

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: BVIHCR2016/0009

BETWEEN:

THE QUEEN

v

PAMPHILL PREVOST

SIMON POWER

Appearances:

Mr John Black, QC and with him Mr Kael London and Ms Ashellica Foy, Counsel for the Crown
Mr Terrence Williams and with him Ms Reynela Rawlins, Counsel for the 1st Defendant
Mr Israel Bruce and with him Mr Michael Maduro, Counsel for the 2nd Defendant

2022: February 2nd, 4th, 7th, 8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th, 25th
March 1st, 2nd, 3rd, 8th, 9th, 10th, 11th, 14th

RULING

- [1] **WILLIAMS J.:** Should the case against the Defendants Mr Pamphill Prevost and Mr Simon Power, be left to the jury? That is the issue to be addressed.
- [2] Counsel, Mr Terrence Williams, on behalf of the First-named Defendant, Mr Pamphill Prevost, submitted at the close of the Crown's case that there was insufficient evidence adduced against the Defendant to support a conviction. He submitted that that the case ought not to be left to the jury and that it was the duty of the Court to stop the case at this juncture. Similarly, Counsel Mr Israel Bruce on behalf of the Second-named Defendant, Mr Simon Power, contended that the Defendant had no case to answer.
- [3] The Prosecutor, Mr John Black, QC, opposed the application.
- [4] The submission of 'no case to answer' and the Crown's response were based on the *locus classicus*, **R v Galbraith** [1981] 72 Cr. App R. 124 [1981] 1 WLR 1039, [1981] 2 All ER 1060.
- [5] It is helpful to first: review the general facts of the case, consider the indictment, and review the evidence of the critical witness in the case, Mr Michael Isles, in order to provide some context for an analysis of the submissions on behalf of the Defendants and the Crown's response to those submissions.

Background

- [6] In November 2014, a team of investigators and police officers were brought to the Territory of the Virgin Islands to be a part of "Operation Lucan"; the purpose of this operation was to investigate allegations of corruption in the Royal Virgin Islands Police Force, RVIPF, during the preceding four years, that is from 2010 to 2014. Members of the team were sworn in as members of the RVIPF.
- [7] The suspects who were targeted in the 'Operation Lucan' investigation included the two Defendants, Mr Pamphill Prevost and Mr Simon Power. Another two of the six suspects in the Lucan investigation were Mr Michael Isles, the key witness in the case, and Mr Marlon Primo who also testified for the Crown in this matter. The focus of the investigation were several operations carried out by the Proactive Unit. The Defendants, Mr Prevost and Mr Power, as well as the witnesses Mr Isles and Mr Primo, were the officers assigned to the Proactive Unit when the team 'Operation Lucan' was assembled. The other two persons of interest to the Operation Lucan were Mr Shawn Henry (who is named as a co-conspirator in the indictment) and Mr Royston DaSilva.
- [8] The Proactive Unit was a small team of four to five officers who conducted intelligence-led operations primarily in relation to matters like the illegal importation of narcotics, firearms interdiction and cash seizures. While some of the team's operations were subject to detailed planning, on other occasions the team responded to unanticipated intelligence.
- [9] Mr Prevost was assigned to the Proactive Unit in 2010. He was then a Detective Constable. However, later Mr Prevost was promoted to the rank of Detective Sergeant. Mr Power was assigned to the Proactive Unit in 2012. Prior to joining the Unit Mr Power, as a member of the Marine Unit, engaged in some joint operations conducted by the Proactive Unit. He was a Detective Constable.
- [10] Two members of the Unit gave *viva voce* evidence for the Crown: Mr Primo and Mr Isles.
- Mr Primo was a member of the Unit from its inception in 2008. He remained a part of the Unit until sometime in mid-2014 when he was suspended from the RVIPF on suspicion of perverting the course of justice. His suspension related to the leaking of a recording of an interview with the witness Mr Michael Isles. Mr Primo is now a Police Constable attached to Beat and Patrol.
 - Mr Michael Isles was assigned to the Unit in January 2013 as a Detective Constable. By the end of 2013, Mr Isles became a registered Covert Human Intelligence Source, CHIS. In mid-2014, Mr Isles became a protected witness. During Mr Isles's time as a Registered Source, he never provided any intelligence to his superiors.
- [11] The other two officers in whom team Operation Lucan had an interest were Sergeant Shawn Henry and Constable Royston DaSilva. They were not members of the Proactive Unit, but for some of the Unit's operations, Sergeant Henry and Constable DaSilva were relied upon to provide assistance, even at short notice.
- [12] Neither the charges that were before the previous jury, who were the Defendants, nor what the outcome of the earlier trial were made evident in the current matter.

The Indictment

- [13] An indictment against the two Defendants was signed by the Learned Director of Public Prosecutions, Ms Tiffany Scatliffe, on the 28th day of January 2021 and filed on the 1st of February 2021. That indictment contained a total of seven counts: one count of conspiracy to steal, and six counts of theft. The pre-trial case management was conducted in keeping with the seven count indictment.
- [14] On the 1st day of February 2022, the day the trial was originally scheduled to commence, the Learned Director of Public Prosecutions signed and filed the present one count indictment. The Defendants were jointly charged with "Conspiracy to Steal: Contrary to Section 311 (1) of the **Criminal Code** 1997 of the Laws of the Virgin Islands." The six counts of theft, contrary to section 209 (b) of the **Criminal Code** 1997 were excised from the indictment.
- [15] Section 311 (1) of the **Criminal Code** states:
- "...a person who agrees with any other person that a course of conduct should be pursued which will necessarily amount to or involve the commission of an offence by one or more of the parties to the agreement if the agreement is carried out in accordance with their intention, is guilty of conspiracy to commit the offence in question." .
- [16] The particulars of the offence in the present indictment states:
- "Pamphill Prevost and Simon Power, between the 1st day of January 2012, and the 31st day of July, 2014, in the Territory of the Virgin Islands, conspired together and with Shawn Henry and Michael Isles to steal quantities of cash obtained or seized during the execution of their duties as police officers."
- [17] In summary, the Crown is saying that the Defendants Mr Pamphill Prevost and Mr Simon Power:
- (a) Conspired with Shawn Henry and Michael Isles;
 - (b) The conspiracy was to steal cash obtained or seized during the execution of their duties as police officers;
 - (c) Were part of four named persons on some unknown date between the 1st day of January 2012 and the 31st day of July 2014; and
 - (d) The conspiracy occurred in the Territory of the Virgin Islands.
- [18] The present indictment therefore differs from the previous indictment in that the Defendants now face a single count only - for conspiracy. Another difference between the present Indictment and the previous one, has to do with the number of witnesses appearing on the back of the indictment: Twenty-four witness were listed on the present indictment compared to Twenty-five on the previous Indictment. The name of the witness Mr Royston DaSilva does not appear on the present indictment.
- [19] On the 7th day of February 2022, one week after filing the new indictment and during the course of the trial, the Crown filed a Notice of Additional Evidence, listing a further seventeen witnesses to be called.

Conspiracy Defined:

- [20] The plain English definition of conspiracy is: "a secret plan by a group to do something unlawful or harmful." It is where parties agree or plot to do something.
- [21] The learned authors of **Archbold Criminal Pleadings Evidence & Practice 2015** have this to say at paragraph 33-5 about the ingredients of conspiracy:
- "The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself.... Nothing need be done in pursuit of the agreement.... It is the course of conduct agreed upon which is critical."
- [22] **Archbold 2015** at paragraph 33-8 notes:
- "The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons."
- [23] It is helpful to note some important features of a conspiracy:
- (a) It is an agreement to a course of conduct. It goes beyond a mere intention and has become an agreement. If the negotiation is not complete, there cannot be a conspiracy
 - (b) There is no requirement for any formal document to constitute a conspiracy. The agreement does not have to be written down.
 - (c) All the parties to the conspiracy need not be present at the same time of the offence in order to be guilty of conspiracy.
 - (d) All the parties to the conspiracy do not need to be in the same jurisdiction at the time the agreement is made.
 - (e) All the parties to the conspiracy do not need to know each other.
 - (f) Anyone may join or leave the conspiracy at any time.
 - (g) It is not a defence for a party to a conspiracy if the agreed course of conduct fails, or the conspirator only played a minor role, or even if the conspirators pulled out of the commission of the offence.

Jurisdiction

- [24] Section 4 of the **Criminal Code 1997** addresses 'Offences committed partly within and partly beyond the jurisdiction.' The section states:
- "When an act which, if done wholly within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or takes part in such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction."
- [25] The conversation grounding the conspiracy alleged by the Crown, involving the witness Mr Isles and the First Defendant, Mr Prevost, occurred in the Commonwealth of Dominica. The only location disclosed from direct evidence of the agreement which constitutes the conspiracy occurred outside

of the Virgin Islands. The Crown is also relying on completed acts in the Virgin Islands to establish that there was a conspiracy.

- [26] Mr Williams indicated that the defence is 'not taking the jurisdiction point', given the Privy Council's decision in **Somachai Liangsirprasert v Government of the United States and Another** [1991] 1 AC 225. In the case cited by Counsel, there was a request for extradition of named persons who were accused of, *inter alia*, conspiring to import drugs as well as trafficking in dangerous drugs. Lord Griffiths, in delivering the Board's decision, said (at page 250):

"As Lord Tucker pointed out in **Board of Trade v Owen** [1957] AC 602, inchoate crimes of conspiracy, attempt and incitement developed with the principal object of frustrating the commission of contemplated crime by arresting and punishing the offenders before they committed the crime. If the inchoate crime is aimed at England with the consequent injury to English society why should English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures? ... Furthermore, if one of the conspirators should chance to come to England, for whatever purpose, he should be liable to arrest and trial for the criminal agreement he has entered into abroad."

- [27] Applied to the circumstances of this case: even if the conspiracy occurred outside of the Virgin Islands, the fruits of it was in the Virgin Islands where the named conspirators worked. The Court therefore has jurisdiction owing to the physical presence of the Defendants.

Incidents/Overt Acts

- [28] Mr John Black, QC, when he opened the Crown's case on Wednesday, the 2nd of February 2022, stated that the Prosecution was relying on five separate incidents in the quest to prove the charge against the two Defendants. The evidence marshalled by the Crown is that sums of money would have been stolen as part of the conspiracy as follows:

- (1) The Leon King/Soper's Hole incident. On the 24th of January 2012, members of the Proactive Team acting on intelligence received, went to the Soper's Hole area where Mr King was detained with a bag containing money. There were six ziplock bags with money. When counted it amounted to \$136,620.00: bag 1, marked 30,000 had \$30,500.00; bag 2 marked 12,500 had \$14,000.00; bag 3 marked 20,000 had \$16,000.00; bag 4 marked 30,000 had \$26,000.00; bag 5 marked 30,000 had \$26,000.00 and bag 6 marked 30,000 had \$30,120.00.
- (2) The Cane Garden Bay/Elms Suite incident. On the 20th December 2012, there was a joint operation involving the police and customs to capture some illegal immigrants. A pillow case stuffed with money was retrieved. (There was no evidence as to how much money was in the pillow case from the Cane Garden Bay incident).
- (3) The Julian Benson Maduro/Fish Bay incident. On the 22nd of June 2013, Mr Maduro was intercepted at Fish Bay, after he disembarked a speed boat upon his return from St Thomas. He was found to have money in a cell phone box. When counted by the authorities at the Financial Investigations Unit, the money amounted to \$29,000.00. Some years afterwards, Mr Maduro said he had \$48,000.00 to \$50,000.00 in the box.

- (4) The Ian Phipps/Fat Hogs Bay incident. On the 10th of April 2014, the police commenced a search at the four storey premises at Fat Hogs Bay. A quantity of money was retrieved in the bushes in an adjacent lot the following day, 11th of April 2014.
- (5) The Cayman Nibbs/Frenchman's Cay incident. On the 23rd of July 2014, Mr Nibbs returned to the BVI from St Thomas aboard an inflatable rubber dinghy. After Mr Nibbs disembarked at Frenchman's Cay and was about to ride off on his scooter (motorcycle), he was intercepted by the police. A quantity of money was found in a child's knapsack that he had. The money when counted amounted to \$32,800.00. Mr Nibbs later said that he had \$42,000.00 in the bag.

[29] (In the interest of completeness, the theft charges in relation to these separate matters appeared on the indictment that was replaced at the commencement of the trial).

Michael Isles – Evidence in Chief

- [30] The evidence of Mr Michael Isles is critical to the Crown's case against the two Defendants. The Crown is relying on Mr Isles to establish that there was a conspiracy involving himself, Mr Prevost, Mr Power and Mr Henry to steal money obtained in the execution of their duties as police officers.
- [31] In late October 2013, about ten months after Mr Isles joined the Proactive Unit, he journeyed to the Commonwealth of Dominica – the land of his birth – on a charter organized by the First Defendant, Mr Prevost. Mr Prevost is also from the Commonwealth of Dominica. Besides Mr Isles and Mr Prevost, two other members of the RVIPF, police constables Marvin Robinson and Royston DaSilva, were among the people who travelled on the charter to the Commonwealth of Dominica.
- [32] Mr Isles said that he journeyed from the airport in a vehicle along with Mr Prevost and Mr DaSilva. The witness testified that the First Defendant took them "directly to Sergeant Prevost house that was under construction."
- [33] Sergeant Prevost then took Mr Isles to a compound for imported vehicles and pointed to a blue Subaru vehicle that the First Defendant, said he was in the process of getting cleared. Mr Prevost told the witness that he had received special concessions from the Government of the Commonwealth of Dominica to import the vehicle.
- [34] Mr Isles testified that a day or two after their arrival in the Commonwealth of Dominica, Sergeant Prevost accompanied by Constable DaSilva and two other persons picked him up in the blue Subaru which had by then been cleared from the customs. They journeyed to a bus stop where they started having a drink. Mr Isles said that Mr Prevost then invited him to go for a drive.
- [35] Mr Isles testified that during the drive, Sergeant Prevost said a number of things:

"Prevost told me he want to tell me something. He had been trying to feel me out for a while. He told me how he was comfortable with me. He will like to disclose something to me. He proceeded to ask me [if I know] how he got the blue Subaru. I said I assume he ordered it. He proceeded to tell me that himself, DC Power and DaSilva all had built homes and I was the only one in the Department who had not constructed a home. He proceeded to say he had formed a clique - he used the word clique – within the Proactive Unit. He proceeded to say in that group of persons – he called out the names of the persons that were in that clique. He mentioned Shawn Henry, Simon Power and himself. He said whenever intel is

disseminated to him, he took on operations involving cash money over drug operations. He said during operations involving cash, himself, Sean Henry and Simon Power would remove money from the original sum of cash that was seized. They would meet at an undisclosed location and share the money among themselves. He said money from those operations will be used to help himself Shawn Henry and Power to buy vehicles and assist in constructing their homes. He said since he felt comfortable with me he would like me to become a part of that clique."

[36] Mr Isles narrated how Mr Prevost spoke of two operations, one at Cane Garden Bay (Elms Suite Apartment) and the other involving Mr Benson Maduro.

[37] With regard to Cane Garden Bay, the witness said that Mr Prevost told him that:

"The intelligence was two pillow cases of cash were to be recovered. He said the two pillow cases of cash were actually recovered. During the search he attempted to throw one pillow case of cash out of the window to Da Silva who was waiting on the outside. He was unable to throw the pillow case out of the window because a customs officer was present in the room. He said the customs officer was Frenchie Gumbs. Prevost proceeded to explain that later that evening himself, Henry and Power met at an undisclosed location and divided a quantity of cash among themselves. He told me that proceeds from that operation, he used some of it to purchase the vehicle in question that we were sitting in. He also said that some of the proceeds were used to assist him in finishing his house in Dominica and also to assist DC Power in constructing his home in the BVI."

[38] Regarding the Mr Benson Maduro arrest at Fish Bay, when a quantity of cash was discovered inside of the cell phone box, Mr Isles said that Mr Prevost explained that:

"Detective Sergeant Henry broke the bundles of cash and separated them quickly inside of the opaque evidence bag. He said that he met at a location, undisclosed, with Sergeant Henry and DC Power sometime later and divided the cash among themselves. He said the amount of cash that Henry broke free was \$21,000.00. He said it was divided equally among himself, Shawn Henry and Power."

[39] Mr Isles said:

"The conversation continued. Prevost proceeded to tell me that on future operations I will be included in the clique. He asked me if I was willing to participate. I told him: 'Yes'. I was put in a very precarious position and I felt it was not smart to decline the offer at that time."

[40] Mr Isles testified that they then returned to the bus stop. Mr Prevost collected Mr Da Silva and the other gentleman who was left there earlier and they all proceeded to a house in Fond Cole. According to Mr Isles, while at the premises, he left the group and went out on the verandah. Mr Prevost joined him there.

"Prevost followed me to the verandah. He asked me if I had given any thought to anything he had said earlier. I said yes, I did. He proceeded to ask me: 'Are you in?' I said: 'Yes, I am in.' I was afraid of the consequences if I had said no. Prevost said to me I should keep DC Primo out of it. Do not mention anything to him, because, he said, Primo spoke too much. I agreed. I told him I will not tell Primo anything.... Da Silva was approaching us

while we were having the conversation. Prevost told me to cut the conversation when Da Silva arrived. The conversation ended."

- [41] Mr Isles said that after spending about an hour at the house, the First Defendant took him home. Mr Isles did not remember meeting up with Mr Prevost in the Commonwealth of Dominica after that. Mr Isles said he spent 3 to 4 days in all in the Commonwealth of Dominica. He said that he travelled back to the Virgin Islands along with Mr Prevost, and Officers Robinson and DaSilva.
- [42] Mr Isles said that he did not want to be a part of the clique. Further, he wanted something to be done about the theft of cash from the police Investigations. Sometime after his return, in December 2013, he contacted Detective Chief Inspector Katherine Adams. A meeting was arranged and Mr Isles informed Ms Adams about what he said Mr Prevost told him in the Commonwealth of Dominica about the theft of cash. That initial meeting lasted about half an hour. Mr Isles had a follow up meeting with DCI Adams and Mr Richard Taylor. The meeting was audio recorded by Mr Taylor.
- [43] A decision was taken at the meeting to make Mr Isles a registered CHIS. He understood his role as requiring him to make observations and report anything illegal to Ms Adams. He continued to work at the Proactive Unit. He participated in a further 3 to 4 operations by the Unit following the meeting with Ms Adams. He said that he felt uncomfortable; he was in a precarious situation as he did not know to what extent he should participate in activities.
- [44] Mr Isles remembered participating in an operation in April 2014 in Fat Hogs Bay at Mr Ian Phipps's residence. He and DC Primo did surveillance prior to the raid. A search warrant was executed and several Hispanic males were detained. He provided security for the detained persons. The premises had several floors and the search was not completed on the first day. Sometime during the night, close to midnight, Mr Isles received instructions from Sergeant Prevost to return to Mr Phipps's residence along with DC Primo to secure the premises. Prior to daybreak, he got out of the vehicle that he and Mr Primo were in and went to do a check of the building. He found a backpack containing four bundles of cash comprising USD\$1,000.00 each inside the bag. Mr Isles kept the money for himself:

"I did not tell anybody at that time what I had done. I do not know why I took the money. I took the money to my apartment and eventually spent it."

- [45] Mr Isles said that later the same day he took the money from Mr Phipps's residence, (in the afternoon), he was directed to go to the Road Town Police Station to assist with interviewing Mr Phipps and some other persons who were detained. After doing the interviews, he proceeded to the Proactive Team Office:

"I met with Power and Prevost. I do not recall if I got there first or if I met them there. While there Sergeant Prevost had in his possession three exhibit bags containing cash. I asked him if that is all the cash recovered from the Phipps residence. He said 'yes'. I asked him if he is going to share any of the cash with myself and DC Power. I don't remember his response at the time. He proceeded to break the seal of the exhibit bag containing the cash. I cannot say for sure if there were two or three bags. He proceeded to remove a quantity of cash from one of the exhibit bags and place it on my desk, made up of US denomination, \$100.00 bills. Small bundles. I counted it and it was \$1,000.00. He proceeded to break another bag and put a bundle of cash on Power's desk in front of him. He broke the 3rd bag with a bundle of cash and kept it. I asked him if that was it. He proceeded to tell me the

bags containing the cash had already been photographed by Forensics. I kept the cash that was placed in front of me."

- [46] Mr Isles then went on to describe his involvement along with Mr Prevost, Mr Power and Sergeant Henry at Frenchman's Cay when Mr Cayman Nibbs was arrested. The suspect had a back pack:

"I asked him what was inside of the back pack. He said \$42,000.00. I asked him what the cash was for and where did he get it. He said it was from sales of either vehicles or motor cycles. I was instructed by Sergeant Prevost to secure the cash, which at the time was in a yellow plastic bag, in a police vehicle – the pickup truck, a Nissan Frontier. I walked over to the vehicle opened the right rear passenger door and placed the bag containing the money on the back seat... The bag was on the back seat when I left the vehicle. The door was opened because Sergeant Henry was standing right there."

- [47] The witness said that after performing some other duties, Sergeant Prevost said that he wanted to do a video recording with Mr Isles securing the exhibit in the presence of Mr Nibbs. Mr Isles said that he found that rather unusual, because they were not in the habit of doing video recordings on a scene securing evidence. Mr Isles said:

"The day following the Nibbs incident, I had a conversation with Detective Constable Theophile. I called Detective Chief Inspector Adams. I spoke with her. I left the BVI."

- [48] There were differences between the testimony of Mr Isles and the other Prosecution witnesses. The Prosecutor indicated that a jury is entitled to accept Mr Isles's recollection of the facts. Some of the notable differences were:

(1) Mr Isles said that in the Cayman Nibbs incident it was Sergeant Henry who placed the money in the evidence bag; Mr Maduro said it was "the young officer."

(2) Mr Isles is the only witness in the Cayman Nibbs incident who describes the evidence bag the cell phone box from Mr Nibbs with the money was placed in as being "opaque". Officer Primo described the bag as being sealed in the presence of the suspect.

(3) Mr Isles is the only witness who mentions the intelligence regarding the Cane Garden Bay incident as being about money rather than apprehending illegal immigrants.

(4) Mr Isles is the only witness who refers to there being two pillow cases of money at the Cane Garden Bay incident, rather than one.

Cross Examination of Mr Isles

- [49] Mr Isles agreed that he was a thief before he became a protected witness. Stealing however was not in his nature. He disagreed that he had a dishonest side quite apart from being an ambitious person, but agreed that he did dishonest things sometimes. When he reported to DCI Adams about his conversation with Mr Prevost, he deliberately did not tell her about his dishonesty. He appreciated that Ms Adams was in a position of trust and was relying on him to be an honest man. He agreed that he also had a duty to "come clean" before he got protection and also had a duty to "come clean" whilst he was a CHIS. He agreed that he deliberately did not disclose his transgressions and that he deceived DCI Adams. He agreed that Mr Prevost as his supervisor and Mr Mark Hughes who was above Mr Prevost trusted him to do his work honestly, but he deceived

them too. He said that he did not disclose to the authorities that he stole money at the Phipps residence until he was put in protection.

- [50] Mr Isles denied that he told Mr Allan Beach that he seized an additional \$2,000.00 from the Spanish-speaking suspects who were at Mr Phipps's house. He was shown a document that was previously marked for identification; he then agreed that: "I may have said I took a further \$2,000.00 from another suspect." He said that Mr Prevost told him to give back the money to the suspect. Mr Isles was asked whether in the space of 24-hours, he benefitted by \$10,000.00 from the Phipps incident which was about one-third of his yearly salary. Mr Isles said he did not know how to answer that question. He however agreed that he benefitted materially and unlawfully from the Phipps incident.
- [51] Mr Isles was questioned as to where the exhibit bags were on the night of the 11th of April 2013. In his evidence in chief, Mr Isles said that after completing the interviews at the Road Town Police Station, he went to the Proactive Unit office where he met Mr Prevost and Mr Power and that Mr Prevost had the exhibit bags in his possession. In cross examination Mr Isles acknowledged that in fact he had the exhibit bags with the money with him at the Road Town Police Station during the time he was interviewing the suspects. Those interviews went on until 11.30 pm. Mr Isles however could not remember if he was the one who took the bags to the Proactive Unit office.
- [52] Counsel Williams questioned the witness about the inter-personal relations at the Unit. Mr Isles said that in his view there was a separation in the office: Mr Prevost and Mr Power being aligned, and so too he and Mr Primo. He thought that Mr Power was getting more cases than he was; he also indicated that Mr Power and Mr Prevost went abroad do courses abroad but he did not get to go. He accepted that he may have said that there was a local preference for Mr Power and that they were pushing him up. He may also have said that he did not even know if Mr Power passed probation and how come Mr Power got a position. Mr Isles denied that he was vexed with Mr Prevost for a variety of things, but he blamed Mr Prevost because he got reprimanded by Mr Hughes for leaving the territory and leaving the office short-staffed. He may have also said something when DC Primo was reprimanded for bringing a lady to the office, and may have said how come Mr Prevost does not get caught and reprimanded when young ladies visit him. He did not like how Mr Prevost managed the Unit's vehicles. He and Mr Primo talked about what they did not like about Mr Prevost. Mr Isles said it was not correct that while in the Commonwealth of Dominica in 2012, Mr Prevost spoke to him about getting close or fresh with Mr Prevost's sister – he however knew which sister Counsel was referring to.
- [53] It was suggested to Mr Isles that he was wrong, when he testified that Mr Prevost returned from the Commonwealth of Dominica on the same flight with him. He said he could not remember if Mr Prevost did so. Mr Isles could not remember either whether it was Sergeant Henry who was in charge of the Proactive team when he returned to the Virgin Islands from the Commonwealth of Dominica.
- [54] Mr Isles agreed that what Mr Prevost said to him in the Commonwealth of Dominica was "shocking news" and he also agreed that as a policeman, it was his duty to report it immediately, because it was serious misconduct. He agreed it took him two weeks before he spoke with DCI Adams. He denied that when he spoke with Ms Adams it was to 'curry favour' for his own advancement, or that he wanted to be the person in charge of the Unit, or that he thought that he was brighter than Mr Prevost, or thought that Mr Prevost had no right to be higher than him. He maintained that he did have the conversation he testified about with Mr Prevost in the Commonwealth of Dominica. Mr Isles said when he spoke with DCI Adams, his hope was that an investigation would begin; he was

disappointed that it did not happen, instead Mr Prevost was sent on more overseas courses. He agreed that he may have said on a previous occasion that he stole some of the money because he was disappointed in DCI Adams.

- [55] Mr Isles said he remembered Mr Prevost using the word "clique" (that is in reference to the conspiracy). Everything, he said, was imprinted on his mind. Questioned further, Mr Isles said he "may have said to the last jury the word imprinted was team."
- [56] The witness recalled saying that Mr Prevost told him that the proceeds from the Cane Garden Bay incident was used to buy the blue Subaru car. He agreed that he did say to DCI Adams and Mr Taylor that Mr Prevost told him it was the proceeds from the Benson Maduro incident that was used to buy the car. He said he did not know if both could be true. He denied that he made up the story and forgot part. Eventually he said that he was not sure if it was the proceeds from the Benson Maduro or Cane Garden Bay incidents.
- [57] With regard to the sequence of events, Mr Isles agreed that after he made the report to DCI Adams, that she wanted to do more inquiries first. "Before those inquiries were completed, I was taken into protection. It happened suddenly." Mr Isles agreed that while he enjoyed the status of a CHIS, he stole money from the Phipps incident. He then proceeded on vacation. When he returned, there was the Cayman Nibbs incident and Mr Prevost was filming what was taking place. The interview that he had with DCI Adams was leaked and he was put in protection after that. Mr Isles was aware that one of the persons who improperly accessed the content of the meeting was his friend, DC Primo.
- [58] Mr Isles acknowledged that he gave a written statement in the Benson Maduro incident soon after it occurred. "I may have said the phone box was put in a transparent evidence bag. I told the jury it was placed in an opaque bag." He agreed with Counsel that he said the bag was opaque because the story could not work if he said the phone box with the money was put into a transparent bag and for his story to make sense, the bag had to be opaque. Mr Isles went on to say that his statement which said that it was a clear plastic bag was not true. It was inaccurate. A lie.
- [59] In relation to the exhibits from the Phipps residence, Mr Isles said that the money remained with the Proactive Team over the weekend. The Financial Investigation Unit was not available on the weekend to count the money and take custody of it. After the seals of the evidence bags were broken and the cash distributed, he did not inform DCI Adams when it occurred and while the evidence of the bags with the broken seals were still at the Proactive Unit. Mr Isles agreed that he spent the weekend searching for similar looking evidence bags; he was instructed to do so. He put the money into the new bags.
- [60] Mr Isles recalled that at the last trial he said that the opening of the bags occurred around seven or eight o'clock on the night of the 11th of April 2013. He said he may have been inaccurate. Mr Isles was shown his witness statement and he agreed that he was in fact at the Road Town Police Station that night from 5.50 pm up until 11.30 pm interviewing the suspects. Following that, he spent 30 minutes writing his statement.
- [61] Regarding his role as a CHIS and now as a protected witness, Mr Isles agreed that he was being dishonest to Ms Adams and the Royal Virgin Islands Police Force. DCI Adams had given him instructions about what to do:

"She told me that what I had to do was come back and tell her. I was given immunity when I went into protection. I was told if I gave evidence in accordance with my statement I would escape charges for my crimes. I was required to come clean. I didn't come clean at the time."

- [62] Mr Isles agreed that there came a point when he was told it was his "last chance" to speak of his crimes. He agreed that he has no incentive to tell of any other crimes he may have done, because he will be in trouble. He agreed that it was better that he kept it all to himself.

Further Cross Examination

- [63] Mr Isles in responding to questions from Mr Bruce, acknowledged that his statement written in the Benson Maduro matter was written one day after the incident. He said that his recollection nine-years afterwards that it was an opaque evidence bag in which the box with the money was placed rather than a transparent evidence bag was what transpired.

- [64] With regard to the exhibit bags with the money from the Phipps incident, according to Mr Isles:

"I can say that I had the moneys with me in the interview room until the interviews were over. I did not leave the money at the Road Town Police Station... I do not remember if I left the Road Town Police Station with the money."

- [65] Mr Isles maintained that when he went to the Proactive Unit office the bags were handed to him by Mr Prevost. "I was not the only one with the bags," Mr Isles said. Mr Isles agreed that he assisted with doing all of the interviews; when asked about how he was able to find himself in both the Road Town Police Station and the Proactive Unit office which was about a mile away, he said that he did not know.

- [66] Mr Isles agreed with Mr Bruce on a number of things: that it was not right to steal money and remain a CHIS; he should have asked them to remove him as a CHIS; he deceived the officers of the Cayman Islands Police Force; he deceived the Royal Virgin Islands Police Force; he deceived DC Primo; he deceived his mother with his conduct.

- [67] With regard to the Cayman Nibbs incident, Mr Isles said:

"I put the money in the pickup truck. I opened the bag [Nibbs's bag] to be able to see the money inside it. I can't remember if I said [in my statement] I tied it back and put it in the pickup truck. I didn't see any of the officers take any money. I opened the bag twice. I saw Henry opened it. He didn't take anything from the bag."

- [68] The cross examination of Mr Isles was rounded off with the witness agreeing:

"Some aspects of my statement were inaccurate. Some aspects of my evidence were not in keeping with my statement. I know that not giving evidence in keeping with my statement is violating the agreement."

First Defendant's Propositions

- [69] Counsel Williams listed the propositions which formed the bedrock of his submission on behalf of Mr Prevost as:

- (1) The Crown's case at its highest does not make out a case of conspiracy in accordance with the indictment.
- (2) Without the evidence of Mr Isles, there is no case of any criminal conduct at all, whether for the offence indicted or any not indicted.
- (3) (a) The evidence of Mr Isles is of a type that judicial experience has shown in the current circumstances that it must not be relied upon;
(b) Mr Isles's evidence has been so discredited that it should not be left to the jury.
- (4) The Crown has lead prejudicial evidence that would vitiate any conviction. The case should therefore be stopped at this stage. This prejudicial evidence comprised:
 - (a) Evidence lead as supposedly overt acts of the conspiracy which failed in that purpose, those being the Leon King, Cane Garden Bay (Elms Suite) and Cayman Nibbs. Those overt acts were purely prejudicial.
 - (b) The opinion evidence of Mr Adrian Dale – based on the authorities - ought not to have been lead by the Crown as the authorities show. If the case was to go to the jury, the fact finding body would have to be told to disregard it. However the evidence looms so large that it is practically impossible to tell the jury to disregard it. It has tainted the entire case.

Second Defendant's Challenges

[70] Mr Bruce indicated that on behalf of Mr Power the particular concerns were:

- (1) The admissibility of the evidence of the Mr Michael Isles
- (2) Whether the evidence was qualitatively and quantitatively sufficient
- (3) The fact that the witnesses for the crown all describe Mr Power as conducting himself in a professional manner.
- (4) The absence of independent evidence to make what Mr Isles said he was told by Mr Prevost admissible against the Second Defendant.

[71] Mr Bruce noted that while on behalf of the Second Defendant he was submitting principally that the Crown has failed to prove an essential element of the offence, he was also saying that the evidence lead was weak, tenuous and discredited.

Crown's Submissions

[72] Mr Black, QC, submitted that there was sufficient evidence for the case to go before the jury.

[73] Mr Black, QC, noted that the "caution of Caribbean jurisprudence" was similar to the position in the United Kingdom. Counsel referred to the learning in **Archbold 2022** towards the end of paragraph 4-365, citing **CPS v F** [2011] EWCA Crim 1844, [2011] 2 Cr App R 28. [2011] WL 2747935 states that:

"...the judge must bear in mind the constitutional primacy of the jury and not usurp their function; to this end expressions such as 'safe to convict' or 'safely left to the jury' should be avoided; the safety of a conviction, if there is one, is a separate one, and one for the Court of Appeal only."

- [74] The Prosecutor stated that it was only in rare or exceptional cases that the Judge's authority is exercised to stop the case under the second limb of **Galbraith**. Mr Black said that things such as lies and inconsistencies are matters for the jury to resolve; this was so, he said, even if the evidence was in some respects unsatisfactory. A judge, he said, ought not to usurp the functions of the jury.
- [75] Queen's Counsel noted that the cases for each Defendant had to be looked at separately, as the two cases did not stand or fall together, even though there were similarities.

No Case – The Test

- [76] The foundation of the no case to answer test is to be found in the judgment of Lord Lane, CJ in **R v Galbraith** [1981] 72 Cr. App R. 124 at 127.

“How then should the judge approach a submission of no case?

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty – the judge will stop the case.

“(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

“(a) Where the judge concludes that the prosecution's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

“(b) Where however the prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...”

“There will of course, always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

- [77] Mr Williams also referred to the learning in **Blackstone's Criminal Practice 2022**. Counsel referred to paragraph D 16.56:

“However, the second limb of the Galbraith test does leave a residual role for the court as assessor of the reliability of the evidence. The court is empowered by the second limb of the Galbraith test to consider whether the prosecution's evidence is too inherently weak or vague for any sensible person to rely on it. Thus, if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness's evidence, and therefore (in the absence of any other evidence) there is no case to answer.”

- [78] Mr Williams then referred to paragraph D 16.58 of **Blackstone's**:

"The following propositions are advanced as representing the position that has now been reached on determining no case to answer:

- (a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.
- (b)
- (c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value...
- (d) The question of whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone."

Conditional Immunity

[79] On the 15th of October 2014, Mr Michael Isles signed an agreement accepting the conditional immunity provided by the Director of Public Prosecutions. The document (which was not before the jury) stated:

"1. That the said Michael Caesar Isles discloses to the investigators every criminal offence in which he has been involved.

"2. That the said Michael Caesar Isles discloses the identity of all persons whom he knows or reasonably believes to have been involved in the said offence. (sic)

"3. That the said Michael Caesar Isles makes full witness statements and/or recorded interviews in relation to each and every offence disclosed, describing in detail the parts played by each participant including himself.

"4. That every such recorded interview and witness statement shall be true to the best of the knowledge and belief of the said Michael Caesar Isles.

"5. That the said Michael Caesar Isles gives evidence in accordance with his witness statements and recorded interviews when required to do so.

"This undertaking will be withdrawn in the event of a deliberate breach of any of the conditions and not otherwise."

[80] Mr Williams submitted that evidence received pursuant to a conditional immunity "is of a type that the accumulated experience has shown to be of doubtful value." Counsel referred to **R v Eiley and Others** [2009] UKPC 40, [2009] 76 WIR 179, at paragraph 49:

"A judge enjoys a discretion to exclude evidence if the circumstances in which it has been obtained are such as to render its admission contrary to the interests of justice. One circumstance where it may be appropriate to do so is where the witness has received an inducement to give evidence for the prosecution that will render the evidence suspect – see *R v Turner* (1975) 61 Cr App R 67 at 78. The discretion is one that should be used sparingly.

Such promises, when made to an accomplice to a crime, have been described as distasteful.”

Conflict of Interest

- [81] Mr Adrian Dale came to the BVI in 2008 after working as a police officer for thirty years in the United Kingdom. He testified initially in relation to his work as the head of the Financial Investigation Unit. Operation Lucan provided Mr Dale with certain financial records relating to the Second Defendant and a property comprising two two-bedroom apartments that Mr Power was building in 2013. The purpose of giving Mr Dale the documents was for him to do an analysis of Mr Power's income and expenditure particularly in the period January to May 2013. Following an application by the Crown, Mr Dale was deemed an expert in the field of Financial Investigation.
- [82] In cross examination, Mr Dale readily accepted a number of propositions from both Counsel for the Defendants. The concessions included: that it was an ethical challenge for him to give expert evidence in the circumstances; his status as a Certified Financial Investigator in the UK had lapsed since he left in 2008; he has not been engaged in any current training in the field; he did not receive the additional documentation he required concerning Mr Power; that his report which said Mr Power had unexplained income of \$65,000.00 was deficient; and he agreed that the deficit could be accounted for by applying the sources described by counsel.
- [82] Counsel Bruce also questioned Mr Dale about “confirmation bias.”
- [83] **Blackstone's 2022** at paragraph F11.7 was cited by Mr Williams:

“In **Toth v Jarman** [2006] EWCA Civ 1028, [2006] 4 All ER 1276, it was held that, although a conflict of interest does not automatically disqualify an expert, where the conflict is material or significant the court is likely to decline to act on the expert's evidence or indeed to give permission for the evidence to be adduced. It is therefore important that the party who wishes to call an expert with a potential conflict of interest of any kind – including financial interest, a personal connection or an obligation... - should disclose the details to the other party and to the court at the earliest possible opportunity... If there is a relationship between the proposed expert and the party calling him or her which a reasonable observer might think was capable of affecting the views of the expert so as to make the expert unduly favourable to that party, the evidence should be excluded, however unbiased the conclusions might be, on the grounds of public policy that justice must not only be done but must also must be seen to be done (**Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (N0. 2)** [2001] 4 All ER 950).”

Non-Participation

- [84] Mr Bruce contended that in the absence of any direct evidence of any conspiracy the Crown was relying on the five incidents and Mr Power's finances to prove participation a conspiracy. Counsel pointed out that mere presence at a scene, or even knowledge of a conspiracy, or approval of the conduct, do not amount to being a part of the conspiracy. Mr Bruce said that it must be proved that the Second Defendant knew of the goals and objectives of any conspiracy and went on to join it.

- [85] Mr Bruce pointed to the American case of **US v Korey** 472 F.3d 89 (3rd Cir 2007) for the proposition that "there must be intentional participation by the defendant in the specific conspiracy charged, with a view to furthering the common design and purpose of the conspiracy."
- [86] Counsel for the Second Defendant said that while he believed the case ought to be stopped against Mr Power on the first limb of Galbraith, because of the inconsistencies and tenuous nature of the Crown's case, the Judge ought to intervene.
- [87] According to Mr Bruce, the combined effect of the failure to prove individual elements of the overt acts, together with the absence of independent evidence of a conspiracy, along with the opinion testimony about Mr Power's finances created undue prejudice to Mr Power. Counsel referred to what Mr Justice Jackson said in **Krulewitch v United States** 336 US 440 (1940):

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naïve assumption that prejudicial effect can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction."

Crown's Response to Mr Prevost

- [88] Mr Black submitted that if the jury accepted the evidence of the witness Mr Isles, the case against the First Defendant was a strong case. The evidence to which Mr Black referred included Mr Isles's testimony that Mr Prevost said a number of things to him while they were vacationing in the Commonwealth of Dominica; and that Mr Prevost opened the evidence bag with money taken from Mr Ian Phipps's residence at the police station and distributed stacks of money.
- [89] Mr Black noted that there was no requirement in law for there to be corroboration of evidence from an accomplice. He used the term "a substantial body of supporting evidence" rather than "corroboration" to describe the other bits of evidence that a jury can look to.

Overt Acts

Cane Garden Bay/Elms Suite Apartment Incident:

- [90] Mr Williams on behalf of the First Defendant said there was no evidence of theft. That the Crown's case was that the pillow case appeared on the night to be fuller than what was eventually presented. The Crown's case was undermined by the photograph it tendered of the pillow case in situ and Senior Customs Officer Frenchie Gumbs directing that the money must travel with the prisoners. The Crown could not show that money was missing.

- [91] Mr Bruce noted that this was an intelligence driven operation; the intelligence concerned illegal immigrants. The operation was not about money. He was of the view that if money was in fact stolen by some unknown person, it was a crime of opportunity not evidence of a conspiracy. The Second Defendant's conduct, he said, was always consistent with the objectives of the mission. Mr Power pursued and captured one of the targets who had escaped.
- [92] Mr Black stated that the fact finding forum could rely on several bits of evidence as supportive of the Crown's case:
- (1) The fact that there was an operation in Cane Garden Bay;
 - (2) Both Mr Prevost and Mr Power were there;
 - (3) A pillow case containing cash was recovered;
 - (4) The fact that the customs officer Mr Frenchie Gumbs was present when the cash was discovered as Mr Isles stated he was told by Mr Prevost;
 - (5) Evidence which if accepted from Inspector of Police Ivo Fraser and former Customs Officer Mr Gurvin Stoutt saying that they saw cash on the counter in the apartment.
- [93] (It is noted that the last point of cash being on the counter was disputed by the other witnesses for the Crown who were present as well as being contrary to the photographs from the scene tendered by the Crown).

Julian Benson Maduro/Fish Bay Incident

- [94] Counsel Williams stated that Mr Isles twisted his evidence at trial to say that the money was in an opaque bag. Everyone else said it was a transparent evidence bag except for Mr Isles. Counsel also noted that with both Mr Maduro and Mr Nibbs, were clearly couriers and a part of a drug trafficking operation. They mixed truth with lies and pretended not to be involved in drug trafficking operations.
- [95] Mr Bruce relied on the testimony elicited from Mr Maduro that the Second Defendant conducted himself throughout as a professional policeman.
- [96] Mr Black said that support for conspiracy in the Mr Benson Maduro Incident at Fish bay came from:
- (1) The fact that there was an incident;
 - (2) Both Mr Prevost and Mr Power were there;
 - (3) A jury could conclude that it was Officer Henry who placed the cash in the bag and sealed it;
 - (4) Evidence of Mr Maduro who claimed that he brought in \$48,000.00 to \$50,000.00 and the actual count being \$29,000.00. When the figure of \$21,000.00 is added to the actual count it comes up to the sum Mr Maduro said he had.

Ian Phipps Residence/Fat Hoggs Bay Incident:

- [97] Mr Williams pointed to the questions which emerge from the video recordings tendered by the Crown. He noted that at one stage the Scene of Crimes Officer, Mr Lesroy Simmons, who previously had custody of the bags is seen "hands free". He asked: "What became of the bags?" Counsel said that the individuals who had an opportunity to steal were Mr Isles, Officer Simmons and the person with whom Mr Simmons left the bags. Mr Williams noted that the Crown could not say at what time on the 11th of April 2014 the sharing of money by Mr Prevost took place at the Proactive Unit office as Mr Isles testified, as the exhibit bags with the money were elsewhere – at the Road Town Police

Station – with Mr Michael Isles, as he interviewed the suspects up until 11.30 pm. Mr Williams submitted that even if money was in fact missing, the person with the opportunity to steal the money was Mr Isles.

[98] Mr Black said that support that the money from Mr Ian Phipps incident was distributed at the police station pursuant to the conspiracy came from:

- (1) Acceptance of the evidence of Mr Allan Beach who looked at enlargements of photographs taken by Inspector Lesroy Simmons of the evidence bags and spoke of the number of stacks he could identify;
- (2) The evidence of Mr Adrian Dale that one of the bags contained 35 stacks and not 42 as Mr Beach said he counted.

Cayman Nibbs/Frenchman's Cay Incident:

[99] Counsel for the First Defendant noted that Mr Nibbs was a witness who undermined his own testimony by conceding his perjury. Counsel said that Mr Isles who had custody of the suspect's bag had the opportunity to steal the money. Mr Williams said that if Mr Isles stole the money from Mr Cayman Nibbs, the Crown would have to show Mr Isles distributed it in order to prove confederacy.

[100] Mr Black said that support for the Mr Cayman Nibbs incident came from:

- (1) The departure from the practice of separating the suspect from the cash when the police vehicle the suspect was in was temporarily relocated;
- (2) The money was not put into an evidence bag until the suspect was brought back to the scene;
- (3) Following the counting of the cash, there were "rumblings that some money was missing."

[101] Queen's Counsel said that it was not an overwhelming inference to be drawn, but the question to be asked was: Could a jury reasonably conclude that money was taken as part of a conspiracy?

Leon King/Soper's Hole Incident:

[102] Mr Williams said that one needed to only compare what the Prosecutor said they were going to prove with the evidence the Crown ultimately adduced in relation to this matter. Mr Williams pointed to what the Scenes of Crimes Officer Mr Forbes Washington said he did at the scene. Mr Washington took the ziplock bags with the money out of the canvas bag and passed them to unknown officers who were behind him to hold, as he photographed the exhibits. The evidence from former Detective Chief Inspector Hughes was that the money was in an exhibit bag and taken to the station by Mr Prevost along with the suspect. Mr Hughes's evidence was that the exhibit bag was sealed, otherwise he would have accompanied the bag. Mr Williams noted that:

- (1) The Crown could not show that the Leon King exhibit bag was not sealed;
- (2) The Witness Mr Dale could not say what the numerals on the ziplock bags meant;
- (3) The improper handling of the exhibit commenced with the Scene of Crime Officer Mr Washington. (It is noted that Mr Washington when summoned, journeyed to Soper's Hole in a Scenes of Crime Vehicle and did not have any exhibit bag with him).

(4) The possibilities are that no money was stolen; or if money was stolen, it was not necessarily by virtue of a conspiracy;

(5) Among the officers who were behind Mr Washington to whom he passed the ziplock bags with the money and therefore had an opportunity to steal were Mr Theophile and Mr Hughes and other persons unknown. Mr Williams noted that the conspiracy indicted by the Crown named four specific persons and does not say "other persons unknown."

[103] Mr Bruce noted that commencing with the Leon King incident, the Crown was not in a position to prove that Mr Power had any knowledge of any plan, or had any intent to participate in any conspiracy. This was an intelligence driven operation by the Proactive Unit. Mr Power was not a member of the Proactive Unit at that time; he was with the Marine Unit and only attended the scene when instructed to do so to take the boat to Road Town.

[104] Mr Black said that the Crown was not in a position to suggest that the Second Defendant, Mr Power, was a part of the Leon King incident. Prosecuting Counsel did not accept however that the incident was outside of the conspiracy as indicted. Mr Black said that the jury could find supportive evidence from the following:

- (1) Mr Prevost and Mr Henry had control of the evidence bag with the money;
- (2) The overlays of the bags done by Mr Morris suggests money was removed.

Crown's Response to Mr Power

[105] Mr Black said that the assessment for Mr Power had to be done separately and the outcome need not be identical to that for the First Defendant. Counsel said that it was up to the jury to come to a conclusion that Mr Power was a part of a conspiracy based primarily on the evidence of Mr Isles. He said that support could be found:

- (1) In the circumstances outlined previously regarding the Mr Cayman Nibbs incident;
- (2) If the jury believed that there was distribution of money to Mr Power from the Mr Ian Phipps's evidence bag;
- (3) In the evidence [in chief] of Mr Adrian Dale regarding unexplained income. (It is noted that Mr Dale conceded that there was a gap in the financial information provided to him when he made his conclusion and that information needed that he regarded as significant was never provided to him by the Operation Lucan team).

[106] Regarding the testimony from Mr Isles of the First Defendant mentioning Mr Power's name during the conversation they had in absence of Mr Power, the Prosecutor stated that the conversation in the car was to further the common design. He noted that while ordinarily things said or acts done in the absence of a co-accused are not normally admissible, in particular circumstances, they can be.

[107] **Archbold 2022** at paragraph 33-66 states:

"It is a matter for the trial judge whether an act or declaration is admitted to prove the participation of another. The judge must be satisfied that the act or declaration was made by [by the] conspirator, that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement.

In determining whether there is a common purpose so as to render the acts and extra-judicial statements done or made by one party in furtherance of the common purpose evidence against the others, the judge may have regard to such acts and statements, although their admissibility is in issue, as well as other evidence. It is an example of conditional admissibility in that it makes no difference which is adduced first, but it follows that if in the result there is no other evidence of common purpose, the act or statement will have to be excluded."

Who Were The Conspirators?

[108] Mr Williams contended that the Crown has not met the case as stated on the indictment. Counsel adopted the words of McCombe LJ in **R v Mehtab** [2015] EWCA Crim 1665, paragraph [22] that: "the Crown did not adduce sufficient evidence to establish the [defendants'] complicity in this conspiracy as indicted." Mr Williams noted that the Crown specified a time period and relied on five overt acts. However, in his view, the Crown could not prove that the Defendants were a part of any confederacy in 2012.

[109] Mr Williams relied on **R v Mehtab** as the authority for his proposition that the defence need to only show that it was "equally likely" that there was another conspiracy besides the one indicted. At paragraph [19] in **Mehtab**, Lord Widgery CJ is quoted as stating in **R v Greenfield** [1973] 1 WLR 1151, at 1156H – 1157A:

"...at the end of the prosecution's case the evidence may be as consistent with defendants, or some of them, having been members of a conspiracy which was not the one charged as with the one charged. In such a situation the trial judge should rule that there is no case to answer."

[110] The indictment as presented names four conspirators. The evidence the Crown lead through Mr Isles points in some ways to a conspiracy involving Mr Royston DaSilva.

[111] According to Mr Isles, during the conversation in which Mr Prevost extended an invitation to join "the clique", the First Defendant said "that himself, DC Power and DaSilva all had built homes and I was the only one in the Department who had not constructed a home." Then later on, Mr Isles went on to say that when the First Defendant spoke of the Cane Garden Bay incident: "He [Mr Prevost] said that... he attempted to throw one pillow case of cash out of the window to DaSilva who was waiting on the outside."

[112] As stated earlier, Mr DaSilva was listed as a witness on the original indictment but removed on the 1st of February 2022. However, a number of issues arise from the aspect of Mr Isles's testimony referring to Mr DaSilva:

- (1) While Mr DaSilva worked along on Operations with the Proactive Unit, he was never identified as a member of the Unit except for the reference in Mr Isles's testimony when he said that Mr Prevost spoke of members of the Department who built houses.
- (2) In addition to the reference of Mr DaSilva building a house, Mr Isles testified that he was told that Mr DaSilva was waiting at Cane Garden Bay to collect money which was to be thrown to him. These point to an involvement in an enterprise.

- (3) On the day that Mr Isles said the First Defendant spoke with him, Mr DaSilva was also in the Commonwealth of Dominica, but, according to Mr Isles, Mr Da Silva was left at the bus stop while he [Mr Isles] and Mr Prevost went for a drive during which joining "the clique" was discussed.
- (4) After Mr Prevost returned to the bus stop and picked up Mr DaSilva they all went to someone's house. Mr Isles said the First Defendant then spoke to him on the verandah asking him whether he thought about their earlier conversation and if he was "in". However, as Mr DaSilva approached where they were, Mr Prevost "told me to me to cut the conversation."
- (5) Why would Mr Prevost take steps to keep Mr DaSilva out of the conversations with Mr Isles about "the clique" by first leaving Mr DaSilva at the bus stop to go for the drive and then instructing Mr Isles to "cut the conversation" when Mr DaSilva approached them on the verandah if Mr DaSilva was in fact a beneficiary and participant in the confederacy? Does this make sense?
- (6) Were there efforts to keep away the man who had allegedly built a house from proceeds of operations and was to catch the bag at Cane Garden Bay from a discussion in furtherance of the conspiracy? Was is that "the clique" was therefore a new and separate conspiracy going forward?

Rolled Up Acts

- [113] Mr Williams stated the principle that once there is evidence of a completed acts, that the Crown ought not to charge a conspiracy – which is an inchoate offence – but rather for the completed offence.
- [114] Here, all the counts relating to the competed offences were removed from the indictment.
- [115] The learned authors of **Archbold 2022** under the rubric: 'Whether to include a count for conspiracy', state at paragraph 33-60:

"The question of whether a conspiracy charge is properly included cannot be determined by the application of any rigid rules. Each case must be considered on its own facts.... Subject to that caveat, the general principles governing the desirability or otherwise of including a count for conspiracy in the indictment may be summarized as follows:

- (1) As a general rule where there is an effective and sufficient charge of a substantive offence, a charge of conspiracy is undesirable....
- (2) There are exceptions which include the following:
 - i. Cases of complexity in which the interests of justice can only be served by presenting to a jury an overall picture which cannot be achieved by charging a relatively small series of substantive offences... The indictment ought to include charges which simplify the issues, shun complexity and avoid a multiplicity of counts. Sometimes, a charge of conspiracy may be the simpler way of presenting the case or reflecting the overall criminality of the case.
 - ii. Cases in which a general conspiracy, e.g to steal, is likely to be inferred by the jury from the evidence but in which the

particular acts constituting the thefts may only be supported by rather nebulous evidence.... Where there is clear evidence of conspiracy but little evidence that any of the overt conspirators committed any of the overt acts, a count for conspiracy is both justifiable and necessary. Where there is evidence that some, but not all, of the defendants committed a few, but not all of the overt act, a count for conspiracy is justified...

- iii. Cases where the agreement to commit the offence is itself more wicked than the act. Thus the conspiracy to desecrate a Jewish cemetery could be charged although, when the agreement was carried out, the amount of damage caused rendered the substantive offence of criminal damage triable only summarily."

[116] The Crown was not required to state which exception enumerated in **Archbold** informed its decision-making.

[117] Mr Williams referred to **R v Davey** [1960] 3 All ER 533 where it was held that "the count of conspiracy was bad in that separate conspiracies were charged thereby as one conspiracy." In that case, "some of the alleged conspirators did not come into the picture until after that date. It was what one might call a 'rolled up' charge of conspiracy. It may well be that it would have been possible to allege a number of separate conspiracies between certain of the seven persons named." (page 560 C-D)

[118] Mr Williams quoted extensively from another case, **R v Dawson** [1960] 3 All ER 163 (and which was also referred to in **Davey**). In **Dawson**, at page 170, it says:

"This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is generally undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible."

Curing Prejudicial Evidence

[119] In response to Mr Williams' submission on prejudicial evidence being lead, Prosecuting Counsel submitted that if in fact there was prejudicial evidence lead in the case, the remedy was not to uphold a no case submission. Mr Black stated that prejudice can be cured by:

- (a) directions;
- (b) discharge of the jury, or
- (c) a stay of proceedings.

Good Character

- [120] A jury is given a direction on the “good character” of a Defendant when appropriate. The two limbs of a “good character direction” address credibility and propensity. It must be given in appropriate circumstances.
- [121] A full good character direction to the fact finding forum would arise in this case. This is so because at least two of the Crown’s witnesses, Mr Maduro and Mr Nibbs were of bad character; they were central to aspects of two of the allegations against the Defendants; and when they were cross examined may have departed from their original evidence. A third witness and the crucial witness, Mr Isles, was shown to have a number of flaws when it came to honesty and he is the one who grounds the allegation against the Defendants. On the other hand, both Defendants elicited evidence from Prosecution witnesses of their character and record. Evidence was also lead of their awards and commendations that were issued by the Police High Command in 2013 and 2014 – Mr Prevost for Outstanding Bravery, Professional Conduct, Exemplary Leadership and Exemplary Policing; Mr Power, Recognition for Police Work, Meritorious Conduct, Outstanding Bravery, Professional Conduct and Exemplary Policing.
- [122] At this stage it is noted that both Defendants were of good character. It is for the forum of fact to assess the effect of their good character. Good character in any event is not a defence, merely a consideration when evidence is being evaluated.

Caribbean Jurisprudence

- [123] The ‘Caribbean Jurisprudence’ to which Mr Black, QC, referred, rested on a question posed to Counsel of an extract from the Jamaica Court of Appeal decision in in **Ovando Anderson v R**, delivered on the 8th of November 2006. Harris JA said:

“A trial judge has an inherent power and duty to withdraw a case from the jury if he is of the opinion that the evidence of a witness or witnesses is thoroughly discredited rendering reliance on it nugatory. However such power should only be exercised in circumstances where there is no evidence upon which a prima facie case has been made out. A judge ought only to withdraw a case from the jury if there is no evidence upon which, a reasonable jury properly directed could properly convict.”

- [124] In the Bahamian case, **The Director of Public Prosecution v Dwayne Benjamin Decosta** [2020] 1 BHS J No 53, several cases from the Caribbean that went to the Privy Council were referred to, including **Daley v R** [1993] 4 All ER 86 (PC), **Taibo v The Queen** (1996) 48 WIR 74 and **Crossdale v R** (1995) 46 WIR 281. The Judge in **Dwayne Benjamin Decosta** said, at paragraph 24:

“...the criterion to be applied by the trial judge is whether there is material on which the jury could, without irrationality, be satisfied of guilt, if there is, the judge is required to allow the trial to proceed. In other words, the judge is merely to consider whether a prima facie case has been established by the evidence adduced by the prosecution.”

Findings

- [125] With regard to the conflict of interest of Mr Adrian Dale, the learning states: "It is for the court and not parties to decide whether a conflict is material or not. The fact that there is a risk of bias or lack of objectivity that is subliminal, as opposed to conscious will not prevent an expert from giving evidence." Mr Dale's knowledge and experience entitle him to be deemed an expert even though his certification in his home country is not current; there is no such requirement in the BVI certification of Financial Investigators. The jury is well-placed to evaluate his credibility and reliability. The extract from **Blackstone's 2022** at paragraph F11.7 that was referred to earlier states:

"The fact that there is a risk of bias or lack of objectivity that is subliminal, as opposed to conscious, will not prevent an expert from giving evidence (**Stubbs** [2002] EWCA Crim 2312)".

- [126] There is nothing wrong with a witness being provided with immunity. It is a mechanism which has to be utilized in appropriate cases. Such a decision can be justified in the public interest. Immunity has been granted to accomplices and members of gangs to testify usually against the principals.
- [127] The indictment states that there was a conspiracy involving four parties from a date unknown between the 1st of January 2012 and the 31st of July 2014. The Crown has not been able to show that the four parties were involved in a conspiracy from January 2012. Mr Isles is the only witness who testifies about "the clique"; and he was not invited to do so until October-November 2013.
- [128] The Crown, which is alleging theft from a series of five incidents and sharing of the proceeds as a circumstance evidencing the existence of a conspiracy, potentially offered direct evidence separate from the Prevost-Isles conversation in relation to only one of these – the breaking of the seals of the evidence bags in the Mr Ian Phipps incident.
- [129] Mr Isles's testimony required extremely close scrutiny. He was on the basis of the indictment, an accomplice, whose testimony would attract an accomplice warning. He was given a conditional immunity to testify and that is a type of evidence that judicial experience has shown one needs to be careful with. There was a noticeable absence of independent confirmation of his evidence. This was a matter in which not just a corroboration warning, but a very strong caution with regard to the absence of corroboration appears to be necessary; that Mr Isles was a witness with an interest to serve; and to consider whether or not Mr Isles admitted that he lied in previous judicial proceedings in connection with this matter. Mr Isles admitted to stealing money at Mr Ian Phipps's residence even while enjoying the status of being a registered CHIS. None of the thousands of dollars he stole from Mr Phipps's residence was shared with any of the co-conspirators, which suggests he was operating separately and apart from the conspiracy of which he testified. His evidence was not just inconsistent with other evidence presented by the Crown, but offended basic commonsense. Could a fact finding forum trust a witness who is telling lies – not merely forgetting particulars, or being mistaken? Has Mr Isles in those circumstances been completely discredited?
- [130] Prosecuting Counsel as well as Counsel representing both Defendants acknowledged and accepted what the Lord Chief Justice of England and Wales said in **CPS v F**, at paragraph 36:

"The authority of Galbraith, with its emphasis on the responsibilities of the jury as the fact-finding body responsible for delivering the verdicts, is undiminished.... In accordance with the second limb of Galbraith there will continue to be cases where the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so

transparently unreliable, that no jury, properly directed, could convict. In cases like these it is the judge's duty to direct the jury that there is no case to answer and to return a 'not guilty' verdict. But in making this judgment, the judge must bear in mind the constitutional primacy of the jury, and not usurp its functions."

[131] Even though the Lord Chief Justice spoke in the context of cases of historic unreported sexual crimes and distinguishing between the proper upholding of a no case submission and other remedies available such as an abuse of process, the cogency and applicability of his reasoning cannot be denied. The principles and procedure that emerge from the judgment are:

- (a) It is the responsibility of the fact-finding forum to deliver the verdict;
- (b) No case submissions ought to be considered in keeping with the principles enunciated in **Galbraith**;
- (c) Trial Judges must preserve the delineation between the functions of the Judge and the responsibility of the fact-finding forum;
- (d) It is the fact-finding forum to weigh the reliability of the evidence;
- (e) A Trial Judge must not be concerned with expressions such as "safe to convict" or "safely left to the jury";
- (f) The question is whether the evidence viewed overall is such that the jury could properly convict;
- (g) The Trial Judge has a duty to intervene where the state of the evidence taken as a whole is so unsatisfactory, contradictory, or transparently unreliable that no jury properly directed could convict.

[132] **Archbold 2022** helpfully states, *iter alia*, at paragraph 4-365:

"The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all commonsense then such evidence was tenuous and suffered from inherent weakness."

[133] A decision by a Trial Judge under the second limb of Galbraith must be exercised sparingly; and it must be exercised judicially. A Judge has a duty to act fairly, decisively and intervene when the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury, properly directed, could convict.

Conclusion

[134] To answer the question: Should the case against the Defendants Mr. Pamphill Prevost and Mr. Simon Power, be left to the jury? The answer is no.

[135] The submission of no case to answer on behalf of the Defendants Mr. Pamphill Prevost and Mr. Simon Power on the charge that they conspired together and with Shawn Henry and Michael Isles to steal quantities of cash obtained or seized during the execution of their duties as police officers is therefore upheld.

[136] The jury is directed to return a formal verdict of not guilty.

Postscript

- [137] On the morning of Wednesday the 2nd of March 2022, the Crown made an application to have the jury discharged. Lead Prosecutor, Mr Black, QC, indicated that at 8.27 am that day, he was informed that the witness, Sergeant No 67 Marley Sebastien, was arrested and charged with perjury in relation to the testimony Mr Sebastien gave in the matter. Sergeant Sebastien was the 19th witness called by the Prosecution; he testified on Tuesday, the 22nd of February 2022. The Crown did not lead any evidence from him; he was tendered for cross-examination at 9.24 am. At the end of the cross examination, Crown Counsel Mr Kael London said that he had no questions for Sergeant Sebastien. The jury did not ask any questions. Sergeant Sebastian was excused at 9.45 am.
- [138] Mr Black indicated that the charging of Sergeant Sebastien, based on what he was told, was part of a wider investigation. Queen's Counsel Black felt that the issue with the witness went to the heart of the integrity of the trial process. Mr Black also indicated his belief and understanding that if the jury was discharged, that it was unlikely that the Defendants would be tried again. Counsel Mr Williams and Mr Bruce for the Defendants objected to discharging the jury.
- [139] Mr Black was asked to identify the particular aspects of Sergeant Sebastien's testimony that was different from either the witness statement provided by the officer, or what the officer said in the previous trial. Mr Black said that one significant aspect was what Officer Sebastien was able to see inside of the Elms Suite Apartment at Cane Garden Bay and whether Officer Sebastien was able to see the Defendant Mr Simon Power or not.
- [140] It was pointed out to the Crown that the parts of Sergeant Sebastien's evidence identified by the Prosecutor were unspectacular and were similar to the testimony of several other witnesses (for example Customs Officer Ms Annette Loutrary-Moses, Mr Frenchie Gumbs and Mr Dean Fahie) as well as what was apparent in the photograph Tendered Admitted and Marked 'DP1'.
- [141] The Crown's application to discharge the jury was refused.
- [142] The following day, on Thursday the 3rd of March 2022, the Learned Director of Public Prosecutions issued a statement, explaining that Sergeant Sebastien was charged with perjury and perverting the course of justice. The DPP explained:

"The allegations are that on the 22nd February 2022 Mr Sebastien attended to the High Court to give evidence in the retrial of The Queen v Pamphill Prevost and Simon Power. Messers Prevost and Power are being tried for the offences of theft (sic) and conspiracy to steal as a result of numerous allegations of corruption. The first trial which was held between January – April, 2019 resulted in a hung jury. Mr Sebastien gave evidence under oath in 2019. Mr Sebastien was served with a subpoena in early February 2022, attended court on the 22nd February, 2022 where he gave evidence under oath that was contradictory to the evidence given in 2019 and to his witness statement given in August 2017."

Colin Williams
High Court Judge

By the Court


Registrar