

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF MONTSERRAT**

IN THE HIGH COURT OF JUSTICE

Criminal Case MNIHCR 2019/ 0008

BETWEEN:

THE QUEEN

And

DAVID BRANDT

Appearances:

Dr David Dorsett and Mr. David Brandt

Anesta Weekes QC Mr. Oris Sullivan DPP and Mr. Henry Gordon Senior Crown Counsel for the Crown

2020: March 2, 4, 5,
March 9.

- RULING ON PRELIMINARY APPLICATIONS -

- (1) DEFENDANT'S ENTITLEMENT TO CHALLENGE CROWN'S RIGHT TO STAND BY JURORS**
- (2) WHETHER THE CROWN HAS A RIGHT TO PEREMPTORY CHALLENGES**
- (3) ADMISSABILITY OF ILLEGALLY OBTAINED EVIDENCE**

[1] **Persad J:** The defendant in this matter raises a number of objections. Firstly, he objects to the Crown being allowed to stand by jurors under the provisions of Section 27 the Jury Act. The Crown

in response counters that if the Court is minded to agree with the accused, then the Crown should be allowed to have an equal right to peremptory challenge 3 jurors. The Defendant has also signaled an intention to object to the admissibility of a large number of “what’s up” messages being relied upon by the Crown in support of their case.

- [2] The Court having had the benefit from both sides of extensive legal submissions both in writing and orally over a number of days now seeks to rule on the various submissions.

The Constitutionality of the Right to Stand By under Section 27 (b) of the Jury Act

- [3] Section 27 of the Jury Act provides as follows:-

When a common jury is being impaneled for the trial in the High Court of any person or persons charged with any offence—

(a) the person charged, or each of the persons charged, may peremptorily and without assigning cause challenge any number of jurors not exceeding three;

(b) the Crown shall have the same right as, at the commencement of this Act, it has in England, to ask that jurors stand by until the panel has been “gone through” and perused. The Crown shall have the same right as at the commencement of this act it has in England to ask that the jurors stand by until the panel has been gone through and pursued

- [4] The contention put forward by the defendant is that two of his constitutional rights are likely to be infringed if the Crown is allowed to stand by jurors at his upcoming trial.
- [5] Mr. Brandt complains that if the Crown is allowed to stand by jurors such a practice is likely to infringe his right to equality of arms as well as his right to a fair hearing and the protection of the law.

[6] In support of his submission's reliance has been placed on the case of **Alcedo Tyson 92 WIR 328** where the appellant in that case complained about the use of the standby mechanism. The Court of Appeal having considered the arguments in that case found two breaches of the appellant's constitutional rights. The Court of Appeal specifically held as follows:-

2. The principle of equality of arms centers on achieving basic and reasonable proportionality as it has been accepted that it is not possible to achieve a perfect equality between the parties. Therefore, not all inequalities will result in a breach of the principle of equality of arms and amount to a violation of the constitutional right.

3. The Crown's unlimited right of stand-by is not justifiable in the public interest as section 28 of the Jury Act allows the Crown to challenge a juror for a cause if, in the opinion of the presiding judge, it is improper or inadvisable for the juror challenged to be impaneled. Therefore, the Crown would not be disadvantaged in the selection of a competent jury by the removal of the unlimited right of stand-by. *R v Andre Penn* BVIHCR2009/0031 (delivered 18th February 2015, unreported) applied; *Craig Alexander Bain v Her Majesty the Queen and The Attorney General of Canada* [1992] 1 S.C.R. 91 applied; *Porter v McGill* [2001] 2 A.C. 357 applied; *The Queen v Kerris Phipps* BVIHCR2009/0026 (delivered 18th November 2010, unreported) disapproved.

4. The tribunal must be independent and impartial but must also be perceived to be independent and impartial. *Millar v Dickson* [2002] 3 All ER 1041 considered; *Porter v Magill* [2002] 2 A.C.357 considered. 5. Section 27(b) of the Jury Act is unconstitutional due to the extreme disparity it creates in the jury selection process. The section permits the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown.

Further, section 27(b) infringes the substantive fundamental right to a fair trial by an impartial court as the perception of bias in the selection process may result in the perception of bias during the trial. In this case, the Crown stood by 21 potential jurors without ascribing any cause. It is likely that a fair minded and informed observer would conclude that there was a real possibility of bias in the actual jury selection process of this

trial and consequently in the performance of the jury and the trial itself. Therefore, the appellant's constitutional right to a fair trial by an impartial court was infringed.

Section 27(b) of the Jury Act, Cap. 30, Revised Laws of the Virgin Islands 1991 applied; *R v Andre Penn* BVIHCR2009/0031 (delivered 18th February 2015, unreported) applied.

- [7] Accordingly the Court of Appeal found that the provision of the Act dealing with the standing by of jurors was prima facie unconstitutional and a breach of the equality of arms principle. In terms of the application of the section, the Court of Appeal also found that the standing by of 21 jurors in the circumstances of that case amounted to a breach of the applicant's right to a fair hearing.
- [8] In fairness to the Crown in this case, they have considered the position of the Court of Appeal and accept in their written submissions that the right to standby should not be used in this case and they are commended for that position.
- [9] The Crown however takes a position that for true equality of arms, they should be afforded an opportunity to have an equal amount of peremptory challenges as the defendant. In support of this submission the Crown relies on the case of **Andre Penn BVIHCR 2009/0031** a decision of Mr. Justice Ramdhani in which the learned judge read into the provisions of the British Virgin Islands a right of peremptory challenge to the Crown after he had found that the right to standby jurors was in fact unconstitutional in that jurisdiction.
- [10] Justice Ramdhani in an illuminating judgment traces the history of peremptory challenge back to 1305 and in the course of his ruling comes to the conclusion that the right to standby jurors did in fact breach the applicant constitutional rights. In the course of his ruling having made that finding, the court goes on to consider what would be the appropriate remedy, in so doing he carries out a very useful analysis of the law relating to modification as it relates to existing laws.
- [11] Having regard to the issues raised by the Crown in this case and the position adopted by Mr. Brandt that this court should be slow to modify or read in to the provisions of section 27 of the Jury Act any right of entitlement to the Crown to peremptory challenge jurors or amend the provision in

any way so as to bring some sort of balance or proportionality to the existing law. Mr. Brandt maintains any change or modification to the law is a matter for Parliament.

[12] I think it would be useful to extract from the first instance decision in **Andre Penn** the very helpful analysis of Justice Ramdhani from paragraphs 87 to 97.

[87] This imbalance offends section 16(1) of the BVI Constitution. What then is to be done about this? Do I stay this trial and await the outcome of the constitutional motion on those declarations? A court must be forever mindful that it should not shirk from resolving matters which are well within its jurisdiction simply on the basis that its resolution may lead to startling conclusions. Having regard to my earlier findings, and the ambit of section 115 of the BVI Constitution I am of the view that I am entitled, for the purposes of this trial, to consider whether section 27 of the Jury Act is capable of being construed in such a manner that can bring it within terms of the fair trial provision of the Constitution.

[88] The 'Existing Law' clause is section 115, which states in full¹:

Existing laws 115.

(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of or in consistency with this Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.

(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with this Constitution or otherwise for giving effect to this Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.

¹ In similar terms to Section 117(1) of the Constitution of Montserrat.

[89) This provision is applicable as the current Jury Act which is the subject of discussion was enacted on the 1st July 1914. The current Constitution of the BVI in which section 115 is found, came into force on the 15th June 2007, therefore the Jury Act was an existing law when the Constitution came into force. Similar provisions contained in the Constitution in other jurisdictions have examined by regional courts. In the San Jose case, where section 134(1) of the Belize Constitution was under the judicial microscope, the question arose as to whether the modifications which the court might read into any existing legislation which was being confronted by the Constitution, could be substantial in nature? Justice of Appeal Liverpool answered this question in the affirmative when he stated at page 86:

- • ... the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing Jaw and the Constitution is too stark to be modified by construction. • Note also page 87.

[90) Notwithstanding that the modifications may reach to matters of substance, I have reminded myself the court must be careful not to overstep the judicial pale and tread on the toes of the legislators. The court must not write the law. In this regard I have paid careful attention 33 to the caution given by Henry P. in San Jose Farmers' Co-operative v The Attorney General when he said:

- 24 "The question which I have to consider is whether this is the type of inconsistency which a court may deal with under section 134 of the Constitution. In my view a distinction must be drawn between on the one hand construing existing provisions in an Act with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and on the other hand introducing entirely new and unrelated or contradictory provisions into the Act. • ... the modification etc must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law in conformity with the Constitution.
- [emphasis supplied]

Note also *Attorney General of St. Christopher, Nevis and Anguilla v Reynolds* (1979) 43 WIR 108 where the Privy Council held that the Court of Appeal of Belize was wrong when it held that it could not construe certain legislation with certain substantial modifications to bring it into conformity with the Belize Constitution.

[91] So one of the tasks of the court is to ensure that no new and contradictory provisions are introduced into the Act. Further, the modification must be necessary and one that fits within the statutory scheme of the legislation with the court stopping short when the "conflict between the existing law and the Constitution is too stark to be modified by construction. •

[92] It is very clear that the Jury Act, by its express provisions has created a scheme allowing the right of preemptory challenge to the defendant and the right of unlimited standby to the Crown. So the statutory scheme is that both sides should have the right, outside of the challenge for cause, to remove persons from the panel selected without giving reasons. That each side has the right to effectively remove persons without cause is not by itself contradictory to the fair trial provisions and in particular to the equality of arms principle. As stated earlier it is the unlimited and unqualified right of standby given to the Crown which offends the Constitution. "*Court of Appeal of Belize* (1991) 43 WIR 63 at page 73 34

[93] There is no doubt that it is sensible feature of the jury system which provides the defendant the right to challenge three jurors without cause, that the Crown should also be allowed the right of standby. Unlike the high court in Grenada, I am the view that there is some degree of utility in allowing the Crown the right of standby. I have considered the UK's position and the AG guidelines on the exercise of this power. In the UK, where there is no right of preemptory challenge by the defendant, it is seen as fair and sensible to limit the exercise of this right to situations where the defence consents or otherwise, only a few exceptional cases. In this jurisdiction, however, a defendant has the right to preemptory challenge three jurors without cause. If therefore, the Crown's present right of unlimited standby is to be curtailed and exercised sparingly as in the UK, then the equilibrium would again be disturbed; the principle applies equally to the Crown as it does the defendant. To

retain this balance, and having regard to the limitation which ought to be imposed on the exercise on the right of standby, I am of the view that section 27 could be read with a substantial modification that the Crown too should have the right to preemptory challenge three jurors for each defendant on trial. Construing section 27 with such a modification does not introduce any new, unrelated and contradictory provision in the law; it fits within the scheme allowing challenges to the jury and it does so to ensure the substantial imbalance is restored.

[94] For the purposes of this trial, section 27 should also be construed with a modification that the right of the standby given to the prosecution should only be exercised with the consent of the defendant, or in exceptional cases.

(95) For the purpose of this trial section 27 of the Jury Act is to be therefore construed as follows:

When a common jury is being impaneled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanour-

(c) the person charged, or each of the person charged, and the Crown in relation to each defendant, may preemptory and without assigning cause challenge any number of jurors not exceeding three;

(d) The Crown shall have the right to ask that jurors stand by only with the consent of the defendant or defendants as the case may be, or in exceptional cases.

(96) I will also give some guidance on what would be regarded as 'exceptional' for the purposes of the standby right of the prosecution. Drawing on the Attorney General's Guidelines of the UK I would suggest that exceptional cases would include cases involving treason, terrorism and national security. This is not a case of treason, terrorism or national security. It is not otherwise an exceptional case. Therefore, the effect would be, that in this trial the Director may exercise the right to make three preemptory challenges, any amount

of challenges for cause, but may not exercise the right of standby unless the defendant consents

- [13] What is of interest is that in the decision in **Tyson**, the approach taken by Justice Ramdhani in the **Andre Penn** matter was brought to the attention of the Court of Appeal at paragraph 105 at page 373 of Volume 92 of the West Indian. The Court of Appeal had this to say:-

In the oral submissions before this court the Crown indicated that the practice in jury selection in the BVI post Penn was to apply section 27 with the modifications set out in Penn. This is a matter that should be properly addressed by the legislature going forward but to the extent that the Crown has raised this issue before this court, **this court would support the practice of applying the modifications of section 27 of the jury act as set out in Penn but excluding the new section 27 (b) the resulting position is similar to that what obtained in a number of other jurisdictions.**

- [14] Having regard to the position of the Court of Appeal and its approach to the decision in **Penn**, while I accept in the normal course of things it is for the legislature to make changes when necessary, the approach of the Court of Appeal in supporting the modified approach implemented in **Penn** is not distinguishable in any way from the matters raised in this court and accordingly this court is minded to adopt the approach taken in **Andre Penn** by Mr. Justice Ramdhani and read into the provisions of section 27 of the Jury Act an entitlement for the Crown to have three peremptory challenges equal to that of the defendant and to allow the Crown to have a right to ask the jurors to standby only with the consent of the defendant or in exceptional cases.

- [15] Such an approach appears to have the support of the Court of Appeal and it is clear to this court that such an approach is sensible and certainly goes a significant way to ensuring the equality of arms for those involved in the trial

Admissibility of “WhatsApp” Messages

- [16] In September 2015, the defendant, Mr. David Brandt ("Mr. Brandt") was arrested and charged with various offences under the Penal Code of Montserrat. He has not yet been tried. The police obtained warrants from a magistrate to search premises occupied by Mr. Brandt.
- [17] The warrants authorised named police officers to search the premises for articles essential to the inquiry into the said offences. The police conducted the search and seized, among other things, cell phones which were subsequently searched. Following the search of Mr. Brandt's cell phones, certain WhatsApp messages were recovered which he does not deny are his. The prosecution indicated that they intend to rely on those communications at Mr. Brandt's trial.
- [18] The defendant in this matter has through Dr. Dorsett raised preliminary submission that the what's up data obtained from the defendant's cell phone was obtained outside of the scope of the magistrates warrant and constituted a failure to comply with the lawful authority granted under the warrant as would otherwise be permitted by section 9(3)(c) of the Constitution of Montserrat.
- [19] The position of the Crown in relation to this preliminary point is that any constitutional challenge to the admissibility of the what's up evidence at this stage must take into consideration that the defendant has already filed a constitutional challenge to the search resulting in the seizure of the defendant's telephone and the recovery of the what's up data being relied upon by the Crown in this prosecution.
- [20] According to the Crown the Court of Appeal of the Eastern Caribbean has already ruled on this matter and therefore it would be inappropriate for this court to express a view on the constitutionality of the search when the Court of Appeal has already made a finding on that issue.
- [21] Dr. Dorsett accepts that the Court of Appeal has ruled on whether the search resulting in the what's up data been recovered was constitutional, however it is his submission that the judges of the Court of Appeal in determining this issue of constitutionality did so without proper consideration of section 21(1) of the Constitution of Montserrat which defines the word "contravene".

- [22] In short it is his submission that the Court of Appeal decision on the constitutionality of the search was "per incurium" and therefore this court is not bound by that decision and is free to depart from the findings made by the Court of Appeal.
- [23] Having had an opportunity to review the Court of Appeal decision it is clear that the Court of Appeal frontally dealt with the question of whether the search and consequent recovery of the what's up data found on the phone seized from the defendant was a breach of the Constitution of Montserrat. The court broadly speaking in making its findings held that although the search was illegal it was not unconstitutional.
- [24] It is in my view trite law that in a criminal trial a person accused of a crime is entitled to raise any constitutional issue in relation to his or her ability to have a fair criminal trial. One obvious aspect of this is the ability of an accused person to raise in the course of a criminal trial, constitutional issues relative to the admissibility of evidence being relied upon by the Crown.
- [25] The raising of constitutional issues in a criminal trial in an effort to secure a fair trial has been a key part of the criminal trial process for a number of years. Examples of instances where it has been held that the criminal trial judge is best suited to deal with constitutional issues within the context of fair trial rights in the course of a criminal trial include allegations where an accused person complains that he cannot have a trial within a reasonable time², allegations of pretrial publicity³ being of such a nature that no fair trial could be had, allegations that the process of standing by jurors⁴ embarks upon fair trial rights, allegations that evidence secured⁵ by the Crown are in breach of the individuals constitutional rights and therefore should not be admitted into evidence.
- [26] Though this list is not exhaustive it is now commonplace to have constitutional issues being raised at the sentencing⁶ stage of a criminal trial where it is argued that the court in imposing a sentence is entitled to take into account breaches of the defendant's constitutional rights in the process leading up to trial.

² Barrington Telesford v R GDAHCV 2012/207

³ Nankissoon Boodram 47 WIR 459

⁴ See Alcedo Tyson op cit

⁵ Allie Mohammed v The State 53 WIR 444

⁶ Callistus Bernard & 13 others v R Case No. 19/84 (Resentencing Hearing)

[27] Accordingly it is important for this court to take into consideration the submissions being made by Dr. Dorsett that the decision of the Court of Appeal in relation to the findings of constitutionality in relation to the search deployed in this case was made "per incurium".

[28] Having had an opportunity to review the submissions made both by Dr. Dorsett and the Crown, as well as an opportunity to review the decision of the Court of Appeal, it is this court's view that the decision made by the Court of Appeal was not "per incurium" and therefore that case not being in any way distinguishable from the case before this court, I am bound to follow the findings of the Court of Appeal that the search of the defendants cell phone and the securing of the what's up data was illegally obtained but not unconstitutional.

[29] I should point out that in making this finding I am not persuaded that the failure by the Court of Appeal to have regard to section 21(1) of the Constitution of Montserrat is in any way material, and quite frankly I find it very difficult to accept it even though it may not have been expressly raised before the Court of Appeal, that the judges of the Court of Appeal would not have had at the forefront of their minds an understanding of what the word "contravenes" means in the context of a constitutional challenge.

[30] Separate and apart from that, this court is mindful of the learning of Lord Diplock in the case of **Cassel v Broome** 1972 AC 1027 at 1131 where he noted:-

"The Court of Appeal found themselves able to disregard the decision of the house in *Rookes v Barnard* by applying to it the label per incurium. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not too it's a right to disregard the decision of a higher appellate court or to the right of a judge of the High Court to disregard the decision of the Court of Appeal"

[31] This to me with the greatest respect to Dr. Dorsett, makes clear, that this court even if it is of the view that the appellate court made the decision per incurium, it is still not able to depart from the

decision of the appellate court particularly where such decision of the appellate court cannot be distinguished from the case at bar.

- [32] Having made this finding, the court indicated to the parties that it was not inclined to hear constitutional arguments on the admissibility of the search of the defendants phone and invited the defendant to indicate whether he was objecting to the what's up data being relied upon by the Crown on the basis of the common law.
- [33] Dr. Dorsett in making his submissions indicated to the court that he was objecting to the admissibility of the WhatsApp data on two grounds.
- [34] Firstly that having regard to Section 4 and 5 of the provisions of the Criminal Procedure Code which dealt with the granting of search warrants it was his submission that the securing of the what's up data in breach of those provisions rendered the material recovered from that unlawful and illegal search inadmissible. In making this submission Dr. Dorsett relied upon in the case of **Scott v Baker** 1969 1 QB 659 to support his argument.
- [35] Secondly it was argued by Dr. Dorsett that it was unfair for the court to seek to admit such evidence in circumstances where the police had wantonly breached the provisions of the Criminal Procedure Code and that because the what's up data was illegally obtained the court should exclude the evidence on that basis.
- [36] Before dealing with the first point being raised by Dr. Dorsett the court should indicate that it starts this analysis with the firm appreciation that the evidence the prosecution is seeking to adduce into evidence falls squarely within the category of illegally or unlawfully obtained evidence. That having been said the material at this stage does not constitute material obtained in breach of the Constitution of Montserrat.
- [37] The specifics of the illegality revolved around the failure of the police in securing the warrant to appreciate that a warrant for a mobile phone is not the same as a warrant to justify access to the

contents of the mobile phone. Accordingly the extraction of the what's up data from the phone was obtained unlawfully and illegally.

- [38] Dr. Dorsett seeks to persuade this court that in addition to that element of unlawfulness the court should take into account sections 4 and 5 of the Criminal Procedure Code which provides the section relevant to the obtaining and execution of search warrants.
- [39] Dr. Dorsett submits that in addition to the failure to specify in the warrant, the contents of the mobile phone there was an obligation on the police having recovered items on the warrant to bring back those items to the magistrate for safekeeping. According to Dr. Dorsett the failure by the police to comply with these requirements under the Code amounted to a deliberate failure by the police to comply with the requirements of the Code and that failure was sufficient in itself for this court to exclude the evidence obtained in noncompliance.
- [40] In making the submission Dr. Dorsett relied upon the case of **Scott v Baker** 1969 1 QB 659 for the proposition that this court could exclude such evidence and ignore the principles outlined in cases such as **Sang** and **Karuma** if it could be establish that the evidence was obtained in a manner which was not in accordance with the prescribed statutory procedure and compliance with the statutory procedure was a necessary step to seek a conviction for a particular offence.
- [41] Dr. Dorsett provided this court with a very useful analysis of the case of **Scott v Baker** and number of cases where it had been applied and distinguished. Having considered the submissions by Dr. Dorsett and Ms Weekes QC for the Crown, I am not persuaded that the case of **Scott v Baker** is applicable to the circumstances of this case.
- [42] Firstly there is no evidence before me, and I have checked both the affidavit and supplemental affidavit of the defendant to see if any mention is made of the execution of the search warrant as to whether the matters recovered in the search were ever brought before the magistrate who issued the warrant. In short there is no evidence before me of noncompliance. Even if there was, I think it is sufficient to say that Section 5 (4) of the Code provides as follows

If anything is seized and brought before the court and the powers conferred by any search warrant, it may be retained until the conclusion of the case of investigation in respect of which its seizure was authorized, reasonable care been taken for its preservation

- [43] A proper reading of that section suggests that if after the police execute their warrant and bring the recovered items before the court, there is an express power for the police to retain until the conclusion of the case of investigation the item seized.
- [44] That of course is a matter of discretion for the magistrate or officer issuing the warrant. It would seem to me that if one was of the view that the officer executing the warrant had to bring back before the magistrate the items recovered it would make a nonsense of the investigative process if those items had to be kept by the magistrate as opposed to the police being allowed to carry out further investigations on the items seized.
- [45] In those circumstances I can hardly envision a situation where a magistrate would exercise her discretion to retain the articles seized before charge in circumstances where the police require further investigations in relation to the exhibit before determining whether to lay a charge.
- [46] Secondly the case of **Scott v Baker** involves the approval of a device by the Secretary of State in relation to the offence of driving motor vehicle having consumed alcohol which was introduced in 1967 the United Kingdom.
- [47] In that case approval of the device had to be proved and in the absence of proof of approval the courts were entitled to dismiss the information. In that case proof of approval by the Secretary of State was a necessary step toward securing a conviction.
- [48] The case at bar is significantly distinguishable, even if there was evidence before me of noncompliance by the police in relation to the what's up messages as it related to sections 4 and 5 of the Criminal Procedure Code, this is not a case where the statutory procedure laid down in those sections are a necessary step to securing a conviction for this offense.
- [49] It is for those reasons I am not persuaded that the decision in **Scott v Baker** applicable to the circumstances of this case.

- [50] The second argument put forward by Dr. Dorsett is that having regard to the fact that the WhatsApp messages were unlawfully or illegally obtained it would be unfair for this court to admit into evidence the WhatsApp messages.
- [51] The Crown in seeking to respond the defendant's objection to the admissibility of the WhatsApp messages makes two submissions.
- [52] Firstly they argue that under the common law principles relating to the admissibility of illegally obtained evidence, this court does not have a discretion to exclude such evidence, that critical issue for this court to start with is relevance, in short it does not matter how the evidence was obtained once it is relevant it is admissible. The prosecution submits that the evidence that is being objected to is reliable, material and certainly relevant, in any event the prejudicial effect of the material does not outweighs the probative value.
- [53] Secondly the Crown submits that even if the court was minded to consider whether the seizure and collection of the what's up material may have constituted a breach of the defendant's constitutional rights, the case law according to the Crown did not make it automatic that the court should necessary exclude such evidence.
- [54] I think an appropriate starting point is to look at the House of Lords decision in the case of **Sang** 1980 AC 402.
- [55] In that case the House of Lords held that the judge in a criminal trial always had a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighed its probative value. The court also held that save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, the judge has no discretion to refuse to admit relevant and admissible evidence on the ground that it was obtained by improper or unfair means, the court not being concerned with how it was obtained, it was no ground for the exercise of the discretion to exclude evidence that it was obtained as a result of the activities of an agent provocateur.

[56] The House of Lords in making that decision relied on cases such as **Noor Mohammed v The King** 1949 AC 182 PC and **Karumah v R** 1955 AC 197 another decision of the Privy Council. Lord Diplock in delivering his ruling stated at 436 C et seq:-

My Lords, I propose to exclude, as the certified question does, detailed consideration of the role of the trial judge in relation to confessions and evidence obtained from the defendant after commission of the offence that is tantamount to a confession. It has a long history dating back to the days before the existence of a disciplined police force, when a prisoner on a charge of felony could not be represented by counsel and was not entitled to give evidence in his own defence either to deny that he had made the confession, which was generally oral, or to deny that its contents were true. The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence." That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.

Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself, your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

A fair trial according to law involves, in the case of a trial upon indictment, that it should take place before a judge and a jury; that the case against the accused should be proved to the satisfaction of the jury beyond all reasonable doubt upon evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied; for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. If your Lordships so hold you will be reverting to the law as it was laid down by Lord Moulton in *Rex v. Christie* [1914] A.C. 545, Lord du Parc in *Noor Mohamed v. The King* [1949] A.C. 182 and Viscount Simon in *Harris v. Director of Public Prosecutions* [1952] A.C. 694 before the growth of what I believe to have been a misunderstanding of Lord Goddard's dictum in *Kuruma v. The Queen* [1955] A.C. 197.

I would accordingly answer the question certified in terms which have been suggested by my noble and learned friend, Viscount Dilhorne, in the course of our deliberations on this case. (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) 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 the result of the activities of an agent provocateur. I would dismiss this appeal.

- [57] It is interesting to note that as recent as July 2018 the Privy Council in the case of **Warren v The State of Pitcairn** 2018 UKPC 20 accepted that any irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility. At paragraph 33 of that ruling the Privy Council went on to say that the test of exclusion is not the nature of any irregularity in obtaining the evidence but rather the extent of unfairness caused thereby.
- [58] In applying these cases this court is of the view that the evidence of the WhatsApp messages though illegally and unlawfully obtained is highly relevant to the issues involved in this case and therefore should be admitted despite the objections of the defendant under the common law.
- [59] I also accept that while this court has a discretion to exclude evidence in circumstances where the prejudicial effect of the evidence outweighs the probative value, it is my considered view that the evidence of the what's up messages are not so prejudicial as to outweigh the probative value.
- [60] Accordingly this court will admit the what's up messages in the circumstances of this case.
- [61] The Crown had encouraged this court to consider the factors relevant to admissibility in the case of **Thanh Long Vu v R** 2013 SCC 60. This was a case where the Canadian courts found that there had been a breach of charter rights under the Canadian charter. In the course of their ruling the court quite correctly in my view indicated that merely because there has been a breach of a constitutional right did not automatically mean that evidence obtained in breach would necessarily be excluded.
- [62] At paragraph 68 the Supreme Court noted as follows:-

Section 24(2) of the Charter requires that evidence obtained in a manner that infringes the rights of an accused under the Charter be excluded from the trial if it is established that “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”. The burden is on the party seeking exclusion to persuade the court that this is the case. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the Court established that

[w]hen faced with an application for exclusion under [s. 24\(2\)](#), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the [Charter](#)-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the [Charter](#)-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. [para. 71]

[63] This court has deliberately not expressed of view on the factors raised by the Crown in that case for a number of reasons. Firstly as mentioned above the case at bar relates to a scenario in which they has been a constitutional challenge to the admissibility of this evidence, however as presently advised Court of Appeal of the Eastern Caribbean which is binding on this court has held that the search and the extraction of the what's up messages was not unconstitutional.

[64] Secondly counsel for the defendant Dr. Dorsett has indicated that an appeal has been lodged with the Privy Council and efforts have been made to have an expedited hearing between the hearing of these preliminary issues before this court and the date for the hearing of the trial.

[65] Thirdly it would seem to me that if before the Crown seeks to adduce into evidence these what's up messages and there is some determination relevant to the constitutionality of the search favorable to the defendant, that it seems to me they will be at liberty to raise that matter before the court at the time the prosecution seeks to tender such evidence.

[66] It is for those reasons that this court will refrain from looking at the issues raised in **Vu** as it is possible submissions on this point may be made at a later stage in this trial.

[67] Accordingly have regard to the matters raised in this ruling the court will make the following orders:-

1. That the use of the power to stand by jurors pursuant to section 27(b) of the Jury Act is unconstitutional and cannot be relied upon by the Crown.

2. That in order to ensure equality of arms the provisions of section 27 of the Jury Act is hereby modified so as to allow Crown a peremptory challenge to three jurors identical to the rights and entitlements of defendant in this matter.
 3. That the right to stand by may be exercised by the Crown only if there is consent by the defendant or defendants in a case, or where there are exceptional circumstances.
 4. That the defendant's objection to the admissibility of what's up messages is overruled and the Crown will be allowed to adduce such evidence at a trial of this matter.
- [68] Allow me to thank the parties in this matter for their very useful and comprehensive submissions that was made before this court.

Justice Rajiv Persad
High Court Judge (Ag)