

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No: BVIHC (COM) 2021/0323

BETWEEN:

TROY ST HELEN

Applicant

and

**(1) DIRECTOR OF PUBLIC PROSECUTIONS
(2) DIGICEL BVI LTD
(3) CABLE & WIRELESS (BVI) LTD
(4) CCT BOATPHONE BVI**

Respondents

Appearances:

Mr. Michael Maduro and Ms. Isis Potter of Potter Lashley & Associates for the Applicant

Ms. Patrice Hickson, Senior Crown Counsel, and Mr. Kristian Johnson, Crown Counsel for the First Respondent

The Second, Third and Fourth Respondents did not appear and were not represented

2022 March 2
March 3

JUDGMENT

[1] **JACK, J [Ag.]:** By an amended Notice of Application submitted on 14th February 2022, the applicant seeks the grant of witness summonses against named executives of the three major mobile phone companies in this Territory, Digicel, Flow

(the trading name of Cable & Wireless) and CCT Boatphone for the production of mobile phone records for seven identified mobile phones between the hours of 4am and 5.30am on 19th January 2021. Mr. St Helen, the applicant, is facing trial in the Magistrate's Court on Tuesday and Wednesday of next week. He says he needs these materials in support of his defence.

[2] The factual background is explained by Mr. Maduro who appeared on behalf of the applicant as follows:

"5. According to the Crown's allegations at the initial appearance on 30 July 2021 before Senior Magistrate Tamia Richards, during an operation in the early morning hours of Tuesday, 19 January 2021, in the Brandywine area, on the island of Tortola, officers intercepted a rental vehicle and when it was searched, a large quantity of cocaine was discovered. The search of a second vehicle uncovered a smaller quantity of cocaine and a boat was also seized as part of the operation.

6. The evidence produced by the Crown purports to show that the applicant was in the vicinity of Brandywine Bay, at the relevant time when the unlawful acts took place. According to police, the applicant was seen exiting a red Suzuki jeep, which they believe was involved with aforesaid drug activities. The Crown is relying on the witness statements of police officers, Detective Constable Ron Augustin, Detective Constable Calvin George and Detective Sergeant Vincent John, to prove these facts.

7. The case relies heavily on cell tower data to place the applicant and his co-accused, Delaino Johnney, Shaun Massicot and Devon Bedford in the said vicinity. In addition, the cell tower data purports to show that in an operation which according to police officers Augustin and George, began around 04:25 hours, that there was an attempt by one, Deverson Williams, a person not charged in this case, between 04:42:39 and 04:42:58 on the relevant morning, to contact the applicant's cellular phone, which, according to the 3 cell data, was at the time using a cell mast in the area, that being, cell mast BVI_HLSCC, located at Paraquita Bay, and facing south west over Brandywine Bay. (See p 19 of the Communication Data provided by the Crown.)

8. On 5 November 2021, the applicant's legal practitioner wrote to the learned Director of Public Prosecutions, Tiffany Scatliffe-Esprit, LLM, reducing in writing, their prior open court request for additional information regarding the cell tower data and mapping for the afore-mentioned three (3) officers, another interdicted officer named Detective Constable Simon Power and also the client's cellular phone. On 18 November 2021,

Detective Sgt. Calvin George of the Intelligence Department of the Royal Virgin Islands Police Force, on information on oath, applied for a search warrant in respect of said information. On 26 November 2021, learned Crown Counsel, Kristian R. G. Johnson, of the Office of the Director of Public Prosecutions, via email indicated that '[i]n a bid to assist with this request, I reached out to Inspector K. Davis of the Royal Virgin Islands Police Force and I have been advised by Inspector Davis that several attempts were made to get the data requested via warrants for the two (2) service providers; however, I have been informed by Inspector Davis that those efforts proved futile as the magistrate declined to sign the warrant. I was informed that the rationale was that he was not satisfied that the warrants were required to assist in the investigation of any reported, or suspected, crime.'"

[3] This account of the facts was not fully evidenced by Ms. Brathwaite's affidavit in support of the application. If it had been relevant, I would have given directions for making good this deficiency.

[4] What happened before the Magistrate, Mr. Jack Husbands, is a little unclear. A note from the Magistrate's Court on Mr. Husband's instructions says:

"On the 18 November 2021, Detective Sgt. Calvin George of the Intelligence Department of the RVIPF, on information on oath, applied for a search warrant in respect of data related to certain telephone numbers. The data was in connection with an offence allegedly committed by PC Troy St. Helen. The information or data was requested pursuant to or to facilitate a request by defence counsel for the information. It appeared to me at the time that this was disclosure in court proceedings and not a request for a search warrant for property on or with respect to which an offence has been committed."

The note continued:

"Mr. Husbands indicated that he declined to issue the warrant. To his recollection there was no request for the issue of a Summons for any person to appear before him, hence he is unable to issue a certificate under section 26(2) of consolidated version of Cap 116."

- [5] The reference to Cap 116 appears to be an error (section 26 of that Act details with corporal punishment in schools). A reference to the **Magistrate's Code of Procedure**¹ seems more likely, but even this seems to be inapplicable. Section 26 of that Act (as amended) provides:

“(1) The Magistrate may in his or her discretion refuse to issue a summons.

(2) If the Magistrate refuses to issue a summons, the person applying for the summons may require the Magistrate to give him or her a written certificate of refusal and may apply to a Judge of the High Court for an order directing the Magistrate to issue the summons sought or such summons as the Judge directs.”

This does not appear to encompass a power to order witnesses to produce documents. It appears to allow the issuance of a summons to someone against whom an offence is alleged.

- [6] The power to order the production of documents is given by section 161 of the **Evidence Act 2006**,² which provides, so far as material:

“Where any order is made for the examination of witnesses within the jurisdiction of the High Court by authority of this Act, the Court may, in and by the first order to be made in the matter or any subsequent order, (a) command the attendance of any person named in such order for the purpose of being examined or for the productions of any writings or other documents to be mentioned in such order...”

“Document” is sufficiently widely defined in section 2 of the Act as to encompass the data sought to be disclosed in the current application. The definition of “Court” in that section includes the Magistrate’s Court.

- [7] The application to Mr. Husbands does not seem to have been based on this provision. There appears to be a reference to an application for a search warrant. If the application was under the **Magistrate's Code of Procedure**, then there would not have been a power to order a witness to produce the production of documents.

¹ Revised Laws of the Virgin Islands, cap 44.

² No 15 of 2006, Laws of the Virgin Islands.

If his attention was not drawn to the provisions of the **Evidence Act** is not surprising that he refused the application. (There is also the oddity that the application was made by Calvin George, who was one of the officers whose data was sought.)

- [8] In fact, Digicel has voluntarily produced the Digicel data to the Court, although that fact was not brought to the parties' attention until the hearing before me. The claim to the Flow and CCT Boatphone data, however, still survives.
- [9] Mr. Maduro put his claim to the issue of a witness summons by this Court in three ways. Firstly, the summons should be issued under section 26 of the **Magistrate's Code of Procedure**. Secondly, the Court should issue the summons in support of an inferior court or tribunal under CPR 33.4. Thirdly, the Court should exercise its inherent jurisdiction to make the order.
- [10] The first point I have already dealt with. Section 26 does not apply to the issuance of witness summonses.
- [11] As to the second point, CPR 33.4(3) defines "inferior court or tribunal" as being one "which does not have the power to issue a witness summons in relation to proceedings before it." Since the Magistrate's Court does have such a power under section 161 of the **Evidence Act**, CPR 33.4 has no application and cannot in my judgment form the basis of an application for the relief sought in this Court.
- [12] As to the third point, none of the cases cited by Mr. Maduro directly apply to the circumstances of this case. I am prepared to assume, without deciding, that this Court has an inherent power to issue a witness summons. As the Supreme Court of North Carolina said in **Vaughan v Broadfoot**:³

"The subpoena duces tecum, an ancient writ well known to the common law, is the process by which a court requires the production at the trial of documents, papers, or chattels material to the issue. A court in which an action is pending has the inherent power (frequently confirmed by statute) to issue a subpoena duces tecum to any person who can be a witness..."

³ (1966) 149 SE 2nd 37, 267 NC 691 (omitting citations).

[13] If, as an ancient writ, it forms part of the inherent powers of the Court, it would follow, I am also prepared to assume, without deciding, that a subpoena duces tecum might be issued in support of proceedings before an inferior court, such as the Magistrate's Court. However, the provisions of CPR 33.4(3) are in my judgment fatal to the Court's continued power to grant the relief (assuming it would otherwise have such a power). As the English Court of Appeal said in **Raja v Hoogstraten (No 9)**:⁴

"76. The position pre-CPR, therefore, was that the inherent powers of the court could not be invoked to do something which was inconsistent with a rule. Thus, if a rule gave a wide discretion to the court to decide whether or not to make a particular order, the court could not exercise its inherent powers to make such an order *ex debito justitiae* as if it had no discretion, or a discretion which could only be exercised one way in accordance with the rules.

77. The same position has obtained since the introduction of the CPR. The CPR are a 'new procedural code with the overriding objective of enabling the court to deal with cases justly' (rule 1.1(1)). There is no doubt that the court continues to have the inherent jurisdiction to regulate the conduct of civil litigation... The existence of the inherent jurisdiction is also implicitly acknowledged by CPR 3.1(1) which provides that the list of powers in that rule 'is in addition to....any powers it may otherwise have'.

78. In our judgment, therefore, where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules."

[14] Accordingly, I refuse the application for witness summonses. This is without prejudice to Mr. St Helen's right to apply to the Magistrate's Court for such relief. I understand it is proposed that Mr. Maduro will apply today, immediately after the

⁴ [2008] EWCA Civ 1444; [2009] 1 WLR 1143. Also cited as *Tombstone Ltd v Raja*.

handing down of this judgment. Mr. Johnson for the Crown indicated that he would attend and wished to take a point on data protection. That is not a matter which was argued before me and I express no view on it.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar