

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

**IN THE HIGH COURT OF JUSTICE  
(CRIMINAL)**

**Criminal Case No. 0001 of 2021**

**BETWEEN:**

**THE QUEEN**

**RESPONDENT**

**AND**

**ST. ELLMORE GARRAWAY**

**APPLICANT**

**Appearances:** Mr. Israel R. Bruce, Counsel for the Applicant  
Mr. Kristian Johnson, Crown Counsel for the Respondent

---

**2022: April 13<sup>th</sup>, June 23<sup>rd</sup>**

---

**JUDGEMENT ON APPLICATION TO EXCLUDE VIDEO EVIDENCE**

- [1] **FLOYD J:** This is an application to exclude video evidence obtained by police during the arrest of the applicant and a search of his residence on 12<sup>th</sup> July 2020. The applicant is charged with perverting the course of justice contrary to **s.93(a)** of the **Criminal Code 1997 of the Virgin Islands**.

**THE FACTS**

- [2] At approximately 4:00 pm on 12<sup>th</sup> July 2020, police received information that a wanted person, Nyron Erickson, was in a house in George's North Side. Police statements indicate that he was with "associates", and they were in possession of drugs and firearms. Later that evening, several members of the Royal Virgin Islands Police Force (RVIPF) attended at the residence of the applicant, St. Elmore Garraway. Police had obtained a search warrant from the Magistrate's Court on 12<sup>th</sup> July 2020. The warrant authorized forced entry to the residence of St. Elmore Garraway and Dian Fahie

of George's North Side based on a sworn belief that firearms and ammunition were kept on those premises. The warrant authorized a search for those items. The warrant was later endorsed with the signature of D/S Francis at 6:00 pm on 12<sup>th</sup> July 2020, indicating that he had executed the search warrant and that "nothing pertaining to the warrant was found." However, the document indicated that some other items were recovered, including a firearm holster, green vegetable matter suspected to be cannabis, cellular phones, and CCTV footage.

[3] The execution of the search warrant consisted of RVIPF members attending at the subject residence and surrounding it. A male was observed outside of the house. He was seen to retreat inside the building. Police statements indicate that they stormed into the yard identifying themselves as armed police, demanding that the door be opened, and stating that they had a warrant. An outer door was breached, and police entered, directing the occupants to get on the floor. Nyron Erickson, his mother, Nema Benjamin, and another person, proceeded to the rear of the house and escaped. Approximately 10 persons were found in the house. They were handcuffed and detained. The warrant was read to the applicant by a police officer and the house was searched. The applicant advised police that his wife was not present, and it was her house. Nothing in relation to the warrant was found during the search. Police went to the applicant's bedroom, where a surveillance or CCTV system was located and seized. Police later extracted video footage from that system and made copies. The applicant was arrested for harbouring a fugitive, Nyron Erickson. The applicant replied that he did not know anyone by that name and that he was just having a party for his workmen. He was transported to the police station.

[4] On 13<sup>th</sup> July 2020, police returned to the applicant's residence with another search warrant. The premises were searched in the presence of the applicant. Nothing in relation to that warrant was found. Later that day, the applicant was charged with perverting the course of justice.

## **THE POSITION OF THE PARTIES**

- [5] Learned Counsel for the applicant submits that the search warrant obtained by the police allowed entry to premises to search for firearms and ammunition. However, in reality, the police were searching for a person of interest, a fugitive known as Nyron Erickson. The search they conducted of the premises resulted in the seizing of video equipment belonging to the applicant and the downloading of video recordings therefrom. This was outside the scope of the search warrant. The equipment was therefore seized and searched without a warrant. The applicant was initially arrested for harbouring a fugitive, which is not an offence known to law in this territory. He was later charged with an offence under the **Criminal Code** of perverting the course of justice. Defence counsel further submits that although the police returned to the applicant's residence the next day and executed a second search warrant, no copy of the second warrant has ever been produced and disclosed.
- [6] Learned counsel for the applicant, in very fulsome submissions, advances the position that reliance should be placed upon **s.125** of the **Evidence Act 2006 of the Virgin Islands**. There is no need to refer to the common law as the legislation governs. Improperly obtained evidence, as the video recording is in this case, shall not be admitted under **s.125(1)** unless the desirability of admitting the evidence outweighs the undesirability of such admission. **Section 125(3)** sets out several factors the court should take into account when considering whether to exercise the discretion conferred upon it to allow the material into evidence.
- [7] Counsel for the applicant submits that the police failed to obtain proper judicial authorization to enter the residence and remove the applicant's property. This was in contravention of the applicant's right to privacy of home and property under **s.19**, and freedom from deprivation of property under **s.25**, of the **Virgin Islands Constitution Order 2007**. The police exceeded the terms of the search warrant by seizing the recording equipment and thereafter searching that equipment for video evidence without a further warrant. Both searches were unlawful. The evidence was therefore improperly obtained. The police were actually searching for a person of interest at the time of this incident. However, the warrant authorizes police to search for guns and ammunition at the residence. There is no connection between the fugitive and weapons at the applicant's residence. The reference in the police statements is to the wanted person, Nyron Erickson, and his associates, being in possession of firearms and drugs. That is different to the reference in the search warrant to firearms and ammunition being at the applicant's residence. The police therefore acted in bad faith by

indicating that their desire was to search for firearms and ammunition at the applicant's residence, when in reality they sought to locate and arrest Nyron Erickson.

- [8] Counsel for the applicant submits that the evidence was improperly obtained and that after the court applies the considerations listed in **s.125(3)** of the **Evidence Act**, it will conclude that the video must be excluded. Further, pursuant to **s.124**, the unfair prejudice to the applicant caused by the evidence, must also lead to the court refusing to admit the evidence.
- [9] Counsel for the applicant also submits that the video evidence is either irrelevant or of little probative value based upon the angle of the CCTV camera. The video footage portrays a common area on the property that is accessible to both the applicant and a tenant who also lives in the building. The applicant is not the sole occupant of the property. An affidavit from the applicant was filed which indicates that there is a tenant in the bottom floor of the building in which he resides. The applicant is not the only person in control of the front gate access. The seized video does not show "recognizable" persons. The stairs leading to the tenant's residence interferes with the video picture. The video evidence would therefore not be supportive of the case for the Crown and may cause the jury to speculate about triable issues. The evidence should therefore not be admitted.
- [10] Counsel for the applicant submits that, due to the breach of the applicant's constitutional rights and the failure of the investigating police to adequately comply with the requirements for judicial authority before searching residences, and seizing and searching personal property, the admission of the video evidence would bring the administration of justice into disrepute.
- [11] Several authorities were submitted in support of the position of the applicant.
- [12] Learned counsel for the Crown, the respondent, submits that the video evidence should be admitted. The issue is a question of law for the trial judge to consider, to ensure fairness to the applicant in his trial. The police attended with a valid search warrant and further, the material seized was done so incident to the arrest of the applicant. The material was therefore obtained both through the terms of the search warrant and through the common law incident to arrest. Although harbouring a fugitive is not a charge under the **Criminal Code**, it is an offence known to law, under the **Immigration**

**Ordinance.** Crown counsel relied upon the case of **R v Sang**<sup>1</sup> to submit that a court has no discretion to refuse to admit relevant and admissible evidence, probative of the guilt of the accused, on the ground that it was obtained by improper or unfair means. The test for admission of the evidence is whether it is relevant and whether the probative value of the evidence exceeds its prejudicial effect. If admitted, it becomes a matter of weight and reliability for a jury to determine. The trial judge can provide appropriate instructions to the jury to deal with any issues regarding identification and speculation that may arise from the video evidence. That will ensure trial fairness.

- [13] Crown counsel submits that the seized video material is akin to computer generated documents and relies upon the presumption of reliability, and therefore admissibility, found at **s.58(2)** of the **Evidence Act**. Further, the privacy issues related to home surveillance recordings is far less than that found in cell phones and personal computers as referred to in the submitted cases of **Brandt v Commissioner of Police et al**<sup>2</sup> and **R v Vu**<sup>3</sup>, which were also referred to by counsel for the applicant. There was also an urgency to the seizing of the video as it could easily have been overwritten and therefore lost to the investigation.
- [14] Crown counsel submits that the search warrant was correctly obtained because the person of interest, Mr. Erickson, that the police were seeking, was known to be armed. Moreover, the video evidence seized has a high probative value because it shows the access point to the residence. The video also apparently shows the fugitive person. This supports the Crown's case that the applicant harboured a fugitive who was evading apprehension, and therefore perverted the course of justice.
- [15] Crown counsel relied upon a number of authorities to support the position of the respondent.

## ANALYSIS

---

<sup>1</sup> [1979] 2 ALL ER 122

<sup>2</sup> MNIHCVAP2019/009

<sup>3</sup> 2013 SCC 60

- [16] It appears abundantly clear that the police were focused on the apprehension of a wanted fugitive at all material times in this investigation. On 12<sup>th</sup> July 2020, it came to their attention that the subject of their interest was at a residence in George's North Side. They had enough time to attend upon a magistrate that same day and obtain a search warrant for those premises. The person of interest was Nyron Erickson. That is clear from the statement of D/C Augustin which indicates that he received information that Nyron Erickson and his associates were in a house in George's North Side and that they were in possession of firearms and drugs. Similarly, the statement of D/S Francis indicates that he received information that Nyron Erickson and others were in possession of firearms and narcotics at the St. Elmore Garraway residence in George's North Side. Two of the officers actually make note of seeing Nyron Erickson at that location in their statements. The focus on Mr. Erickson is further confirmed when police arrest the applicant for harbouring a fugitive.
- [17] When a search warrant is executed, the person whose premises are being searched is entitled to know from an examination of the search warrant for what reason the search is taking place and the seizing officer must know in relation to what offence or circumstances the articles listed are to be seized. In this case, a review of the warrant would advise the reader that the search was to look for weapons - firearms and ammunition - at the applicant's residence. However, the questioning of the applicant by the police, as indicated in their statements, refers only to Nyron Erickson and his whereabouts. The applicant is not asked about weapons.
- [18] It is curious that the search warrant obtained by police the same day they become aware of the presence of the person they seek at the applicant's residence, makes no reference whatsoever to Nyron Erickson. Instead, the warrant is obtained to look for firearms and ammunition that were kept on those premises. That is entirely different to information that Mr. Erickson may be in possession of firearms. It is also curious that nowhere in the material is it noted that the police have a warrant for the arrest of Nyron Erickson, although one might conclude that from the references to Mr. Erickson in the police statements. P/C Winter describes the police as being engaged in "Operation Eagle" at the applicant's residence. If the police knew that the person they were seeking was at a particular residence, they had options. From the material available to this court, it is apparent that several officers were dealing with this case on the day in question. One option available to them would surely have been to surround the residence and conduct surveillance, awaiting the appearance of the

person sought. That person could then have been arrested pursuant to an arrest warrant which the police presumably had. Another option available to the police was to obtain a judicial authorization to enter the premises. That was the option selected, however, the authorizing warrant must have been correctly obtained in relation to the actual purpose for which it was sought.

[19] Search warrants are written authorizations allowing police investigators to enter premises to search for material and people, and to seize items enumerated in the warrant or other relevant material. The information to obtain the search warrant in this case is not before the court, so the court does not know exactly what information was provided to the magistrate to obtain the search warrant. However, it appears that there was little or no basis for the police to believe that firearms and ammunition were to be found on the applicant's premises. It is far more apparent that the police believed that firearms might be in the possession of the fugitive suspect, Nyron Erickson. But those are two different things. That has an impact on the validity of the search warrant used by the police in this case. There appears to be little or no connection between the focus of the police on the arrest of Nyron Erickson and the stated purpose for obtaining the search warrant. It certainly appears that the search warrant was obtained as a means to enter the applicant's premises in order to locate and arrest Mr. Erickson rather than to look for firearms and ammunition that were likely to be found there.

[20] 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. A further consideration is how accessible the seized

items were. That is to say, although the video equipment was in plain sight and available, the evidence extracted was certainly not. That required additional steps, taking the evidence further away from the stated terms of the search warrant.

[21] Crown counsel has submitted that not only were the items seized in accordance with the search warrant but also at common law as incident to arrest. The difficulty with that argument is that the applicant was initially arrested on a charge of harbouring a fugitive. In that regard, his video equipment was seized when he was arrested. It was only after the video had been downloaded that he was formally charged with the criminal code offence of perverting the course of justice. He is charged the day after the search has been conducted and with a second search of his residence also intervening. The connection between arrest and seizure is therefore tenuous at best. The common law power of search incident to arrest is generally held to apply to a search of the person arrested and his or her immediate surroundings. In this case, the video equipment was located in the applicant's bedroom within his residence and the video evidence was extracted at the police station sometime after the arrest had occurred.

[22] Even assuming there was a basis at law for the seizure of the video equipment, another argument can be made as to the need for a further warrant to authorize access to the equipment and the downloading of the video. The search warrant did not authorize the seizure of the video equipment. It was either obtained incident to arrest on a replacement charge or it was found as part of a broad investigation encompassing what an officer believed on reasonable grounds would afford evidence in respect of another offence. Crown counsel has submitted that the video evidence had to be seized to avoid its destruction by possible overwriting. However, the material provided shows that the equipment was seized, and the applicant was taken into custody. There was no risk of any loss of evidence. There was ample time to apply for and obtain another warrant to search the video equipment. Reference to **s.58** of the **Evidence Act** does not assist. That section deals with the admissibility of documents in criminal proceedings without the necessity of proving accuracy or the proper functioning of the equipment that produced the statement. The issue in this case is not one of reliability but rather admissibility. The reliability of the video equipment and its product is not the consideration at this stage. The consideration for this court is admissibility of the video evidence simpliciter.

[23] The situation involving the search of the video equipment in this case is clearly analogous to the electronic devices searched in the **Brandt** and **Vu** cases. Although the **Vu** case was narrower in that it dealt with computers, which have a higher privacy threshold than video equipment, its findings are helpful. The court indicated that if police came across a computer in the course of a search and the warrant did not provide specific authorization to search computers, they could seize the computer (assuming it may reasonably be thought to contain the sort of things that the warrant authorizes to be seized) and do what is necessary to ensure the integrity of the data. If they wanted to search for the data, however, they would need to obtain a separate warrant. The Court of Appeal in the **Brandt** case found the cell phone search to be unlawful because it was not authorized in the warrant to search for and seize cell phones. As the court held at **para 11**:

A cell phone (or a computer) is more than just an article to be searched for at a particular place; it is an article which is itself a place to be searched for messages **and images stored there**, and the data obtained from it can be extracted or copied and transported or transmitted from place to place. A warrant to search for a cell phone, therefore, is not a warrant to search a cell phone. If the police are intending to access and use data from cell phones found in the lawful search of a person's home, they should include in the warrant which they apply for and obtain, the authorization to search the cell phones; not having done so in the present case, they ought to have brought the cell phones before the Magistrate's Court - in accordance with section 24(1) of the Criminal Procedure Code - to seek and obtain authorization to search them (emphasis added).

[24] This court notes the reference in the above ruling to the electronic device being an article which stores images and the data obtained can be extracted and copied. The similarity to the video equipment in this case is striking. What is also notable is that in the **Brandt** case, the police had a search warrant for the items seized, being cell phones. In this case, the police had no such specific warrant. Surely, therefore, if police using a search warrant that specifies the items found and seized are required to obtain a further warrant to search within those items and extract data, then police operating on a more general warrant must also obtain a second warrant in order to search the items seized and extract data.

[25] Although Crown counsel referred to the common law in his submissions, I am satisfied that the statute law of the Territory of the Virgin Islands governs in this case. That was made clear in the Court of Appeal case of **Capital WW Investment Limited (In Liquidation) acting through its**

**Directors v Tall Trade Limited**<sup>4</sup> which confirmed that the legislature of the Virgin Islands provided a statutory scheme that must be applied to the consideration of the admissibility of improperly obtained evidence. At **paras 92 and 93** the court held that:

The resolution of the issue of the admissibility of the messages into evidence required the judge to determine whether he should exercise the discretion conferred upon the court by section 125 of the Evidence Act so as to allow them into evidence... The judge, in his judgment, showed fidelity to both sections 125(1) and 125(3) of the Evidence Act and considered the probative value of the evidence together with the other factors that are relevant. There is no law in the BVI which states that if the evidence has probative value, it is mandatory that it should be admitted into evidence. I reiterate that section 125(3) requires the judge to consider all of the factors including the probative value of the hacked telegram messages in the exercise of his statutory discretion... He was alive to the fact that the telegram messages had been obtained by reason of impropriety and therefore section 125(1) of the Evidence Act was engaged. He further indicated that he had to assess the various factors set out in section 125(3) to reach a value judgment under section 125(1). Further, the judge quite properly indicated that he had to assess the probative value and the importance of the evidence of the telegram messages.

[26] It is therefore clear that if the court finds the video evidence seized by the police in this case during the search of the applicant's residence to have been obtained improperly or in contravention of the law, then it must proceed to carry out an assessment of whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, taking into account the factors set out in **s.125(3) of the Evidence Act**.

[27] There is no question that the common law has always placed a high value on the security and privacy of the home. This is codified in **s.19 of the Virgin Islands Constitution Order 2007** which states that every person has the right to respect for his or her private and family life and his or her home. 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. One of the exceptions to this right is for the prevention or detection of offences against the criminal law. For that reason, the police in this case sought authorization by way of a warrant to enter the applicant's premises. However, despite the police focus being clearly on the fugitive, Nyron Erickson, they did not obtain a warrant to search for a person of interest. Instead, they chose to obtain an authorization to search for firearms and ammunition to be found at the applicant's residence. That is quite specific. Nothing related to that warrant was found by police. However, the

---

<sup>4</sup> BVIHCMAP 2020/0025 & 2020/0026

police went beyond the stated terms of that warrant and seized video equipment belonging to the applicant. That material must therefore have been improperly seized. It is not saved by any reference to the common law doctrine of search incident to arrest in these circumstances.

[28] Was the material seized as part of a general latitude given to police to seize items relevant to events that give rise to criminal liability? If the criminal offence to which the seized items relate is the harbouring of a fugitive, we know that is not a criminal offence. It is an offence under the **Immigration Ordinance**. The police later amend the arrest of the applicant to refer to a charge of perverting the course of justice. This, it appears, relates to allowing the fugitive, Nyron Erickson, access to the applicant's premises. However, that amended arrest and charge take place after the electronic equipment has been seized. If that is the basis upon which the items seized are sought to be admitted then it is very tenuous indeed. That reasoning is so far removed from the initial warrant and its narrowly stated terms that it must again be held that the items were seized improperly.

[29] If the court is incorrect in that determination, then the next consideration is the examination of the seized video equipment and the downloading of video recordings, which was all undertaken without a further or secondary warrant. It cannot be said that there was an urgency to this secondary search. The material had been seized. The property owner was under arrest and in custody. The video was not at risk of being overwritten and lost. The equipment contained video recordings and images just as the cell phones referred to in the **Brandt** case did. A supplementary warrant was found to be required in that case before the evidence could be accessed and retained. The same must be found to apply in this case. The video equipment was located in the applicant's bedroom. The data extracted would portray the residence of the applicant, activities taking place there as well as people in attendance. That far exceeds the parameters of the search warrant. Although privacy rights associated to that equipment cannot be said to be as strong as the privacy rights referred to in cell phones and computers in the **Brandt** and **Vu** cases, there can be no doubt that the applicant does have a reasonable expectation of privacy associated to that material. The intrusion into those interests would necessitate the police seeking to obtain a secondary search warrant to access it. Such invasive actions by the police require judicial authorization. They did not obtain that.

- [30] For all these reasons, the court therefore finds that the video evidence was improperly obtained and in consequence of an impropriety, contrary to **s.125(1)(a)** and **(b)** of the **Evidence Act 2006**. It cannot be admitted without an assessment of the desirability of admitting the evidence, taking into account the factors set out in **s.125(3)**.
- [31] Under **s.125(3)(a)**, the court considers the probative value of the evidence. The submission from counsel is that the video evidence is of a communal area. Further submissions indicate that the applicant is not depicted in the video footage. Little evidence was presented as to what exactly is depicted in the video. However, if the premises contain another dwelling and the video depicts an area open to use of both the applicant and the tenant, then the probative value of the evidence is significantly lessened. Even if the area in camera view portrays an access point to the building open to both the applicant and the tenant, as Crown counsel submits, that does not increase the probative value of the evidence. Quite the contrary, if the area is not unique to the applicant's property interest, then it dilutes the strength of that evidence, since it must surely be arguable that either the applicant or the tenant allowed the person of interest, Mr. Erickson, on to the property, if that is the purpose for which the Crown seeks to tender the evidence. The probative value of the evidence is therefore low.
- [32] Under **s.125(3)(b)**, the court considers the importance of the evidence in the proceeding. In this case, this appears to be the same consideration as for probative value. Although the Crown argues that the video evidence is important to its case, a review of the evidence proves otherwise. The importance of the video evidence is lowered for the same reasons as set out in consideration of **s.125(3)(a)**. Far more important evidence may be found in the police statements indicating that they observe Nyron Erickson within the dwelling house, moving to the rear of the building. The importance of the video evidence is therefore low.
- [33] Under **s.125(3)(c)**, the court considers the nature of the offence and the subject of the proceedings. Although the applicant was initially arrested for Harboursing a Fugitive, he was later charged with Perverting the Course of Justice. That is an offence relating to the administration of justice and as such is a serious matter. The court takes that into consideration.

[34] Under **s.125(3)(d)**, the court considers the gravity of the impropriety or contravention. In that regard, there can be no doubt that the impropriety in this case is extremely serious. Search warrants are fundamentally important to the rule of law and constitutional rights to privacy. Everyone has the right to be secure against unreasonable search and seizure. This is particularly important in regard to residential premises. Every person has an expectation of privacy in her/his residence. It is unacceptable in a free and democratic society that agents of the state enter premises and seize items. That is codified in **ss.19 and 25** of the **Virgin Islands Constitution Order 2007**. Judicial authorizations in the form of search warrants are therefore required for entry and the seizing of items. Although the police were intent on apprehending a person of interest, they obtained a search warrant for firearms and ammunition at a specific location, the applicant's residence. The purpose for entering the residence certainly appears more related to locating and apprehending Mr. Erickson than searching for weapons, although the court notes that the police were concerned about Mr. Erickson possibly being in possession of weapons. Nonetheless, the search warrant is quite specific. The basis for entry is therefore questionable at best. The electronic equipment seized was not specifically authorized by the warrant obtained. The equipment may have some relevance to the charge before the court but that is not what the applicant was arrested for at the time of the search of his home and the seizure of his possessions. The search was therefore improper, and the gravity of the impropriety was high, since it relates to entry into a private dwelling house and the seizing of items belonging to the homeowner.

[35] The impropriety is further heightened by the fact that once seized, the electronic equipment is searched without police obtaining a further judicial authorization for that purpose. The applicant had a reasonable expectation of privacy in his video recording equipment. It was located in his bedroom. The cameras depicted an area in and around his private residence. Not only did the police not have a warrant to seize electronic equipment such as video recording equipment belonging to the applicant, but they also went further by examining the equipment and extracting recordings without a warrant. As held in the **Brandt** and **VU** cases, a warrant authorizing a search for documents and specific items in a residence does not implicitly authorize a search of a computer or a cell phone found in that residence. Specific prior authorization is required by police to search those items. Although the privacy interest in a video recording system does not hold the same degree of privacy

interest as a computer or a cell phone, the court finds that the video recording system in this case does hold sufficient privacy interests such that judicial authorization was required before police accessed it. Privacy interests implicated by searches of electronic devices are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. Only specific authorizations to search such devices ensure that the authorizing justice has considered the distinctive privacy concerns raised by searches of electronic devices. In this case, there was no urgency requiring access without a warrant. The police had seized the equipment and arrested the property owner. There was nothing to prevent the police from taking the time to obtain a judicial authorization to go further. The gravity of the impropriety caused by the warrantless intrusion into the electronic equipment and the extracting of video evidence was therefore high.

[36] Under **s.125(3)(e)**, the court considers whether the impropriety was deliberate or reckless. In this case, it is to be hoped that the actions of the police in obtaining a search warrant that did not appear to accurately reflect their intentions was not deliberate. It was certainly reckless. A more detailed and precisely worded judicial authorization could have been obtained, tailored to the facts of the case, which was the apprehension of Nyron Erickson. That intention is confirmed by the nature of the item seized being electronic equipment containing video recordings. Those recordings relate to the presence of the person of interest, Mr. Erickson, on the property. Further, as counsel for the applicant submits, the presence of a video security system was obvious to anyone observing the applicant's residence. The police had intelligence indicating the presence of Mr. Erickson at the applicant's residence. Therefore, surveillance of the property must have been ongoing. The video cameras were apparently obvious and not hidden. The information to obtain the warrant should have prudently included a term including searching for such video evidence. It would have been simple to add such a term. However, the police did not do that. It appears that the judicial authorization was obtained in a manner that was greater than simply careless. It was reckless, given that the authorization pertained to police entry into a private dwelling house to search for and seize items.

[37] Under **s.125(3)(f)**, it does not appear at this point that any proceeding, other than this application, is likely to be taken in relation to the impropriety.

- [38] Finally, under **s.125(3)(g)**, the court must consider the difficulty, if any, of obtaining the evidence without any impropriety. In that regard, the answer must surely be that there would not have been any such difficulty. The police could have obtained a more fulsome and detailed warrant. That warrant could have not only pertained to the seizing of the electronic equipment, but it could also have allowed for the examination of the equipment and the extraction of the video evidence. Even if the initial warrant did not allow for the seizing of the video recordings, there was nothing to prevent the police from seeking a further authorization to extract the video evidence once they were in possession of the equipment. There would have been, therefore, no difficulty in the police obtaining this evidence without the impropriety that took place.
- [39] Having found that the evidence made up of the electronic surveillance equipment and the video recordings found therein, was obtained improperly, pursuant to **s.125(1)** of the **Evidence Act 2006**, and having considered the desirability of admitting that evidence, taking into account all the factors found in **s.125(3)**, the court is not persuaded that the evidence should be admitted.
- [40] Further, pursuant to **s.124** of the **Evidence Act 2006**, the court finds, for the reasons already advanced, that the probative value of the evidence adduced is substantially outweighed by the danger of unfair prejudice to the defendant. The evidence shall not, therefore, be admitted.
- [41] To allow the improperly obtained evidence, the prejudicial effect of which far outweighs its probative value to be admitted in this case, would also be contrary to the applicant's right to a fair hearing under **s.16(1)** of the **Virgin Islands Constitution Order 2007**.
- [42] For all of these reasons, the application to exclude the video recordings obtained on 12<sup>th</sup> July 2020 is granted. That material is hereby ordered excluded.

**Richard G. Floyd**  
**High Court Judge**

**By the Court**

**Registrar**