurisdiction within which to issue any section 18 (1) warrants, and the Warrants in question outlined above are therefore nullities, and they are not admissible in this case.

- [5] In the result, it is my ruling that section 37/38 of the Code does not give the Magistrate power to issue section 18 (1) of the Act warrants – or any warrants which implicate the intendment of section 18 (1) – and section 18 (1) of the Act does not give the Magistrate jurisdiction to issue the warrants. The warrants in issue are therefore not admissible in this case for the reasons stated.
- [6] I have cited no authorities because only one authority was submitted to the Court during arguments, that of The Queen and St. Ellmore Garraway, Criminal Case No. 0001 of 2021, which addressed section 125 of the Evidence Act, dealing with video evidence obtained during the execution of a Search Warrant issued by the Magistrate within the section 37/38 jurisdiction in respect of a Criminal Code offence, and not in relation to a specialized Act like the Telecommunications Act. The question there being whether the Warrant covered the seizure of the video evidence. The Generalia Specialibus Non Derogant maxim being so trite, required no authority to be cited by me, and none were cited to the Court by Counsel on either side
- [7] While it is true that my Ruling does not interrogate the Constitutionality of any of the Acts or Code mentioned above, I am obliged to comment that the Fundamental Rights and Freedoms protected by sections 19 and 23 of the Virgin Islands Constitution – indeed, like all Chapter II Rights – despite “all the soul-and-body scars” suffered over time, and whether they be “torn but flying, streams like a thunder-storm against the wind”, they must be respected, honoured and protected by the State, and where derogations are permitted, such shall be done within the statutory guardrails that are reasonably justifiable in a democratic society.

Thomas W. R. Astaphan KC
High Court Judge (Ag.)

By the Court


Registrar