

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2019/0009

BETWEEN:

DAVID BRANDT

Appellant

and

[1] COMMISSIONER OF POLICE

[2] ATTORNEY GENERAL

[3] DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. John Carrington

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant
Ms. Anesta Weekes, QC for the Respondents

2020: January 27;
February 14.

Civil appeal – Constitutional proceedings — Search and seizure — Search warrant issued by magistrate to police to search appellant’s premises and seize articles relevant to inquiry into criminal offences — Whether search warrant permitted police to search cell phones seized from appellant’s premises — Constitutional right to privacy — Section 9 of the Constitution of Montserrat — Whether search of cell phones breached appellant’s constitutional right to privacy — Limitation on right to privacy — Whether search of cell phones without prior authorisation unlawful — Abuse of process — Whether appellant’s claim for constitutional relief constitutes an abuse of process

In September 2015, the appellant, 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. 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.

Before the trial, the learned judge issued case management directions for Mr. Brandt to file written submissions on the issue of admissibility of this evidence. Mr. Brandt did not comply with these directions. Instead, he filed a fixed date claim seeking *inter alia* declarations that: (i) his right to privacy under section 9 of the Constitution of Montserrat [the "Constitution"] was contravened; (ii) the search of his cell phones without prior authorisation was unlawful and unconstitutional; and (iii) the evidence obtained from the search of his cell phones is inadmissible as evidence against him. The learned judge dismissed the claim, found that the use of the court's jurisdiction to grant relief under the Constitution in the circumstances was wholly inappropriate and constituted an abuse of process, and ordered Mr. Brandt to pay the respondents' costs.

Mr. Brandt appealed. The thrust of his appeal was that the learned judge erred in dismissing his claim as the search of his cell phones was in violation of his constitutional right to privacy and unlawful. Mr. Brandt also challenged the learned judge's decision to make a costs order against him.

Held: allowing the appeal in part; affirming the order as to costs made in the court below; and awarding costs of the appeal to the respondents at the rate of one-half of the amount assessed in the court below, that:

1. The recourse to the Constitution for a declaration that the search of the cell phones was unconstitutional was an abuse of process as effective alternative means of redress were available to the appellant in the circumstances to challenge the use of the evidence gathered from such search.
2. (per Michel JA and Webster JA [Ag.]) The search of the appellant's cell phones was unlawful but did not breach his constitutional right to privacy.
3. The finding by the court below that the claim was an abuse of process satisfied the requirement under rule 56.13 of the Civil Procedure Rules 2000 that the appellant had acted unreasonably in making the application and the exercise of discretion by the judge below should not be disturbed.
4. The matter is remitted to the High Court for assessing the costs of the proceedings in the High Court and costs of the appeal are awarded to the respondents in the amount of one-half of the amount assessed as costs in the court below.

Per Michel JA (Webster JA [Ag.] concurring):

- a. A cell phone is an article which is itself a place to be searched for messages and images stored there, and the data obtained from it can be extracted or copied and

transported or transmitted from place to place. A warrant to search for and seize a cell phone is, therefore, not a warrant to search a cell phone. Inasmuch as it may seem obvious that a warrant to search for and seize cell phones in the investigation of offences relating to the sexual exploitation of minors must be for the purpose of obtaining data from the cell phones to connect their owner(s) to the offences, and that the search of the cell phones must therefore be authorised by the warrant to search for the cell phones, this is not the direction in which the case law is heading. Where the police intend to access and use data from cell phones found in a lawful search, they should include in the warrant, which they apply for and obtain, the authorisation to search the cell phones. The search of Mr. Brandt's cell phones was therefore unlawful, since it was not authorised by a warrant to search the cell phones.

R v Vu [2014] 3 LRC 515 considered; **Myland v Director of Public Prosecutions** GDAHCV2012/0045 considered.

- b. Notwithstanding that the search of Mr. Brandt's cell phones was unlawful, his constitutional right to privacy guaranteed by section 9 of the **Constitution of Montserrat** was not breached. The issue of a search warrant under the **Criminal Procedure Code** to search Mr. Brandt's premises and seize certain items connected to the suspected offences is clearly reasonably justifiable in a democratic society for the prevention or detection of offences against the criminal law. The fact that the police went outside the scope of the warrant did not make their actions unconstitutional.

Harrikissoon v Attorney General (1979) 31 WIR 348 applied.

Per Webster JA [Ag.]:

- c. The court should guard against the use of constitutional motions to delay criminal and civil proceedings in the High Court, particularly where there are other avenues for redress. Mr. Brandt had the right, and still does, to object at his trial to the admission of the evidence taken from his cell phone. However, he filed a fixed date claim form alleging that his constitutional right to privacy had been breached. This attempt, by Mr. Brandt, to not only tread upon the criminal jurisdiction of the High Court but to also derail the criminal proceedings against him, constitutes an abuse of process. It is sufficient on this ground alone to dismiss the appeal.

David Brandt v Director of Public Prosecutions MNIHCVAP2018/0003 (delivered 29th November 2018, unreported) applied.

Per Carrington JA [Ag.]:

- d. Constitutional relief should not be granted unless the circumstances include some feature which makes it appropriate. In the instant case, the criminal proceedings and the exercise by the learned judge of his case management powers to hold a hearing on the admissibility of the cell phone evidence provided an effective means by which Mr. Brandt could seek relief in respect of evidence which he claims to be inadmissible. There is also no evidence that there was arbitrary

conduct on the part of the police or that a ruling by the learned judge in the criminal trial would not otherwise be adequate redress. Accordingly, there is no reason for a separate constitutional challenge to be made on the issue of the searches which led to the evidence which presumably will now be challenged only at the trial. Mr. Brandt's claim for constitutional relief is therefore an abuse of process.

Attorney General v Ramanoop (2005) 66 WIR 334 applied; **Harrikissoon v Attorney General** (1979) 31 WIR 348 applied; **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379 applied.

- e. The declaration that the search was unlawful should be refused for a number of reasons. Firstly, there is no evidence that the learned judge erred in refusing to grant a declaration of unlawfulness. Secondly, the allegation that the search was unlawful arises from the same factual matrix as the allegation of unconstitutionality. It follows then that, if it is appropriate for the learned judge presiding at a criminal trial to determine constitutionality, it is appropriate for him to consider unlawfulness. Thirdly, though **R v Vu** represents the correct approach to the interpretation of the rights of privacy, the court must examine the factual matrix against which these principles are to apply; the judge presiding over the criminal trial is well-positioned to do so. Fourthly, there is no utility in making such a declaration where there is strong authority that a criminal court may not exclude evidence merely because it has been unlawfully obtained.

R v Vu [2014] 3 LRC 515 considered; **R v Sang** [1980] AC 402 considered.

- f. Rule 56.13(6) of the **Civil Procedure Rules 2000** provides that a costs order should not be made against an applicant for an administrative order (this includes an application for constitutional relief) unless the court considers the applicant acted unreasonably in making the application. There is no doubt that the learned judge's finding of abuse of process satisfies this requirement and provides a proper basis for the exercise of discretion to award costs to the respondents.

Rule 56.13(6) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

- [1] **MICHEL JA:** I have read in draft the judgment written by my brother Carrington JA [Ag.], and I concur with his conclusion that the filing and prosecution of the case, here and in the court below, was an abuse of the process of the court, and I agree with his proposed disposition of the appeal. I note, however, that both here and in the court below, the parties addressed fairly extensively the question of whether

the action of the police in searching the appellant's cell phones was unconstitutional and/or unlawful, and whether the data obtained from the search of the cell phones will consequently be inadmissible at his trial on the criminal charges giving rise to the search and seizure of the cell phones. I take the view, therefore, that this fact, coupled with the fact that this Court has never addressed the underlying issue, merit some judicial comment on a question which one can be fairly certain will come before the Court again, given the significance and pertinence of the issue in the current technological environment.

- [2] Before this Court was an appeal against the judgment of Evans J [Ag.], delivered on 9th July 2019, dismissing an application made by the appellant by fixed date claim for various orders, including a declaration that he is entitled to the protection of the law and protection for the privacy of his home and other property; a declaration that the search of his cell phones was without prior authorisation and was unlawful and unconstitutional; and a declaration that the evidence obtained as a result of the unlawful and unconstitutional searches of his cell phones is inadmissible as evidence in court proceedings involving him.
- [3] By his notice of appeal, the appellant prayed that his appeal be allowed, the judgment of Evans J [Ag.] be set aside, and that this Court makes the declarations which he sought in the court below.
- [4] In submissions filed on 30th October 2019 in support of his appeal, the appellant stated that the gist of his complaint is that the police acted in contravention of his right to privacy by accessing certain data from his cell phones. He contended that certain WhatsApp data, comprising messages and images downloaded from his cell phones, and which data the prosecution is intending to adduce in evidence in a criminal trial in which he is the defendant, was improperly and unlawfully obtained. The appellant contended that although his cell phones were lawfully seized by the police by virtue of a search warrant obtained from a magistrate authorising the search of his home and the seizure of the cell phones,

there was no warrant authorising the search of his cell phones, for which separate authorisation was required.

- [5] The principal remedies sought by the appellant are the three declarations mentioned, with the third declaration, on the admissibility of the evidence derived from the WhatsApp data, being the primary reason for the filing of the fixed date claim in the first place and then of the appeal against the dismissal of the claim.
- [6] In submissions filed on 15th January 2020 in opposition to the appeal, the respondents contended that the appellant's decision to use a constitutional motion (essentially to challenge the admissibility of evidence obtained from the appellant's cell phones) was an abuse of process and should not be countenanced by the Court. They contended too that the timing of the filing of the constitutional motion so long after the cell phones were seized and so close to the scheduled commencement of the trial was an attempt to derail the trial and was itself an abuse of process. The respondents also contended that the WhatsApp data contained crucial evidence which the Director of Public Prosecutions submitted is compelling evidence of the charges on the indictment, which it was always anticipated that the appellant would challenge the admissibility of.
- [7] I have considered the Grenada High Court case of **Myland (Shankiell) v Commissioner of Police et al**¹ and the Canadian Supreme Court case of **R v Vu**,² and although none of them binds this Court - one being a high court case from the Eastern Caribbean Supreme Court and the other being a case from the Supreme Court of Canada - I consider them to be persuasive, not just by their source, but so too by the discussion and analysis which they contain on the specific question in issue here of whether a warrant to search and seize cell phones authorises the police to undertake a search, not just for the cell phones,

¹ GDAHCV2012/0045 (delivered 9th May 2014, unreported).

² [2013] 3 SCR 657.

but also of the cell phones, so as to be able to use data from the cell phones, in this case messages and images from WhatsApp, as evidence in a criminal trial of the owner of the cell phones. The item seized and searched in **Vu** was a computer and not a cell phone, whilst the judge in **Myland** addressed both cell phones and computers, but the analysis and conclusion are identical whether the item searched is a cell phone or a computer.

- [8] I will reproduce a brief extract from the judgment of the Supreme Court of Canada in **R v Vu** and of the High Court in Grenada in **Myland (Shankiell) v Commissioner of Police et al** which have helped to inform my own view of the need for specific authorisation to search cell phones seized in the course of a lawful search for items, including cell phones. In **Vu**, the Supreme Court of Canada stated:

“... if police intend to search any computers found within a place they want to search, they must first satisfy the authorising justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for...If police come across a computer in the course of a search and their warrant does not provide specific authorisation to search computers, they may seize the computer, and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.”³

- [9] In **Myland (Shankiell) v Commissioner of Police et al**, the learned judge, referring to the decision of the court in **Vu**, stated:

“While it would no doubt strike anyone as odd that a warrant to search for a computer would not inevitably imply the power to conduct a search of the computer, that is precisely what the Supreme Court of Canada concluded after considering the argument advanced by the Crown”⁴

- [10] I am of the view that, in keeping with the cases of **Myland** and **Vu**, the search of the appellant’s cell phones was unlawful, as not being authorised by a warrant to search for and seize the cell phones. Inasmuch as it may seem obvious that a warrant to search for and seize cell phones in the investigation of offences

³ Supra, n. 2 at paras. 48-49.

⁴ Supra, n. 1 at para. 117.

relating to the sexual exploitation of minors must be for the purpose of obtaining data from the cell phones to connect their owner(s) to the offences, and that the search of the cell phones must therefore be authorised by the warrant to search for the cell phones, this is not the direction in which the case law is heading, except in the United Kingdom where there is specific legislation dealing with the issue.

[11] A cell phone (or a computer) is more than just an article to be searched for at a particular place; it is an article which is itself a place to be searched for messages and images stored there, and the data obtained from it can be extracted or copied and transported or transmitted from place to place. A warrant to search for a cell phone, therefore, is not a warrant to search a cell phone. If the police are intending to access and use data from cell phones found in the lawful search of a person's home, they should include in the warrant which they apply for and obtain the authorisation to search the cell phones; not having done so in the present case, they ought to have brought the cell phones before the Magistrate's Court – in accordance with section 24(1) of the **Criminal Procedure Code**⁵ - to seek and obtain authorisation to search them.

[12] I am not of the view, however, that the search of the appellant's cell phones was unconstitutional, as being in contravention of his fundamental rights guaranteed in section 9 of the **Constitution of Montserrat**⁶ to respect for his privacy (including the privacy of his correspondence) and freedom from being subjected to the search of his property without his consent. This is because subsection (3) of the same section 9 provides the following exemption –

“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 ... for the prevention or detection of offences against the criminal law ...”

⁵ Cap.4.01, Revised Laws of Montserrat 2013.

⁶ Cap. 1.01, Revised Laws of Montserrat 2013.

[13] The **Criminal Procedure Code** of Montserrat is a law which authorises the search and seizure of the property of a person without his consent, and the issue of a search warrant under this law to search the home of the appellant and to seize particular items of property found there is clearly reasonably justifiable in a democratic society for the prevention or detection of offences against the criminal law, such as those with which the appellant is charged. The fact that the police went beyond what the letter of the search warrant authorised (with no apparent malice or ill will) does not put their actions outwith the Constitution. Unlawfulness does not equate to unconstitutionality. In this regard, the dicta of Lord Diplock in the Privy Council in the case of **Harrikissoon v Attorney General**⁷ is apt:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by ... the Constitution is fallacious.”

[14] Having determined that the search of the appellant's cell phones without a warrant specifically authorising their search was unlawful, though not unconstitutional, I come back to my initially expressed position, in line with the finding by Carrington JA [Ag.], that the filing of the fixed date claim challenging the lawfulness and constitutionality of the search of the appellant's cell phones nearly four years after the search and nearly four months before the criminal trial was an abuse of the process of the court. The issue of the admissibility of the evidence obtained from the search of the cell phones is one which is and always was for the determination of the trial judge in the criminal trial of the appellant, if the Crown seeks to adduce it at the trial. Subject to the declaration that the search was unlawful, the appeal must accordingly be dismissed in all other respects and costs are awarded to the respondents on the appeal. Having regard though to the appellant's success on the issue of the lawfulness of the search of his cell phones, I would depart from the usual formula of two-thirds of the amount assessed as costs in the court below and would instead make an

⁷ (1979) 31 WIR 348 at p. 349.

award of costs to the respondents of fifty percent of the amount assessed as costs in the court below.

- [15] **WEBSTER JA [AG.]:** I have read in draft the judgments prepared by my brothers Michel JA and Carrington JA [Ag.], and I concur with their conclusion that the filing and prosecution of the case, here and in the court below, was an abuse of the process of the court, and I agree with the judgment of Michel JA that the search of the appellant's cell phone was unlawful but not in breach of his constitutional rights. Brief reasons for my conclusions are set out below.

Abuse of process

- [16] The law relating to abuse of process, in the context of bringing constitutional motions when there are other avenues of redress available to the applicant, has been fully developed by the courts of the English-speaking Caribbean all the way to the Privy Council. The principles are also adequately set out in the judgment of Carrington JA [Ag.] and do not require further elaboration by me. I would add only a few comments on how the principles apply in this case.
- [17] It is trite law that the appellant had the right, and still does, to object at his trial to the admission of the evidence taken from his cell phone. That right was more obvious than usual in this case because the trial judge made a case management decision to hear the appellant's objection to the evidence as a preliminary issue before the trial. The appellant responded to this offer by filing a fixed date claim form alleging that his constitutional right to privacy had been breached. The motion was dismissed by Evans J who found, among other things, that:
- “[73]. The use of Constitutional motions such as this, is in my view wholly inappropriate and to expect the Court to trespass on the criminal jurisdiction is wholly wrong.
- [74] I also find that the attempt to raise this matter at this late stage is yet another misconceived delaying tactic/device that was intended to delay and/or derail the criminal trial...”

This is a clear finding by the learned trial judge that the appellant abused the process by launching the constitutional motion. There is no appeal against the finding of abuse by the trial judge and no written or oral submissions were made by counsel for the appellant challenging the finding.

- [18] I also note that this is the third attempt by the appellant to delay the trial by filing appeals challenging decisions of the courts below on constitutional grounds, all of which have been dismissed. In the second attempt (**David Brandt v Director of Public Prosecutions**)⁸ the Court noted at paragraph 10:

“This Court must guard against the use of constitutional motions to derail or delay proceedings in the Civil and Criminal Divisions of the High Court. I find that this appeal, and the application before Belle J, involved in essence, the singular issue of the construction to be given to section 141 of the Penal Code, which is a matter eminently suitable for resolution by a judge of the High Court in the sufficiency hearing. It is wholly inappropriate for this Court, or the High Court in its constitutional jurisdiction, to be made to tread upon the criminal jurisdiction of the High Court in the manner undertaken by the Appellant. The procedure used by the Appellant to bring this matter to the High Court as a constitutional claim is entirely wrong and improper.”

- [19] These comments are repeated and I find that this is a more egregious attempt by the appellant to derail the criminal trial. It is an abuse of the court’s process and for that reason only I would dismiss the appeal.

The search

- [20] The proper procedure for the police to adopt to search cell phones and other electronic equipment used for the storage and retrieval of information has been considered by the High Courts of the Eastern Caribbean in two cases. In **Myland (Shankiell) v Commissioner of Police et al** Ellis J considered the decision of the Supreme Court of Canada in **R v Vu** and found that a search warrant authorising the police to search for cell phones (among other things) did not authorise the police to search for the data stored on the cell phone and flash drives kept by the claimant. In a comprehensive judgment, covering the issues

⁸ MNIHCVAP2018/0003 (delivered 29th November 2018, unreported).

arising from a search warrant that authorises a search for but not of electronic equipment, Ellis J declared the search of the cell phone and flash drives unlawful. However, the search did not violate the claimant's constitutional rights because it was reasonably justifiable pursuant to section 10(2)(a) of the **Grenada Constitution Act**⁹ in furtherance of a criminal investigation which resulted in criminal charges being laid against the claimant.

[21] The decision of Ellis J on the lawfulness of the search was considered by Cenac-Phulgence J in **Terrence Alcee v The Attorney General**.¹⁰ The learned judge found that although the search warrant authorised the police to search for the claimant's cell phone, it did not authorise a search of the data housed in the cell phone.

[22] The decisions cited above are not binding on this Court and while the issue of the lawfulness of the search and the admissibility of the evidence recovered are quintessentially matters for the trial judge in the impending trial of the appellant, I agree with Michel JA that it is important for this Court to give guidance on the matter.

[23] As stated in the opening paragraph of my judgment, I agree with the reasoning and conclusions of Michel JA that the search of the appellant's cell phone was unlawful but not in breach of his constitutional rights. There is nothing useful that I can add.

Conclusion

[24] Having found that the appellant's claim for constitutional relief is an abuse of process and subject to the declaration that the search was unlawful, I would dismiss the appeal in all other respects and make the same award of costs as my brother Michel JA.

⁹ Cap. 128A, Revised Laws of Grenada 2011.

¹⁰ SLUHCV2016/0006 (delivered 25th October 2017, unreported).

- [25] **CARRINGTON JA [AG.]:** In September 2015, the Montserrat police applied for and obtained from the local magistrate a warrant to search premises occupied by the appellant based on reasonable suspicion that he had committed the offence of conspiracy to commit unlawful sexual intercourse with a girl under the age of 16 years contrary to the Montserrat **Penal Code**¹¹ and had in his possession “cell phones, iPads, computers and other electronic items”. In the warrant dated 16th September 2015, the magistrate authorised the named police officers to search the premises occupied by the appellant at Olveston, Montserrat for “articles essential to the inquiry into the said offence”.
- [26] The magistrate also issued two further warrants on 19th and 22nd September 2015 based on suspicion that the appellant had committed unlawful sexual intercourse with a girl under the age of 16 years, also authorising the search for articles essential to the inquiry into the offence. It appears to be uncontested that the police conducted the search and seized, inter alia, cell phones which were subsequently searched and which revealed potentially incriminating communications which the appellant does not dispute that he made.
- [27] On 27th May 2019, the appellant filed a fixed date claim form for constitutional relief seeking, inter alia, declarations that: he is entitled to the protection of the law and protection of the privacy of his home and other property; the search of his cellphone was without prior authorisation and was unlawful and unconstitutional; and, that the evidence obtained as a result of the unlawful and unconstitutional searches of his cell phones is inadmissible as evidence in court proceedings involving him. He also sought a stay of any criminal proceedings involving the use of evidence obtained from searches of his cell phones when seized under the authority of said warrants.
- [28] This motion was heard in June 2019 by Evans J [Ag.] who, in a written judgment delivered in July 2019, dismissed the claim with costs. The learned judge found

¹¹ Cap. 4.02, Revised Laws of Montserrat 2013.

primarily that the use of the court's jurisdiction to grant relief under the Constitution in this case was wholly inappropriate and was an abuse of process.

[29] The appellant appealed the order made by the learned judge below on three grounds, namely that: he erred in dismissing the claim for an administrative order when the search of the mobile phone was in violation of the appellant's constitutional right to privacy; he erred in admitting oral evidence from a respondents' witness in the middle of oral arguments by counsel; and he erred in ordering costs against the appellant in the absence of a finding that the appellant had acted unreasonably in making the application or in the conduct of the application.

[30] It became obvious during the hearing of the appeal that appellant's focus was on the first ground of his appeal. At the conclusion of his opening arguments, counsel for the appellant indicated to the Court that the only relief that he was seeking in the event that the appeal were to be allowed were declarations that the search of the cellphone was unconstitutional and/or unlawful. The main issues that arise on this appeal therefore are: (i) whether the appellant's constitutionally guaranteed rights have been infringed; (ii) if so, whether the appellant is entitled to relief based on such infringement; and (iii) if so, what is the appropriate form of relief.

[31] Sections 9 and 20 of the **Constitution of Montserrat** (the "Constitution") state as follows:

"9(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence.

(2) Except with his or her consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.

(3) 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 —

...

(c) for the prevention or detection of offences against the criminal law ...”

“20(1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available to him or her, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction —

(a) to hear and determine any application made by any person under subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it under subsection (3)

And may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Part to the protection of which the person concerned is entitled.”

[32] Section 9 recognises the broad right to privacy including privacy as to correspondence and a narrower right, stated in more justiciable terms, of protection from search of person or property. Neither of these rights, however, is absolute as section 9(3) permits the derogation from these rights where the state action is (i) reasonably justifiable in a democratic society; and (ii) for one of the purposes set out in section 9(3)(a)-(e). The relevant sub-paragraph in these proceedings is 9(3)(c) – action for the prevention or detection of offences against the criminal law.

[33] In the instant case, search warrants were issued under the **Criminal Procedure Code** for the search of the premises for articles essential to the inquiry into suspected offences including conspiracy, which include cell phones and other electronic items. Dr. Dorsett for the appellant, relying on the Canadian Supreme Court decision in **R v Vu** submitted that this did not permit the police to search the cell phones for electronic data and communications thereon as the warrants

were only in relation to searches for tangible items and that the appellant's constitutional right to privacy continued in respect of data and correspondence accessible through the cell phones. Ms. Weekes, QC for the respondents responded that the terms of the warrants, when read together with the evidence led before the magistrate to obtain them, made it clear that the warrants were directed at the data and communications on the electronic devices and not the devices only, as the devices only would obviously not be relevant to the types of offence which the appellant was suspected of having committed. She further submitted that the factual situation in **Vu** is distinguishable from that in the instant case.

- [34] **R v Vu**, which has been applied in this jurisdiction by the High Court in **Myland (Shankiell) v Commissioner of Police et al** and in **Terrence Alcee v Attorney General**, was an appeal from a decision of the High Court in British Columbia. The police in British Columbia had obtained a warrant to search premises for evidence of theft of electricity, including documentation identifying the owners and occupants of the premises. The warrant did not specifically refer to computers or to the search of computers on the premises. The police seized and searched computers found on the premises and used the information obtained in the search of the computers to prosecute Mr. Vu. Mr. Vu sought, on the basis that the search was in violation of his right under section 8 of the Canadian Charter of Rights and Freedoms 1982 (the "Charter") to be free from unreasonable searches and seizures, to have that evidence obtained from the computers excluded under the section 24(2) of the Charter, which permits a court to exclude any evidence obtained in a manner that infringed a right under the Charter if the admission of the evidence in those proceedings would bring the administration of justice into disrepute.
- [35] The Canadian Supreme Court, in a single judgment of Cromwell J, held that a warrant to search premises would include the search of receptacles on the premises. However, a computer and a cellphone were not to be regarded as a

receptacle for that purpose because of the particular issues of privacy arising in relation to such items and that a computer search required specific prior authorisation. In effect, such items constituted a different “place” for the purposes of the Canadian Criminal Procedure Code than the premises of the appellant, Mr. Vu. The Canadian Supreme Court considered at paragraph 48 of the judgment the requirements of specific prior authorisation for the search of computers:

“Specific, prior authorisation means, in practical terms, that if police intend to search any computers found within a place they want to search, they must first satisfy the authorising justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for.”

It seems to me that the decision in **Vu** represents the correct approach to the balance of the rights of privacy under section 9(1) and (2) of the Constitution and the limitations to that right under section 9(3). However, in the application of all legal principles, one must examine the facts against which such principles are to apply.

[36] In the instant case, the evidence filed on behalf of the respondents in the court below is that they presented to the magistrate, who issued the warrants, information that they believed that there would be evidence of phone calls made by the appellant in connection with the suspected offences. The warrant that was issued specifically permitted the search for computers, cell phones “and other electronic items”.

[37] As I understand the respondents’ submission, the question is whether the appellant has failed to discharge the burden of showing that the magistrate did not give specific prior authorisation for the search of the cell phones as well as the search for cell phones. In other words, on the evidence, could a court reasonably conclude that the magistrate was satisfied on the information laid before her that it was reasonably justifiable in this case for the police to search the cell phones for the purpose of preventing or detecting crime? **Vu**, in my

judgment, does not lay down an absolute rule as to the wording of a search warrant. What it emphasises is that, if the need for a search must be justified to a judicial authority, a reviewing court must be satisfied that the person authorising the search was able to consider the need for the search of the computers etc. based on information before him and had reached a decision that, in the circumstances, such an invasion of privacy was justified.

[38] The respondents further argued that notwithstanding the application of **Vu**, there is no need for recourse to an application for relief under the Constitution as there are adequate and effective remedies under the law for the issues raised by the appellant.

[39] Notwithstanding the breadth of the wording of section 20 of the Constitution, the courts have jealously guarded against unwarranted recourse to relief under the Constitution. In **Attorney General v Ramanoop**,¹² Lord Nicholls referred to the use of the word “may” in the equivalent of section 20 above in the Constitution of Trinidad and Tobago as conferring a discretion on the courts to decline to grant constitutional relief. In **Harrikissoon v Attorney General**,¹³ Lord Diplock stated:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which

¹² (2005) 66 WIR 334 at para. 23.

¹³ (1979) 31 WIR 348 at p. 349.

involves no contravention of any human right or fundamental freedom. The instant case concerns, and concerns only, the right of a holder of a public office not to be transferred against his will from one place to another. In their Lordships' view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter I of the Constitution."

[40] In **Ramanoop** at paragraph 25, Lord Nicholls explained this principle as follows:

"In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power."

[41] It is therefore necessary to consider, before making a determination as to whether there has been a breach of constitutional rights, whether some other available and adequate means of legal redress was available to the appellant. In so doing, it is useful to review at this stage the background to these proceedings.

[42] Mr. Brandt was arrested and charged in September 2015 with various offences under the **Penal Code**. He has not yet been tried. Following the execution of the search warrants and the search of his cell phones, certain WhatsApp messages were recovered, which he does not deny are his communications, on which the prosecution have indicated they intend to rely at the trial. The trial judge, Evans J [Ag.], issued case management directions for the appellant to file written submissions for a pre-trial hearing on the issue of admissibility of this evidence. The appellant did not comply with these directions but filed a fixed date claim form seeking declarations that: the search of his cell phones was unlawful and unconstitutional; that the evidence obtained from such search is inadmissible; and that the criminal proceedings involving the use of such evidence should be stayed.

[43] As indicated above, during his oral submissions, the appellant abandoned the other relief being sought under his fixed date claim form, including the declaration that the evidence was inadmissible as a result of the unconstitutional and unlawful searches. Notwithstanding this change of position on the appeal, I am satisfied that in practical terms, Mr. Brandt is seeking constitutional relief to assist him in his defence at his criminal trial and so the real question is whether it is appropriate for the Court to consider the application for such relief or if it should let the criminal proceedings take their course.

[44] In **Sharma v Browne-Antoine and Others**,¹⁴ the Judicial Committee of the Privy Council dealt with an appeal concerning an application for judicial review by the then Chief Justice of Trinidad and Tobago of a decision to prosecute him for attempting to pervert the course of justice. The Board ruled that it was not appropriate for the accused to challenge the decision to prosecute him in judicial review proceedings and that his allegations of political interference in that decision was best resolved by the criminal court trying the charges. The majority of the court (Baroness Hale, Lord Carswell and Lord Mance) stated at paragraph 34:

“Viewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise. The suggestion of improper political interference in or influence over the prosecuting decision is distinct in principle from the question whether the proposed charge has any basis – the decision to charge may have been entirely proper, without the charge being in any way sustainable. But there is in this case some potential overlap in some of the evidence relevant to each of these matters, and a risk that they would not be easily severable in the evidence or judgment given on any judicial review hearing. A criminal judge would we think be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial) and, if the case gets

¹⁴ (2006) 69 WIR 379.

that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the Chief Justice might hope to gain by judicial review proceedings. That was, as we see it, the approach taken by Lord Steyn in *Ex parte Kebilene*.”

[45] In my judgment, this statement can be applied *mutatis mutandis* to the instant case. Even though proceedings for constitutional relief are likely to be shorter as they generally are meant to proceed on uncontested facts, the criminal proceedings, and moreso the exercise by the learned judge below of his case management powers to hold a hearing on the issue of the admissibility of the cell phone evidence, provide an effective means by which an accused can seek relief in respect of evidence which he claims to be inadmissible. Indeed, it is one of the primary roles of the judge in a criminal case to rule on the admissibility of evidence in the trial. As he is well-placed and equipped to do so having heard all the arguments for both prosecution and defence, including arguments on constitutionality of any actions by the prosecution relative to evidence being brought before that court, I agree with the court below and find that there is no reason for a separate constitutional challenge to be made on the issue of the searches which led to the evidence which presumably will now be challenged only at the trial. Dr. Dorsett for the appellant somewhat surprisingly did not choose to address this issue in his submissions to this Court, even though it was highlighted in the written submissions of the respondents and formed part of the reasoning of the court below.

[46] Using the analysis provided at paragraph 25 of **Ramanoop** quoted above, I am of the view that there is nothing in the evidence of the appellant in the court below that can lead to a conclusion that there was arbitrary conduct on the part of the police or that a ruling in the course of the criminal trial would not otherwise be adequate redress for the appellant. I therefore find that, in the circumstances, it was an abuse of process for the appellant to seek relief under the Constitution in the form of a declaration of the constitutionality of the search of the cell phones and I will not disturb the finding of the court below on this issue.

[47] The factual situation in this case can be distinguished from that in **Terrence Alcee v The Attorney General**, where computers were seized pursuant to a valid warrant and then searched. The court found that the police officers acted on the erroneous belief that they were entitled to conduct such a search under the terms of the warrant and that Mr. Alcee's constitutional right to be protected from arbitrary search had been infringed. In that case, unlike the present case, the court found that there was no alternative remedy to constitutional relief.

[48] The appellant sought in the alternative a declaration that the search was unlawful. I also refuse to exercise my discretion to grant this relief for the following reasons. Firstly, the appellant has not satisfied me that the learned judge below committed any error in principle in exercising his discretion to refuse to grant the declaration of unlawfulness. Secondly, the allegation that the search is unlawful, i.e. not covered by the terms of the warrant issued by the magistrate, arises from the same facts as the allegation of unconstitutionality. Therefore, if it is appropriate for the judge presiding at the criminal trial to determine the issue of constitutionality, it appears also appropriate for him to determine whether the search was unlawful for that or any other reason. Thirdly, Dr. Dorsett drew to the Court's attention the decision of the High Court in Grenada in **Myland** where Ellis J granted a declaration that the searches of computers and flash drives were unlawful as they were not authorised by the search warrants obtained by the police. However, as I have indicated above, while I accept that the principles stated in **Vu** should apply to the interpretation of the right to privacy under section 9 of the Constitution, the application of these principles requires the Court to examine the evidentiary background to the grant of the relevant warrants. In my judgment, the judge presiding over the criminal trial is in a better position to do so especially as, in light of the finding that the application for constitutional relief was an abuse of process as the use of a fixed date claim form to seek this kind of declaration, which must be based on facts, was inappropriate. Fourthly, I have not been convinced by the appellant of the utility of making such a declaration, especially making it independently of a determination of the admissibility of the

evidence to which it relates and where there is strong authority that a criminal court may not exclude evidence merely because it has been unlawfully obtained.¹⁵

Conclusion

[49] I would therefore dismiss the appeal. In light of Dr. Dorsett's submission that the appellant was only pursuing one head of relief on this appeal, I do not propose to deal with the other orders made by the learned judge below or grounds raised by the appellant as I treat the appellant as having abandoned his appeal in relation to these matters.

[50] On the issue of costs, rule 56.13(6) of the **Civil Procedure Rules 2000** ("CPR") contains the threshold requirement that an order for costs should not be made against an applicant for an administrative order, which includes an application for relief under the Constitution, unless the court considers that the applicant has acted unreasonably in making the application. The finding of abuse of process satisfies this requirement and also is a proper basis for the exercise of the discretion to award costs to the respondents. The learned judge was required by rule 56.13(5) of the CPR to assess costs but did not do so. I therefore direct that the matter be remitted to the High Court solely for the assessment of the costs of the proceedings in the court below. I agree that the respondents should be awarded one-half of the assessed costs in the High Court as the costs of this appeal.

By the Court

Chief Registrar

¹⁵ See: R v Sang [1980] AC 402.