

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

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

**CLAIM NO. BVIHCR 0009 OF 2016
BETWEEN:**

THE QUEEN

Claimant

And

**PAMPHILL PREVOST
SIMON POWER
SHAWN HENRY**

Respondent

Appearances:

Mr. Patrick Thompson for the 1st Applicant
Mr. Israel Bruce for the 2nd Applicant
Mr. Ian Wilkinson QC for 3rd Applicant
Mr. John Black QC, Mrs. Tiffany Scatliffe- Esprit and Tamara Foster for the Crown

2019: January 16, 17

JUDGEMENT ON APPLICATION TO SEVER COUNTS ON AN INDICTMENT

- [1] **Persad J:** The Defendants were before the Court on an Indictment dated the 4th July 2018. This Indictment included 10 counts of which two counts related to conspiracy, seven counts related to theft and one count related to the acquisition possession or use of the proceeds of criminal conduct.
- [2] As a result of directions from the Court legal submissions were filed by counsel for Prevost and Power in November 2018 seeking to quash a number of counts on the Indictment. The Crown having considered these submissions indicated in their written submissions that they would not proceed upon count eight of the July 4, 2018 Indictment.

- [3] Accordingly a new Indictment was presented to the Court reflecting the removal of count eight in the July 4, 2018 Indictment. This new Indictment dated 29 November 2018 included some nine counts. Two counts of conspiracy (conspiracy to steal and conspiracy to pervert the course of justice). There were also six substantive counts of theft and one count of acquisition possession or use of the proceeds of criminal conduct.
- [4] When the matter came before the Court on the 10th of January 2019 the Court of its own motion raised with the Crown a concern that since the Indictment included on the face of it counts of conspiracy to steal as well as substantive counts of theft relating to the same time. The Court wished to know whether the Crown was considering proceeding on both the conspiracy and substantive counts as these counts appeared from the depositions to relate to the same time period.
- [5] The Court reminded the Crown that in cases where there are substantive and conspiracy counts included on an Indictment, the practice is that the Crown would be required to justify the inclusion of both these types of counts on an Indictment.
- [6] In the case of ***Bhola Nandlal v The State*** 1995 49 WIR 412 at 429 Sharma JA noted as follows under the rubric "Now the Conspiracy charge":

But the mischief created by the State in adopting this division of counts and separate trials was still not complete, for the order or sequence in which the matters were taken had proverbially cooked the legal goose of the appellant.

After all, if he had already been found 'Guilty' by a jury on the first Indictment on a count for corruption, how in the name of decency and fair play could the State justify the prosecution for conspiracy on a second Indictment? Inherent in the 'Guilty' verdict returned by the jury in respect of the corruption charge in the first Indictment was the undeniable fact (and juridically unimpeachable decision) that there must have been the conspiracy (agreement) to pervert the course of justice, as the act of corruption was the end result or fruit of the conspiracy.

The course taken by the Director of Public Prosecutions was a clear breach of a settled practice as to how charges are laid and proceeded with when a conspiracy (a procedural offence) alone is charged, and when it is charged with an offence which is the fruit of the conspiracy (the substantive offence).

If a substantive offence was not committed, it is the practice to charge conspiracy. The reason for this is obvious. Where, however, there is an effective and substantive charge, the addition of a charge of conspiracy is, in the absence of exceptional circumstances, undesirable; see *Verrier v Director of Prosecutions* [\[1967\] 2 AC 195](#).

It is not desirable to include a charge of conspiracy which adds nothing to the effective charge of the substantive offence; see *R v Jones* (1974) 59 Cr App Rep 120. One example of an exceptional circumstance in which a charge of conspiracy might be added is where the substantive offence(s) does not adequately represent the overall criminality; see *R v Jones* (1974).

It is the modern practice where an Indictment contains a substantive count(s) and a related conspiracy count that the judge should require the prosecution to justify the joinder, or (failing justification) to elect whether to proceed on the substantive count or on the conspiracy count. A joinder is satisfied for this purpose if the judge considers that the interests of justice demand it.

- [7] Mr. John Black QC, lead counsel for the Crown informed the Court that he would indicate the Crown's position before the accused were arraigned.
- [8] It turns out that at the next hearing counsel for accused Henry, Mr. Wilkinson QC indicated to the Court that he also wished to make two applications for the Court's consideration. Firstly, he wished to join with the other applicants who had filed motions to quash particular counts on the Indictment and if that was unsuccessful, he indicated his intention to make an application for severance on behalf of his client.

- [9] It turns out that after consideration of the matters ventilated in Court the Crown indicated to the Court that it would be proceeding on three counts mentioned on the November 29 Indictment and that by extension the Crown was not pursuing the six substantial or completed counts of Theft that were reflected on that Indictment.
- [10] In short the Crown had opted or elected as is their entitlement to prosecute the accused persons for the conspiracy to steal offence as well as the offence of conspiracy to pervert the course of justice which was laid against Prevost and Power and the offence of acquisition possession or use of the proceeds of criminal conduct which was laid solely against Power.
- [11] The Indictment having now come down to three counts, a further application was made by Mr. Wilkinson for Mr. Henry that there should be severance. In support of this an application and affidavit by those acting for Henry on the 15th of January 2019.

Application by Defendant Henry to Sever the Indictment:

- [12] Counsel for the Applicant Henry, Mr. Wilkinson QC making his submissions makes the following points: -
- a. the applicant Henry is charged with the conspiracy to steal count where he is charged along with Prevost and Power.
 - b. The other counts on the Indictment do not in any way include Mr. Henry as they relate to the other accused.
 - c. That there is a real risk of prejudice that arises if the jury in the consideration of the evidence in relation to the other counts that Mr. Henry is not part of that the jury may use either the existence of the other counts on the Indictment or the material led in evidence on those counts as a basis to conclude that Henry be guilty of the charge of conspiracy.

- d. That because there is a risk of prejudice this Court should sever from the Indictment the two counts that have nothing to do with Mr. Henry and therefore what this Court should do is proceed upon in effect an Indictment on the count of conspiracy to steal alone.
- e. According to Mr. Wilkinson QC the risk of prejudice is so high that no direction from the Court however comprehensive would be sufficient to protect Mr. Henry from this prejudice.
- f. Further that when one considers the factors that the Court should take into account in determining whether to sever the two counts that have nothing to do with Mr. Henry little or no weight should be given to matters such as the number of witnesses and costs that arise if the Court is minded to sever the counts that Mr. Henry is not involved in.

[13] Mr. John Black QC for the Crown submits in response as follows: -

- a. The Crown has as it is entitled to opted to elect for the conspiracy charges over the substantive charges.
- b. He does not agree that there is a need for a separate trial in relation to the counts on conspiracy to pervert the course of justice or the acquisition possession or use of the proceeds of criminal conduct.
- c. According to the Crown all counts are properly included on the Indictment in that they meet the test for being included on an Indictment in that they either relate to a series of offenses that are of a similar kind or the arise out of the same series of facts. The Crown asked the Court to look at the principles in the case of Ludlow in support of their position.
- d. In any event the offence of perverting the course of justice arises out of the conspiracy to steal charge and is closely related and therefore properly included on the Indictment. Similarly, the money-laundering charge also arises out of the conspiracy to steal offence.

- e. The Crown's position is that there is no prejudice to Henry as neither of the other counts in any way link or apply to Henry and the Court in the trial process is well-equipped to protect the interests of the Defendant by appropriate directions at the end of the trial.
- f. The Crown indicates that should the Court consider it appropriate to order separate trials, it would mean that the 63 witnesses that the proposed to be called in this case and the expenses incidental to that would have to be repeated if there was another trial.
- g. In fact, the Crown's position is that in order to properly prosecute the two other counts which Mr. Henry is not part of the would have to lead the same evidence from the same witnesses in order to establish those counts. According to the Crown the presumption of having a joint trial of matters which are of similar kind or arising out of the same set of facts militate towards a joint trial.

[14] In dealing with this application, it is necessary to appreciate the legal principles that apply to the inclusion of Counts on an Indictment generally and then the Court will have to look at the legal principles that apply to the severance of counts on an Indictment in order to determine whether in the circumstances of this case the Court should grant the Application and sever the Indictment.

The Inclusion of Counts on an Indictment: -

[15] The question of Joinder of counts on an Indictment arose in the case of **Andrew Ryan Ferrell v The Queen** 2010 UKPC 20 where the Privy Council noted as follows: -

Joinder

7. Mr Salter submitted on behalf of the appellant that the money laundering counts should not have been joined and thus tried together with the drugs' counts. It is common ground that the principles relevant to joinder in Gibraltar are the same as in England and Wales: see sections 4 and 138-142 of the Criminal Procedure Act 1961. Rule 9 of the Indictment Rules 1961 provides:

“Charges for any offences may be joined in the same Indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character.”

At first instance Pitto J held that the two sets of charges arose out of the same facts. However, it was accepted by the Attorney General, both in the Court of Appeal and before the Board, that he was wrong so to hold. The issue both before the Court of Appeal and before the Board is whether the two sets of offences ‘form or are part of a Page 3 series of offences of’ a ‘similar character’. The Court of Appeal held that they are. The question is whether it was correct to do so.

8. The Court of Appeal referred to the decision of the English Court of Appeal Criminal Division in *Kray* (1969) 53 Crim App R 569 and to that of the House of Lords in *Ludlow v Metropolitan Police Commissioner* [1971] AC 29. It then summarised the relevant principles as set out in the 2009 edition of Archbold. The principles are now set out in the 2010 edition, which includes the following at para 1- 158:

“The fact that evidence in relation to one count was not admissible in relation to another count under the old ‘similar fact’ principle did not necessarily mean that those counts could not properly be joined pursuant to this limb of the rule: see ... *Kray* ... and *Ludlow* ...

... a sufficient nexus must nevertheless exist between the relevant offences; such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other, but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a *prima facie* case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the Defendants, those of the Crown, witnesses and the public;

... it is not desirable that the rule should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the Indictment

... both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character."

9. Like the Court of Appeal, the Board was referred to a number of other cases including Clayton-Wright (1948) 33 Cr App R 22, Harward (1981) 73 Cr App R 168, Marsh (1985) 83 Cr App R 165 and Williams [1993] Crim LR 533, but, again like the Court of Appeal, it has formed the view that they are simply examples of the application of the principles expounded in Kray and Ludlow. The same is true of Anwoir [2008] 2 Cr App R 36. The question is whether, in the circumstances of this case there is a sufficient nexus between the offences charged in the money laundering counts and in the drugs counts. Page 4

10. The Court of Appeal accepted the submission made by the Attorney General that there was both a legal and factual nexus between them. Counts 1 to 4, and especially counts 2 and 4, which alleged possession of cocaine with intent to supply, all dealt with the supply of drugs. The drugs would of course have been sold for money, which would then require to be banked and, in all likelihood, laundered. The Attorney General correctly accepted that the prosecution had to show, in the case of each of the money laundering counts 7 to 15 that some at least of the money derived from drug dealing. He submitted, however, that on the facts set out above, it was open to the jury to infer that the money was indeed the proceeds of drug dealing. He accepted of course that all the money laundering counts related to transactions that pre-dated the possession of the drugs in the drugs counts but submitted that, in the absence of a credible explanation to the contrary, it was open to the jury to infer that the appellant had had a system of selling drugs and laundering the money over an extended period.

11. The Court of Appeal accepted that submission and so does the Board. Mr Salter correctly accepted that the evidence relating to the money was evidence that the appellant was laundering money for some illegal or improper purpose. He could not do otherwise.

The appellant had no apparently legal means of accumulating significant amounts of cash. Yet he had deposited nearly £70,000 and moreover did so in individual amounts of under £1,000. A jury would be very likely to infer that in doing so he was laundering ill-gotten gains. It would be entitled to do so.

- [16] In this case the Crown proposes to rely upon 3 counts on the Indictment. Count 1 which includes Prevost Power and Henry relate to the Conspiracy to steal offence which relates to the period 1st January 2012 and 31st July 2014. The second Count relates to Acquisition Possession or Use of Proceeds of Criminal Conduct is against Simon Power alone. This count particularizes that that Power acquired possessed or used property namely cash US Currency from Nunez Hernandez and Tapia which represented the proceeds of Criminal conduct. The final count is against both Prevost and Power and includes a conspiracy to pervert the Course of Justice
- [17] Having looked at the deposition the Court is of the view that the 3 counts left on the Indictment are properly included on the Indictment as they certainly appear on the face of the material before the Court a have sufficient nexus existing between the relevant offences, certainly the offences included on the Indictment exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the Defendants, those of the Crown, witnesses and the public.

Severing the counts on an Indictment:

- [18] That having been said it is of course possible in the appropriate case for the Court to exercise its discretion to sever a count on an Indictment. **Blackstone Criminal Practice 2011** at D 11.78 provides as follows: -

The proper exercise of the power was considered by Lord Pearson in *Ludlow v Metropolitan Police Commissioner* [1971] AC 29 (see also **D11.70**). Having held that the joinder of the counts against L for attempted theft and robbery was lawful, his lordship dealt with the appellant's further argument that a single trial of the two offences inevitably prejudiced or embarrassed the accused in his defence since the jury heard evidence on count 1 that was inadmissible on count 2 and vice versa. Therefore, the trial judge should

have ordered separate trials in exercise of the discretion given him by s. 5(3). In rejecting this argument Lord Pearson said (at pp. 40–2):

Before the Indictments Act 1915, it was a tenable theory ... to say that any joinder of counts relating to distinct alleged offences was necessarily so prejudicial to the accused that such joinder ought not to be permitted. [His lordship then reviewed pre-1915 cases lending support to the theory.]

In my opinion, this theory — that a joinder of counts relating to different transactions is in itself so prejudicial to the accused that such a joinder should never be made — cannot be held to have survived the passing of the [Indictments Act 1915](#). No doubt the juries of that time were much more literate and intelligent than the juries of the late 18th and 19th centuries, and could be relied upon in any ordinary case not to infer that, because the accused is proved to have committed one of the offences charged against him, therefore he must have committed the others as well. I think the experience of judges in modern times is that the verdicts of juries show them to have been careful and conscientious in considering each count separately.

Also in most cases it would be oppressive to the accused, as well as expensive and inconvenient for the prosecution, to have two or more trials when one would suffice. *At any rate, ... the manifest intention of the Act is that charges which either are founded on the same facts or relate to a series of offences of the same or a similar character properly can and normally should be joined in one Indictment, and a joint trial of the charges will normally follow, although the judge has a discretionary power to direct separate trials under section 5(3).*

If the theory were still correct, it would be the duty of the judge in the proper exercise of his discretion under section 5(3) to direct separate trials in every case where the accused was charged with a series of offences of the same or a similar character, and the manifest intention appearing from section 4 and [r. 9] would be defeated.

The judge has no duty to direct separate trials under section 5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice.

In some cases the offences charged may be too numerous and complicated, ... or too difficult to disentangle, ... so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced.

In other cases, objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused ...

D11.79 -Application of this Principle

Thus, where counts for separate offences can be tried together (through compliance with CrimPR 3.21(4)), the trial judge is able to exercise his discretion to order separate trials, if their joint trial would be prejudicial or embarrassing for some reason (r. 3.21(4)(a)), or if some other feature makes that course desirable (r. 3.21(4)(b)). Although they are not intended to be exhaustive, examples of such features or reasons might include the following:

(a) *The scandalous nature of the evidence as to one of the counts.* For example in *Laycock* [2003] EWCA Crim 1477, the Court of Appeal warned that prosecutors should be careful not to charge counts that would prejudice an accused unless there was a real purpose to be served. In that case, the prosecution were criticized for including in a firearms Indictment a count which showed that the accused had been sentenced to a previous sentence of imprisonment with the result that he was prohibited from possession of a firearm.

(b) *The number and/or complexity of the counts.* This may result in difficulties for a jury in disentangling evidence on one count from that on the other count or

counts. In this regard, special considerations govern the trial of counts for sexual offences (see [D11.80](#)).

The fact that the accused wishes to give evidence in his own defence on one of the counts but not on the others is not, in the normal case, a sufficient reason for severance, even though non-severance will oblige him to choose between not testifying at all and exposing himself to cross-examination about all the charges (*Phillips* (1987) 86 Cr App R 18). See also *Lanford v General Medical Council* [\[1990\] 1 AC 13](#).

Also relevant for discussion is paragraphs D 11.86-88

The Court has a discretion to order separate trials of accused who have properly been joined in one Indictment pursuant to CrimPR 3.21(4) and in accordance with the principles stated in *Ludlow v Metropolitan Police Commissioner* [\[1971\] AC 29](#) (see [D11.70](#)). The existence of the discretion was acknowledged by Sachs J in *Assim* [\[1966\] 2 QB 249](#). His lordship said (at p. 261B–C):

Where ... the matters which constitute the individual offences of the several offenders are upon the available evidence so related ... that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one Indictment and can, *subject always to the discretion of the Court*, be tried together [emphasis added].

Although that was said in the context of an Indictment which did not contain a joint count, it has never been doubted that the discretion may be exercised as much in respect of accused charged in a joint count as in respect of those charged in separate counts on one Indictment. The discretion may be attributed either to the Court's inherent power to control its own proceedings or to the power to sever contained in the [Indictments Act 1915, s. 5\(3\)](#).

D11.87

Guidance as to the Exercise of the Discretion Because severance of the trial of jointly indicted accused is a matter of discretion, the way in which the discretion is exercised is unlikely to provide a successful ground of appeal (see [D11.113](#)). Guidance on ordering separate trials does, however, emerge from the decided cases. The following propositions summarise that guidance.

(a) Where the accused are charged in a joint count, the arguments in favour of a joint trial are very strong. These arguments include:

(i) severance will necessitate much or all of the prosecution evidence being given twice before different juries and increase the risk of inconsistent verdicts;

(ii) even if the accused are expected to blame each other for the offence (i.e. will run 'cut-throat' defences), the interests of the prosecution and the public in a single trial will generally outweigh the interests of the defence in not having to call each accused before the same jury to give evidence for himself which will incriminate the other *Grondkowski* [1946] KB 369; *Moghal* (1977) 65 Cr App R 56; *Edwards* [1998] Crim LR 756; *Crawford* [1997] 1 WLR 1329).

(b) Where the prosecution case against one accused (A1) includes evidence that is admissible against him but not against his co-accused (A2), there is no obligation to order severance simply because the evidence in question might prejudice the jury against A2. However, the judge should balance the advantages of a single trial against the possible prejudice to A2, and should consider especially how far an appropriate direction to the jury is really likely to ensure that they take into account the evidence only for its proper purpose of proving the case against A1 (*Lake* (1976) 64 Cr App R 172; *B* [2004] 2 Cr App R 34 (570); *Miah* [2012] 1 Cr App R (S) 11 (47)).

(c) Where a joint trial of numerous accused would lead to a very long and complicated trial, the judge should consider whether a number of shorter trials, each involving only some of the accused, might make for a fairer and more efficient disposition of the issues. This reason for severance is tied up with the rule against overloading Indictments, which is considered at [D11.91](#).

(d) There may be some distinction to be drawn between cases where the accused are jointly charged in a single count and those where they allegedly committed separate offences which were nonetheless sufficiently linked to be put in one Indictment. In the latter situation, the cases against the accused are unlikely to be as closely intertwined as when a joint offence is alleged, and the public interest argument in favour of a single trial is correspondingly less strong. There should, therefore, be a greater willingness to order separate trials.

D11.88

Presumption in Favour of Joint Trial The authorities cited above indicate that the decision whether to grant severance is one within the discretion of the trial judge, and that the decision should be in favour of joint trial unless the risk of prejudice is unusually great. Thus in *Josephs* (1977) 65 Cr App R 253, where the same issue arose as in *Lake* (1976) 64 Cr App R 172, Lord Widgery CJ said (at p. 255, emphasis added):

... it is a very rare thing for this Court to interfere with the trial judge's decision about separate trials. Nothing is more peculiarly left to the trial judge as his concern with that particular point. *Of course we have jurisdiction to interfere where something has clearly gone wrong*, but it is very rare, and members of the Court today cannot remember a case in which such an interference with the trial judge's decision was made.

... the fact that some of [a co-accused's] statements may rub off on the other accused ... is just one of those things that happens in the course of a multiple criminal trial. The advantages of having co-Defendants tried together is so great

that the right to order a separate trial will not be granted unless there is good reason for it.

See also *Marsh-Smith* [2015] EWCA Crim 1883 for an application of the same approach, discussed at **D11.73**.

[19] Similar sentiments were expressed in the case of *R. v John Joseph O'Boyle*, by the Court of Appeal (1991) 92 Cr. App. R. 202 at 206 where the following was stated: -

Mr. Solley for the appellant concedes that in the light of the authorities, and in particular *Grondkowski and Malinowski* (1946) 31 Cr.App.R. 116, [1946] K.B. 369 , and *Miller* (1952) 36 Cr.App.R.169 , the general rule is that conspirators should be tried together in order (*inter alia*) to avoid each taking advantage of the other's absence to secure an unjust acquittal.

Indeed Lord Goddard C.J., in the former case said at p. 119 and p. 371 respectively this:

“... in some cases it would be as much in the interest of the accused persons as of the prosecution that they should be [i.e. tried together]. Suppose for instance that the defence of one was that he or she was acting under the positive duress of the other. It would obviously be right that they should be tried by the same jury who might see in one prisoner a harmless or nervous looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime.”

In *Miller* Devlin J. (at p. 175 and p. 670 respectively) had this to say:

“I think that in charges of this sort justice ordinarily requires that the whole matter should be tried as one case, and that it needs a very strong and exceptional case before it is split up into two separate trials. If separate trials were to be ordered as a matter of course simply because one prisoner proposed to attack the character of another, then a separate trial, and the possible advantages in the case of the

guilty prisoner, could always be obtained simply by the threat that one prisoner proposed to attack the character of his fellow-prisoner."

Conclusion

- [20] Having regard to the principles outlined above the Court will consider the competing submissions and rule as follows: -
- [21] Based on the authorities mentioned above it would seem to the Court that the Crown has properly included on this Indictment the count of conspiracy to steal along with the count of conspiracy to pervert the course of justice and the count of acquisition possession and use of the proceeds of criminal conduct.
- [22] The Court has the advantage of having the depositions in relation to this matter before it as well as an outline of the opening speech which has been distributed to all parties in this matter.
- [23] From that material it is clear that at the very least the counts relating to conspiracy to pervert the course of justice as well as the count relating to acquisition possession or use of the proceeds of criminal conduct, appear to arise out of the matters upon which the Crown will be leading evidence in relation to the conspiracy to steal count.
- [24] From that point of view, it appears that when one looks at the test for the inclusion of counts on an Indictment, the Crown appears to have a basis for suggesting that these Counts are properly included on the Indictment.
- [25] That having been said this Court in light of the application to sever, must move on to consider whether any sufficient prejudice will necessarily accrue in the circumstances of this case to the applicant Henry who it is accepted has nothing to do with the counts relating to conspiracy to pervert the course of justice as well as the count relating to the acquisition possession or use of the proceeds of criminal conduct.

- [26] In this case the question that arises is whether the prejudice that the applicant Henry speaks of is of such a nature so as to warrant this Court severing the two counts that do not apply to him on the Indictment.
- [27] It goes without saying that in every criminal case there is going to be some level of prejudice against an accused person. The very nature of a criminal trial suggests that there will be evidence that will implicate an accused person of a criminal offence which no doubt is clearly prejudicial.
- [28] The criminal trial process is by its nature, equipped with mechanisms to balance and deal with the question of prejudice so as to ensure that accused persons get a fair trial at the end of the day. This case is no different, certainly where there is a level of prejudice capable of giving rise to unfairness or some special feature that warrants a separate trial then the Court in the exercise of its discretion should order a separate trial where it is appropriate to do so.
- [29] Having considered the submissions by learned Queen's counsel Mr. Wilkinson the Court is not of the view that the level of prejudice that he articulates will arise in the circumstances of this case by having the two counts that make no mention of Mr. Henry included on the Indictment is of such a level to warrant this Court severing the counts.
- [30] In coming to this conclusion, the Court has sought to balance what may be described as the presumption in favor of a joint trial which is the starting point for any Court in looking at a severance application.
- [31] The Court also took into account what may be described as the overlap between the conspiracy to steal count and the two other counts on the Indictment which appear on the face of it to relate to matters which will be the subject of evidence in the conspiracy to steal count.
- [32] When this Court balances the potential unfairness to the accused by having to be tried on an Indictment which includes two counts that he is not involved in and weigh that up against having to hold two or more separate trials with the attendant costs of those trials and the need to recall the 60+ witnesses which are carded for this trial including witnesses from abroad, it would seem that the balance would be in favor of affording a joint trial in this case.

- [33] In this case the Court did inquire of defence counsel for the other two accused of their positions in relation to the application for severance and while there was no objections to the application on behalf of Henry both counsel indicated that their clients would wish to be able to have all the matters dealt with at one time rather than having the trial split up.
- [34] The Court is of the view that there are no particular special circumstances in this case that warrant the separation of the counts on this Indictment, the level of prejudice that is complained about may be adequately dealt with by the provision of appropriate directions which are commonplace and normal in these types of trials.
- [35] This is not a case where the level of prejudice is such that by including all three counts on this Indictment that the accused Henry would almost certainly be convicted as was the case of **John Joseph O'Boyle** which was cited above.
- [36] In the circumstances the Court is not minded to grant the application to sever the counts and will therefore dismiss the application.

Justice Rajiv Persad
High Court Judge (Ag.)

