

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

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

CRIMINAL CASE No. 4 of 2016

BETWEEN:

THE QUEEN

Applicant

and

ANDREAS NORFORD

Respondent

Appearances: Mrs. Tiffany R. Scatliffe Esprit, DPP & Mr. Kael London, Crown Counsel, Counsel for the Crown/Applicant
Mr. Sherfield P. Bowen & Ms. Ruthilia Maximea, Counsel for the Defendant/Respondent

**2021: July 12th
September 17th**

RULING ON PRE – TRIAL APPLICATIONS

[1] **FLOYD J:** The Applicant has brought two Applications. The first Application seeks to allow the reading into evidence of the statements of two Crown witnesses, Detective Inspector Mark Hughes and David Springette, during the trial of this matter. The second Application seeks to have audio recordings and the transcripts of those recordings of conversations between the Respondent and the Crown witness, Lenin Joseph, admitted into evidence (subject to editing) at the trial of this matter. The Respondent is charged with murder contrary to section 148 of the Criminal Code 1997. The date of offence is 9th May, 2013. These Applications were originally filed on 18th April, 2019.

THE FACTS

- [2] On the evening of 9th May, 2013, Melbourne Francis, also known as “Trouble,” was shot and killed at a place known as “The Stickett”, in Long Look, Tortola. Investigation revealed that the deceased was socializing with friends in a gazebo, when a gunman approached carrying a handgun. The deceased was shot five times. He died at the scene.
- [3] The police spoke to a number of witnesses. They received a description of the gunman from an eyewitness, J.F. The gunman wore a hat and a handkerchief covered his face. Further descriptors, including clothing, complexion (from his hands), hairstyle, height and build, were given. The gunman ran past this witness towards Little Dix Hill Main Road until he was out of sight.
- [4] Another witness, David Springette, also known as “Moonhead,” gave a statement to police. He was in the same location as the deceased at the time of the shooting. He had known Melbourne Francis for many years. He told police that the shooter was someone he had also known for many years. That man went by the name “Thirteen.” “Thirteen” was in the area, then left in a rental car. He returned, but as a passenger in the vehicle. He again left. Later, the witness saw a man wearing a hoodie with a bandana covering his face. He recognized the man as “Thirteen.” “Thirteen” had a gun in his hand. He was dressed as before and the witness gave a description to police including clothing, height, build, hairstyle, and complexion (from the area around the eyes). After shooting “Trouble”, “Thirteen” ran up Little Dix Hill Main Road. The witness described “Thirteen” as running with a limp. This was the same gait he had always had since their school days, including time spent on the basketball court.
- [5] The police did not charge anyone with this crime for some time. In September, 2013, a new witness, Lenin Joseph, came to the attention of the Royal Virgin Islands Police Force (RVIPF). Mr. Joseph knew “Trouble” as they had lived in the same building at one time. Mr. Joseph became friends with someone known as “Kip”. Mr. Joseph was aware of the killing of “Trouble.” At some point, “Kip” informed Mr. Joseph that a friend of his known as “A.J.” had told him that he had killed “Trouble.” Mr. Joseph was aware of people wanting to harm “Trouble.” In particular was one, Jefferson Joseph, also known as “Hoody” and “Jeff.” “Jeff” was a drug dealer for whom the witness, Lenin Joseph, had

worked selling drugs. “Jeff” had offered Mr. Joseph money and a gun to kill “Trouble.” Mr. Joseph had declined that invitation. The witness, Lenin Joseph, also said that “Kip” told him that “A.J.” planned on murdering other people. Although they were not friends, “A.J.” and Lenin Joseph were known to each other.

[6] As a result of receiving this information, Lenin Joseph decided to tell his cousin, Detective Inspector Vernon Larocque of the RVIPF. After doing so, further meetings were arranged between Mr. Joseph and members of the RVIPF, including on 11th September, 2013. Thereafter, Mr. Joseph agreed to work with the police. This became a covert surveillance operation. The focus of the operation was to gather evidence regarding the murder of Melbourne Francis. The main subject of the investigation was Andreas Norford, also known as “A.J.” Detective Inspector Mark Hughes and Detective Sargent Richard Taylor were in charge of the investigation. Lenin Joseph would be given money with which to rent a motor vehicle. A listening device would be installed in the vehicle. Conversations between Lenin Joseph and the Respondent would be recorded. At one point, some additional funds were given to Mr. Joseph to purchase an IPAD or a laptop computer that the Respondent had offered for sale and to purchase some credit for use on Mr. Joseph’s cell phone plan. Authorization for this operation was given by Police Commissioner David Morris. It was determined by the police that such a covert operation was necessary and proportionate in order to further investigate this serious murder case. It was determined to be in the public interest.

[7] From 11th September, 2013 to 18th September, 2013, the Respondent and Lenin Joseph met and socialized. They attended bars, restaurants and other locations. They bought and consumed alcohol and marijuana. Conversations inside the rental vehicle were recorded. During those conversations, the Respondent made certain utterances admitting to the killing of “Trouble.” He provided certain details such as shooting “Trouble” in the head and neck while “Trouble” had been texting on his cell phone. He described running towards the church and then to the main road where someone was waiting for him in a car. The Respondent said that “Moonhead” was there when he shot “Trouble.” “Moonhead” saw him and ran away. The Respondent said that he was paid to do this and that he had disposed of the gun. At one point, the Respondent produced a handgun and showed it to Mr. Joseph.

- [8] All of the audio recordings were transcribed by police.
- [9] Sometime in 2013, the Respondent left this Territory and traveled to St. Kitts. An extradition request was eventually made and the Respondent was ordered back to the Territory of the Virgin Islands. On 23rd November, 2015, the Respondent returned in police custody. He was charged accordingly and has remained in detention ever since.
- [10] Detective Inspector Mark Hughes provided a statement in this case. He subsequently passed away on 7th February, 2019.
- [11] David Springette, also known as "Moonhead," gave a statement in this case. He subsequently passed away on 21st June, 2017.

THE POSITION OF THE PARTIES

- [12] Counsel for the Applicant advised the Court that she now sought only to read into evidence the statement of Crown witness D/I Mark Hughes and not David Springette. She invited the Respondent to bring his own Application if he sought to read into evidence the statement of Mr. Springette. Counsel for the Respondent indicated that he would nonetheless wish for the Court to consider that portion of the Application relating to the evidence of David Springette.
- [13] For the reading into evidence at trial of witness statements, the Applicant relies upon **s. 5 (1) (a) of the Evidence Act** which states, somewhat obviously, that a person shall be taken not to be available to give evidence if that person is dead. Further reference is made to **ss. 71 (1) and (2) of the Evidence Act** which state that where a person who made a previous representation is not available to give evidence, the hearsay rule does not apply if the representation was made under a duty to make that representation, the representation was made at or shortly after the time when the asserted fact occurred, the representation was made in the course of giving sworn evidence or the representation was against the interests of the person who made it. Similarly, **s. 71 (5)** states that the hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a Defendant.

- [14] The submission of the Applicant is that the confirmed deaths of the witnesses, Hughes and Springette, who had previously provided statements, renders them unavailable and their statements or previous representations, are therefore admissible. The information provided in their statements is relevant to the issues at trial and appropriate for consideration by the jury. Counsel for the Applicant concedes that the inability of counsel to cross examine these witnesses is a consideration. It is not, however, a bar to the admissibility of the evidence. It would require an appropriate direction from the trial judge to the jury as to how such evidence may be considered and what weight that evidence should be accorded. Counsel for the Respondent did not make any submissions on the issue of the tendering of these statements, other than by reference to making use of the statement of Mr. Springette in his own case.
- [15] The larger issue in this Application is the request to enter into evidence the covert recordings of the conversations between the Respondent and the police operative, Lenin Joseph. The position of the Applicant is that these recordings are relevant, their probative value outweighs any prejudicial effect upon the Respondent, the rights of the Respondent were not violated in the obtaining of the recordings, the recordings were obtained in compliance with United Kingdom legislation, the **Regulation of Investigative Powers Act 2000 (RIPA)**, such legislation being appropriate as no such legislation existed in this Territory, and the admission of the recordings would not impede the Respondent's right to a fair trial.
- [16] The statement of D/I Hughes indicates that, as the officer in charge of this operation, he followed the guidelines set out in the **RIPA** legislation.
- [17] Counsel for the Applicant submits that evidence from the recordings that relates to any other criminal offence and unrelated to this case, would be edited out before being presented. This would safeguard the rights of the Respondent and ensure no prejudice to his right to a fair trial.
- [18] The recordings and transcripts are relevant and highly probative as they contain admissions by the Respondent that he was responsible for the murder of Melbourne Francis. Reference is made to **PART XIV of the Evidence Act**. The Applicant submits that such evidence is admissible as no violent, oppressive, inhuman, or degrading conduct was involved in obtaining the admissions. No

threats or promises were made. The Respondent spoke freely and without prompting. The evidence verifies the contents of the statement of Lenin Joseph, who was a party to the conversations.

- [19] Counsel for the Applicant submits that there was no breach of the Respondent's right to privacy under **s. 19 (1) of the Virgin Islands Constitution Order 2007** as this evidence was obtained in the interests of public safety and for the detection of criminal offences pursuant to **ss. 19 (3) (a) and (e) of the Constitution**. The Respondent's constitutional right to a fair trial under **s. 16** was not infringed.
- [20] The Applicant submits that the police operative, Lenin Joseph, did not act as an agent provocateur as he did not encourage the Respondent to commit any illegal act or to falsely implicate himself. Mr. Joseph was under no obligation to provide a caution to the Respondent before they spoke.
- [21] Counsel for the Respondent referred at length to the statement of the witness, David Springette, which he described as exculpatory, describing someone other than the Respondent as being responsible for the murder of Melbourne Francis. As such, the statement is relevant to the case for the Defence.
- [22] As to the recordings and transcripts of the conversations involving the Respondent, Counsel for the Respondent submits that Lenin Joseph was an agent provocateur, who provided alcohol, marijuana and money to the Respondent in order to elicit admissions or confessions regarding this offence. The evidence should therefore not be allowed.
- [23] Counsel for the Respondent submits that statements taken from other witnesses, in particular, J.F. and David Springette, describe other culprits as being responsible for the murder.
- [24] The Respondent submits that the recordings are not clear and that expert evidence is required to identify the parties involved and to generally authenticate the recordings.

- [25] Counsel for the Respondent submits that the recorded conversations were not obtained voluntarily. Not only were inducements given to the Respondent but he was not provided with any caution or confirmation of his rights prior to speaking with the police agent. In order for the statements to have been made voluntarily, it must be shown that they were not obtained by threats or inducements as held out by a person in authority. Further, much of the conversation took place when the Respondent was intoxicated or under the influence of drugs.
- [26] The Respondent submits that there is insufficient evidence to justify this covert operation as being a last resort and that all other methods of investigation had not been exhausted.
- [27] Counsel for the Respondent submits that judicial approval was necessary for this covert operation and that was not obtained.
- [28] Counsel for the Respondent submits that the admission of this evidence would breach the Respondent's constitutional rights to a fair trial. It would be unsafe to admit this evidence.
- [29] Counsel for both the Applicant and the Respondent provided the court with several authorities in support of their positions.

ANALYSIS

- [30] The first part of this Application seeks to have the statement of the Crown witness, D/I Mark Hughes read into evidence. Initially, the Application also sought to have the statement of another witness, David Springette, read into evidence. Although the Crown no longer seeks to have the latter witness statement entered, Counsel for the Respondent submits that the evidence of Mr. Springette would be of assistance to the case for the Defence. The Respondent has not objected to this portion of the Application. Both witnesses, Hughes and Springette, have passed away.

- [31] The **Evidence Act at s. 5 (1) (a)** clearly states that a person is considered to be unavailable to give evidence if the person is dead. That obvious conclusion is necessary to proceed further. At **ss. 71 (1) and (2)**, the Act indicates that where a person who made a previous representation is unavailable to give evidence, the hearsay rule does not apply. This is particularly so at **s. 71 (2) (a)** when the witness was under a duty to make the representation and at **s. 71 (2) (b)** when the representation was made at or shortly after the time when the asserted fact occurred.
- [32] The statement of D/I Mark Hughes is dated 17th June, 2017. However, other witness statements, including that of Lenin Joseph, confirm Mr. Joseph meeting and interacting with D/I Hughes regarding this case in September, 2013. The incident in this case took place in May, 2013. Later evidence, including statements dated 8th January, 2019 and 7th February, 2019 from Senior Review Officer Nigel Niven, confirm the terminal illness and eventual death of Mark Hughes on 7th February, 2019. D/I Hughes was a senior officer with the RVIPF. His duties included investigating serious crime and included the use of covert surveillance techniques. He was the officer in charge of the covert surveillance operation involving Lenin Joseph and the Respondent.
- [33] The statement of David Springette is dated 28th May, 2013 and the incident date in this case is 9th May, 2013. A death certificate filed confirms that Mr. Springette passed away on 21st June, 2017 from a gunshot wound to the head. Mr. Springette was an eye witness to the killing of Melbourne Francis. He described and identified the shooter as someone known to him as "Thirteen," not the Respondent.
- [34] I am therefore satisfied that, under the terms of the **Evidence Act**, the witnesses Hughes and Springette are unavailable to give evidence. However, the admission of their statements would not offend the hearsay rule according to the terms of the **Evidence Act**. The contents of these statements are clearly relevant to issues in this case and the jury should be given the opportunity of considering this evidence. Their probative value outweighs any prejudice to the Respondent. In fact, the evidence of Mr. Springette is in no way prejudicial to the Respondent, as it identifies someone other than the Respondent as the person responsible for the death of Melbourne Francis. The weight to be attributed to this evidence is, however, a matter to be determined by the jury, based on all of the surrounding circumstances and in conjunction with all of the remaining evidence.

Although neither witness is available for cross-examination, that does not constitute a basis to exclude this evidence. It would be unfair to the parties to disallow receipt of this evidence based on witness unavailability through death. It will be necessary, however, for the trial judge to give appropriate instructions and directions to the jury in the course of this trial as to how to receive this evidence, untested as it is by cross-examination, and what caution should be applied.

[35] Although the Applicant no longer seeks an order allowing the admission of the evidence found in the statement of the witness, David Springette, the Court has included that statement along with the statement of the witness, Mark Hughes, in this decision. The contents of the Springette statement are potentially significant and the Respondent has indicated a desire to call that evidence in the case for the Defence. Rather than forcing the Respondent to bring a separate Application relating to the Springette evidence when that material is already before the court in this Application, it is appropriate and expeditious to continue to consider it at this time. The issues raised in this Application have already been before the court for some time. As such, and for the reasons advanced, both the statement of Mark Hughes and the statement of David Springette will be allowed to be tendered into evidence at this trial.

[36] The second part of this Application relates to the admission into evidence of the recordings of conversations between the Respondent and the Crown witness, Lenin Joseph, and the transcripts of those recordings. The use of a covert human intelligence source by the police in this case was an extreme measure. One that was taken in an attempt to solve a serious crime, the murder of Melbourne Francis. The placing of a concealed listening device in a rented vehicle operated by a civilian under the direction of the police, in order to record conversations involving the Respondent without his knowledge, was a significant investigatory step. It is apparent that guidelines for such a unique line of inquiry did not exist in this Territory at that time and indeed still do not. It is for that reason that the police looked for direction from legislation in place in the United Kingdom. I am satisfied that the RVIPF had recourse to such legislation. The police were therefore entitled to look to the **Regulation of Investigative Powers Act, 2000 (RIPA)** for guidance in this operation. I am similarly satisfied that, according to **s. 12 of the Evidence Act**, this Court can consider the terms of **RIPA** when assessing the admissibility of the evidence obtained in this process.

- [37] A careful review of the provisions of **RIPA**, in conjunction with this case, is necessary to confirm that the appropriate code of practice was followed in this covert surveillance and the obtaining of private information. To assist in this examination, the Home Office has, from time to time, issued guidelines regarding the use of Equipment in Police Surveillance, and Covert Surveillance and Property Interference. The Court of Appeal in **R v Mason and Others**¹, referred to the 1984 **Home Office Guidelines** regarding considerations at the senior police level for the authorization of covert recordings. Those considerations include i) whether the investigation concerned serious crime, ii) whether normal methods of investigation had been tried and failed or were unlikely to succeed if tried, iii) whether there was good reason to think that the use of the equipment would be likely to lead to an arrest and a conviction, iv) whether the use of the equipment was operationally feasible.
- [38] The statement of D/I Hughes indicates that the covert surveillance was authorized by a senior officer, identified as then Police Commissioner David Morris. D/I Hughes states that the information or evidence could not have been obtained by less intrusive means. It was necessary and proportionate to the goals of the investigation. D/I Hughes followed the terms of **RIPA**. There can be no doubt that the investigation of a murder is a serious matter. Based upon the information provided by Lenin Joseph, there seemed good reason to believe that the operation would lead to an arrest and conviction. It is apparent that the use of the listening equipment was deemed operationally feasible and the information sought could not be obtained by other less intrusive means. However, had other normal investigation methods failed? It appears that the standard police investigation had been carried out. The scene was examined, a post mortem conducted and witnesses spoken to. Despite the evidence provided by David Springette and others, no arrest was made and the case apparently came to a halt. It was not until Lenin Joseph approached the police with his information that the investigation revived and the covert operation began.
- [39] It therefore appears that regular police methods had failed and the covert operation involving the police operative was justified. However, the information that the police received from the witness, Springette, cannot be discounted. Although the police either did not or could not use that information to identify the person known as "Thirteen", since it points to another individual as being responsible, it is relevant. It is particularly relevant to the case for the defence and in fairness to the Defendant,

¹ [2002] EWCA Crim 385 at para 37

it needs to be left with the jury and perhaps explored by the defence with police witnesses. This reasoning goes not only to the acceptance of the covert operation evidence, but also bolsters the decision to allow the reading into evidence of the statement of Mr. Springette.

- [40] Were the provisions of **RIPA** adequately followed by the police? **RIPA** is the Act governing the use of covert surveillance by police and other public authorities in the United Kingdom. That includes the use of undercover agents, sometimes referred to as covert human intelligence sources or CHIS. The Act refers to two types of surveillance, directed surveillance and intrusive surveillance. Directed surveillance is conducted as part of an investigation and results in the obtaining of private information about a person. Private information would include a record of a person's movements, activities and utterances at any given time. Clearly, therefore, this was a case of directed surveillance. Intrusive surveillance is defined at **s. 26 (3)** as being directed surveillance that involves either residential premises or a private vehicle, and involves a person in the premises or in the vehicle or is carried out by means of a surveillance device.
- [41] For the purposes of this investigation, the type of vehicle used was critical. A private vehicle is defined in **s. 48 (1) of RIPA** as any vehicle used primarily for the private purposes of the person who owns it or a person otherwise having the right to use it. For example, a company car used by an employee. By making use of a rental vehicle, a vehicle for public hire, the surveillance that occurred in this case does not meet the definition of intrusive surveillance.
- [42] The determination of the conduct in this case to be directed surveillance and not intrusive surveillance is important because under the **RIPA** framework, an authorization for intrusive surveillance must be brought before a Judicial Commissioner for approval. By using directed surveillance, the police in this case were not required to seek judicial authorization for that procedure.
- [43] For all of the foregoing reasons, I find that the police operation in this case consisted of directed surveillance. It was covert surveillance conducted for the purpose of a specific investigation or operation. It was likely to result and did result in the obtaining of private information about a person, the Respondent. It was not, however, intrusive surveillance as it did not take place in a private vehicle. It therefore did not require judicial authorization. The authorizing senior police officers

involved believed that the procedure was appropriate, proportionate and necessary in order to detect and prevent serious crime.

- [44] The recordings of the conversations between the Respondent and the witness, Lenin Joseph, contain utterances made by the Respondent that indicate he was responsible for the murder of Melbourne Francis. Since such evidence may be classified as either a confession or an admission, it triggers consideration under the **Evidence Act**. Under **s. 82**, the court must be satisfied that the making of the admission was not influenced by any violent, oppressive, inhuman or degrading conduct or by any such threats or by promises made to the person who made the admission. Similarly, under **s. 83**, any confession made by an accused sought to be given in evidence against him, must be relevant to any matter in issue in the proceedings and it may not have been obtained by oppression or obtained as a result of anything said or done which would make it unreliable. Oppression is defined under **s. 83 (8)** to include torture, inhumane or degrading treatment and the use of threat of violence.
- [45] From a review of the evidence provided in this Application, including the various statements of Lenin Joseph and the transcripts of the audio conversations, I can find no evidence of oppression, threat, violence, degradation or anything else enumerated in the **Evidence Act** that would affect the admissibility of that evidence. The material takes the form of a series of conversations between the two individuals. The conversations as transcribed appear to be entirely voluntary. No pressure is being exerted upon the Respondent to take part in the conversations. Further, there appears to be no evidence of any sort of inducement offered to the Respondent by Lenin Joseph for taking part in the conversations. Reference is made at various points in the conversations and the statements to the purchase and consumption of alcohol and cannabis. However, the use of the intoxicants appears to be mutual between the two parties and does not appear to be provided to the Respondent in order to extract the information. The use and consumption of the substances appears to be recreational and part of the accepted behaviour of the parties at the time.
- [46] As a result of this analysis, I am satisfied that no oppressive behaviour and no inducements led to the admissions of the Respondent which were recorded in this case. The information contained in the admissions is obviously relevant to issues engaged in this case, relating as it does to the identity

of the person responsible for the death of Melbourne Francis. The probative value of the evidence is high and that value outweighs any prejudice to the Respondent. The evidence is therefore admissible.

[47] That is not, however, the end of the matter for the purposes of this Application. Under the terms and provisions of the **Virgin Islands Constitution Order 2007**, the Respondent has rights. Under **s. 12**, he is entitled to equal protection and benefit of the law. Under **s. 16**, he is entitled to a fair hearing. Under **s. 19**, he is entitled to privacy and the protection of his private life. Specifically, **s. 19 (1)** states that every person has the right to respect for his or her private and family life. However, that safeguard is modified under **s. 19 (3)** wherein it is indicated that nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society **a)** in the interests of ... public safety ... or **e)** for the prevention or detection of offences against the criminal law. As has already been confirmed in the analysis of the police action under the terms of **RIPA**, this was a case of directed surveillance that resulted in the obtaining of private information about the Respondent. Clearly, therefore, although the police actions in this covert operation infringed the Respondent's **s. 19 (1)** Constitutional right to privacy, those actions were demonstrably justified and saved by **s. 19 (3)**. The police actions were carried out under the legal authority of **RIPA** as authorized by the **Evidence Act** in the pursuit of public safety, crime prevention and detection. The admission of this evidence would not, therefore, interfere with the Respondent's Constitutional right to a fair trial.

[48] Counsel for the Respondent has taken issue with the quality of the recorded evidence and also the manner of identification using that evidence. He has pointed to a lack of expert evidence or forensic analysis relating to the recordings and the identification of the Respondent as one party to the recordings. The voice on the recordings is not that of the Respondent. Certainly, voice identification can be a complex issue. As the Court of Appeal held in the case of **Baptiste v The Queen**² "voice identification has the same if not more dangers as visual identification. Therefore, the very reasons why the direction is required as explained in **R v Turnbull** in cases of visual identification are also applicable to voice identification." The Court went on to refer to **s. 112 of the Evidence Act**, as being the legislation in the Territory of the Virgin Islands designed to deal with this issue and reflect

² BVIHCRAP 2013/0003 at para 27

the considerations set out in the **Turnbull** case. The Court held that **s. 112** is applicable to both visual and voice identification. The Court stated at **para 36** that “when voice identification is admitted, the judge is required to direct the jury on voice identification and in so doing the judge must address the factors outlined in the section.”

[49] In the case at bar, the voice identification evidence is strengthened by the fact that the parties speaking in the recordings are actually together, in person. They are not communicating electronically. They are also within each other's line of vision. For this reason, the evidence is not voice identification in the classic sense. However, the issue remains. Once the evidence is found to be admissible, then in fairness to the rights of the Respondent and in keeping with the rules of evidence, the trial judge would be required to follow the terms of **s. 112** and provide a **Turnbull** warning to the jury.

[50] I do not accept the submissions of Counsel for the Respondent that forensic evidence is required to identify the voices recorded. The transcripts of the recordings are clear. They, along with the audio recordings, allow the conversation to be assessed. This material will be provided to the jury. The witness, Lenin Joseph, as an in-person party to the conversations, will be able to identify the Respondent and the words spoken. The Respondent was known to Mr. Joseph. They were familiar with each other. Any evidentiary issues and considerations can be adequately dealt with under the terms of **s. 112** and a **Turnbull** warning.

[51] Another objection from Counsel for the Respondent relates to the lack of any caution being administered to the Respondent by the witness, Lenin Joseph, The Respondent's utterances are described as being involuntary and uninformed. His right to silence was breached and he was induced into providing self-incriminating evidence without counsel and without any knowledge of his rights. I am unable, however, to accept this argument. Lenin Joseph was not a person in authority. Although he was working with the police, he was not a police officer. As previously noted, **s. 12 of the Virgin Islands Constitution 2007**, grants everyone the right to equal protection and benefit of the law. Under **s. 15 (3)**, any person arrested or detained shall be informed of his or her right to remain silent. Similarly, under **s. 15 (4)**, any person arrested or detained shall have the right to retain and instruct a legal practitioner. The common thread that triggers all of these rights is the arrest or

detention of the subject. At no time when the Respondent spoke to Lenin Joseph, was he under arrest or detained. That would not have occurred because Lenin Joseph was not a police officer. Lenin Joseph was not a person in authority. It is only such persons who are obligated to advise a subject of their rights and to, in effect, administer a caution.

[52] A person in authority has been defined in the Supreme Court of Canada case of **R v Hodgson**³, as referring to “those formally engaged in the arrest, detention, examination or prosecution of the accused and so applies to police officers, prison officials or guards.” In such a case, a voir dire would be required to determine the admissibility of the statement, which would include whether or not a caution was administered. The court extended this line of reasoning to include “persons whom the accused reasonably believes are acting on behalf of the state and could therefore influence or control proceedings against him or her. That issue must be resolved by considering it from the viewpoint of the accused. The receiver’s status as a person in authority arises only if the accused has knowledge of that status... This issue will not normally arise in relation to undercover police officers, because from the accused’s viewpoint, they will not usually be viewed as persons in authority.” Therefore, if the issue does not arise in relation to undercover police officers, then it surely cannot arise for civilians working with the police as covert intelligence sources, as Lenin Joseph was.

[53] To summarize, Lenin Joseph was not a police officer and therefore under no obligation to administer a caution before speaking to the Respondent. Lenin Joseph was not an undercover police officer. Lenin Joseph was a covert human intelligence source. Taken at its highest, he was working with the police when the conversations took place. That was not something that was known to the Respondent at the time. Lenin Joseph could not, therefore, be described as a person in authority. Just as any other civilian speaking to the Respondent, Lenin Joseph was not required to provide a caution to the Respondent.

[54] Counsel for the Respondent has referred to the State inducing a statement from the Respondent through the use of marijuana, alcohol, car rental and money to entertain women. It is submitted that this led to a state of intoxication, a loss of voluntary control and a sense of bravado and boastfulness, resulting in the comments made to Lenin Joseph. The inference is presumably that the Respondent

³ [1998] 2 S.C.R. 449

may have spoken of things that were not true in order to inflate his ego, persona and standing in the company of Mr. Joseph. With respect, the evidence presented is that State funds were provided to Mr. Joseph to rent a vehicle, purchase an IPAD or tablet and top up his phone. There is no indication of any other funding being provided nor the specific provision of drugs and alcohol. It is noted that the Respondent and Mr. Joseph at times travelled in the rental vehicle, purchased cannabis and alcohol, and consumed those items. This sometimes occurred in the company of women at bars and restaurants. However, no such items were provided by the State nor was funding provided for that purpose. If this voluntary consumption led to a state of intoxication on the part of the Respondent, it is a matter for the jury to consider when it examines the evidence in its entirety. It does not, however, go to the issue of the admissibility of the evidence itself.

[55] I am satisfied that the recorded statements were voluntarily given. The evidence takes the form of conversations that took place off and on over the course of several days between two civilians known to each other. The background to the conversations includes general socializing around town as the two men travel in a vehicle. Without a doubt, the information contained in the recorded conversations is adverse in interest to the Respondent, confirming as it does that the Respondent was responsible for the murder of Melbourne Francis. The evidence is highly probative to the issues of the case, including the identity of the shooter and details of how the murder occurred. The balancing of probative value and prejudicial effect is critical. This will have an impact on the fairness of the trial. The overriding requirement of ensuring a fair trial was emphasized in **R v Sang**⁴. A trial judge should not allow evidence which, though strictly admissible, is in its nature much more prejudicial than probative to be laid before the jury, so as to minimize the risk of miscarriage of justice. The court in the case of **The Public Prosecution Service v William Elliott, Robert McKee**⁵, cited with approval the words of Lord Diplock in **Sang** regarding the power of a trial judge:

Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as a result of the activities of an agent provocateur.

⁴ [1980] A.C. 402

⁵ [2011] NICA 61, 2011 WL 6943264

[56] The Respondent submits that the witness, Lenin Joseph was an agent provocateur. This is of course a French term for an inciting agent, someone who lures or persuades another to break the law. The phrase is often used in conjunction with the concept of entrapment. Indeed, the Respondent uses that term as well in his submissions. Entrapment is defined in the case of **R v Looseley**⁶, as occurring when “an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order that he should be prosecuted.” I am not satisfied that Lenin Joseph could be described as an agent provocateur. He did nothing to instigate a crime. He did not entrap the Respondent. In reviewing the transcripts of the various conversations, I do not find that Mr. Joseph spoke in a consistently leading fashion with the Respondent nor did he offer any encouragement to the Respondent. At times, questions were asked but they were appropriate and relative to the conversations. Nothing said by Mr. Joseph appears to have caused the Respondent to do or say anything particular in reply. Certainly, nothing said by Mr. Joseph caused the Respondent to commit a crime or to say that he had done so. Although the **Sang** case indicates that the use of an agent provocateur is not a ground to disallow the admission of evidence so obtained, I am satisfied that no recourse to that case is necessary. Lenin Joseph was not an agent provocateur.

[57] I am satisfied that, in the case at bar, no improper or unfair methods were employed to obtain the evidence. Proper procedure and guidelines were followed through the use and guidance of **RIPA**. Therefore, although there is jurisdiction to refuse to admit evidence of admissions or confessions such as this, I can find no basis for that from the manner in which it was obtained. The rights of the Respondent were not infringed. The evidence was obtained in a secretive manner but that is the nature of a covert operation. The authorities followed the appropriate guidelines. As the court in the **William Elliott** case stated, “the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides.” I am satisfied that to admit the audio recordings and the transcripts thereof, would not undermine trial fairness in this case. Indeed, by allowing this evidence along with the statements of D/I Hughes and David Springette, trial fairness is enhanced.

⁶ [2001] UKHL 53

[58] For all of these reasons, the Application is allowed. I find the evidence in question to be admissible. It is relevant and its probative value outweighs any prejudice to the Defendant. The weight to be attributed to this evidence is, however, a matter to be determined by the jury, based on all of the surrounding circumstances of the obtaining of the evidence, and in conjunction with all of the remaining evidence. It will be the subject of a full **Turnbull** warning, just as the statements of D/I Hughes and David Springette will be the subject of appropriate jury instructions. All of the audio recordings and the transcripts of the conversations between the Respondent and Lenin Joseph, as well as the statements of Mark Hughes and David Springette, will therefore be admitted into evidence in the trial of this matter.

Richard G. Floyd
High Court Judge

By the Court

Registrar