

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRA2022/0001

BETWEEN:

THE KING

Appellant

and

**[1] PAMPHILL PREVOST
[2] SIMON POWER**

Respondents

Before:

The Hon. Mr. Gerard St. C. Farara
The Hon. Mde. Petra Nicola Byer
The Hon. Mr. Anthony Gonsalves

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

Appearances:

Mr. Sandip Patel KC and Ms. Kelee-Gai Smith for the Appellant
Mr. Terrence Williams KC and Ms. Karlene Thomas-Lucien for the
1st Respondent
Mr. Israel Bruce for the 2nd Respondent

2025: March 26
September 18.

Criminal appeal – Conspiracy – Section 311(1) of the Criminal Code 1997 – Section 52 of the Criminal Procedure Act – No Case Submission – Appellate interference in reviewing acquittals on no case submission – Credibility of witness – Appellate interference in a trial judge’s finding on witness credibility – Whether the learned judge erred in upholding the respondents’ no case submission – Whether the learned judge erred in excluding aspects of vital evidence in the prosecution’s case

Mr. Pamphill Prevost and Mr. Simon Power (“the respondents”) were jointly charged with conspiracy to steal contrary to section 311(1) of the Criminal Code 1997. The particulars of the offence charged in the indictment stated that the respondents, ‘between the 1st day of January 2012 and the 31st day of July 2014, in the Territory of the Virgin Islands, conspired together with Shawn Henry and Michael Isles to steal quantities of cash obtained or seized during the execution of their duties as police officers.’

The foundation for the conspiracy charge was a report by the Crown’s chief witness, Mr. Michael Isles, of a conversation he said he had with Mr. Pamphill Prevost while they were both in Dominica in October 2013. Isles stated that Prevost told him that he formed a clique within the Proactive Unit, a specialized unit within the police force, and mentioned the names Shawn Henry and Simon Power. Isles reported that Prevost told him that he prioritized cash operations over drug operations and during said operations involving cash, he, Henry and Power would remove money from the seized sums, meet at an undisclosed location and share the money among themselves to help buy vehicles and build their homes. Prevost reportedly told Isles he felt comfortable with him and asked him to join the clique.

Michael Isles testified under a conditional immunity agreement with the Crown and his evidence was critical to the case against the respondents. The Crown relied on Mr. Isles to establish that there was a conspiracy involving himself, the respondents and Mr. Henry to steal money obtained in the execution of their duties as police officers. As the conversation grounding the conspiracy alleged by the Crown involving the witness Mr. Isles and Mr. Prevost occurred outside the Virgin Islands, the Crown relied on several completed acts occurring within the jurisdiction of the Virgin Islands to establish that there was a conspiracy. In the High Court, at the close of the prosecution’s case, the respondents mounted a no case submission. In considering the no case submission, after a review of the evidence, and highlighting several concerns over, and discrepancies and inconsistencies in Mr. Isles’s evidence, the trial judge asked himself whether Mr. Isles had been completely discredited. Without expressly so stating, the trial judge impliedly answered that question in the affirmative and upheld the submission of “no case to answer” in relation to both respondents. The Director of Public Prosecutions, being dissatisfied with the decision of the High Court, filed an appeal seeking to have the acquittal of the respondents set aside on the following grounds:

- (i) “That the learned trial judge erred in upholding the submission that the respondents had no case to answer by incorrectly applying the law, and evidence led in the Crown’s case.
- (ii) That the learned trial judge erred in law in excluding aspects of the evidence of Michael Isles which went to the root of the Crown’s case.
- (iii) That the learned trial judge erred in law by failing to discharge the jury upon learning that a witness was charged with perjury and perverting the course of justice.”

Held: dismissing the appeal, that:

1. An appellate court should not interfere with a trial judge's findings of fact unless they are plainly wrong, which connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of evidence, or the finding was one that no reasonable judge could have reached. This standard applies equally, if not more stringently, in appeals against acquittals made on a no case submission. An appellate court may only interfere where it is shown that the ruling was wrong in law, involved an error of law or principle, or was one no reasonable judge could have made. Appellate intervention must be restrained and based on demonstrable legal error and not mere disagreement.

Section 67 **Criminal Justice Act 2003 (UK)** considered; **Starcy Huggins v The Commissioner of Police** BVIMCRAP2021/004 (delivered on 25th April 2023, unreported) followed.

2. The question of whether a witness is lying is nearly always one for the jury. However, there may be exceptional cases where inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone. Where other material factors exist that supplement 'credibility disqualifications', together they could amount to enough to satisfy a no-case submission.

R v Shippey and Ors (1988) Crim LR 767 applied; **Attorney General v Michael Spicer and Alexander Benedetto** BVIHCRA2011/0006 (delivered 14th January 2002, unreported) followed; **R v Barker** [1975] 65 Cr App R 287 applied; **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56 applied.

3. There were several crucial bits of evidence where the court could reasonably conclude that Isles was not simply forgetting but was being untruthful. The learned trial judge identified several instances where Mr. Isles was either caught out in a lie, admitted he had lied in previous proceedings or on previous occasions, or where his evidence was contradictory or transparently unreliable. In order to determine whether the learned judge acted reasonably in withdrawing the case from the jury, it must be asked whether the inconsistencies were so great to allow him to do so. The learned judge looked at the evidence and although he did not say so, it is pellucid that he was influenced by the instances where the lies and inconsistencies were material and manifest and where he thought the story offended basic common sense to conclude that Mr. Isles could not be believed at all.
4. Assessing the credibility of a witness is considered more an art than a science. It can be a difficult and imprecise exercise with a judge taking multiple factors into consideration. The main tests needed to determine whether a witness is lying or not, are the following, although their relative importance will vary widely from case to case: 1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred, 2) the internal consistency of the witness's evidence, 3) consistency with what the witness has said or deposed on

other occasions, 4) the credit of the witness in relation to matters not germane to the litigation and, 5) the demeanour of the witness. Furthermore, it is undeniable that there is an element of subjectivity in the determination by any judge of what weight should be accorded to any factor. Therefore, the relative importance of the factors will vary widely from case to case.

Faryna v Chorny [1951] B.C.J No. 152 applied; **R. v S. (R.D.)** [1997] 3 SCR 484 applied.

5. In assessing an appeal challenging a trial judge's finding on witness credibility, the appellate court must afford a high degree of deference on the basis that the trial judge is in a far superior position to assess it as he has sat through the entire case, and his ultimate judgment reflects this total familiarity with the evidence. However, this does not excuse a material error of law, or a conclusion so unreasonable that no reasonable judge could have reached it. Such findings will not be overturned absent a material error of law or a conclusion so unreasonable that no reasonable judge could have reached it.

R v Howe 2005 CanLII 253 (ONCA) applied; **R v Aird** 2013 447 CanLII (ONCA) applied; **Housen v Nikolaisen** 2002 SCC 33 (CanLII) applied.

6. Where credibility is central and based on oral testimony, appellate interference is limited. Greater scope for review exists where findings are derived primarily from undisputed documentary evidence. Where the trial judge's findings arise from conflicting oral testimony and hinge on assessments of honesty and credibility, appellate intervention is highly limited due to the trial judge's advantage in observing the witness firsthand. Conversely, where findings are derived primarily from undisputed documents, the appellate court is equally positioned to assess the evidence and may more readily intervene. The more objective and reliable the fact-finding method, the more open it is to appellate scrutiny.

Beacon Insurance Company Ltd v Maharaj Bookstore Ltd [2014] 4 All ER 418 applied; **Whitehouse v Jordan** [1981] 1 WLR 246 applied.

7. In criminal proceedings, the jury is the finder of fact. Except for the very rare case when the credibility of a witness has been so clearly undermined, the issue of whether a witness is lying should be left to the jury. There must however be a balance between withdrawing a case from the jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient. An appellate court must allow the trial judge a margin of judgment who has heard the evidence and seen the witnesses. It was the trial judge's task to evaluate the evidence of Mr. Isles and the other evidence. He went through it in detail. In reviewing the trial judge's decision under the second limb of **R v Galbraith**, the appellate court must not substitute its own assessment of the evidence but determine whether the judge's conclusion fell within the range of reasonable disagreement. The trial judge, having seen and heard the witness Mr. Isles, was entitled to assess the reliability of his evidence in a manner this Court cannot

replicate. Although criticisms can be made regarding the weight the judge gave to certain aspects of the evidence, such criticisms do not amount to a glaring error that would have necessarily led to a different result. The judge applied the correct test intervening only where the evidence was so unsatisfactory or unreliable that no properly directed jury could convict and his decision, even if debatable, was not plainly wrong.

R v Galbraith [1981] 1 WLR 1039 applied; **R v Bush** [2019] EWCA Crim 29 applied.

JUDGMENT

- [1] **GONSALVES JA [AG]:** This appeal arises from a successful submission of no case to answer by the respondents, police officers in the Royal Virgin Islands Police Force. The respondents, Mr. Pamphill Prevost and Mr. Simon Power, were jointly charged with conspiracy to steal contrary to section 311(1) of the **Criminal Code 1997**¹. The particulars of the offence charged in the indictment stated that the respondents, 'between the 1st day of January 2012 and the 31st day of July 2014, in the Territory of the Virgin Islands, conspired together with Shawn Henry and Michael Isles to steal quantities of cash obtained or seized during the execution of their duties as police officers.'
- [2] The foundation for the conspiracy charge was a report by the Crown's chief witness, Mr. Michael Isles, of a conversation he said he had with Pamphill Prevost while they were both in Dominica in October 2013. Isles stated that Prevost had told him that he had formed a clique within the Proactive Unit, a specialized unit within the police force, and mentioned the names of Shawn Henry and Simon Power. He stated that Prevost told him that whenever intel is disseminated to him, he took on operations involving cash over drug operations. Isles reported that Prevost said that during operations involving cash, he, Henry and Power would remove money from the original sum of cash that was seized, meet at an undisclosed location and share the money among themselves. Prevost is reported to have explained that money from those operations was to be used to help himself, Henry and Power to buy vehicles

¹ Criminal Code 1997, Laws of the Virgin Islands.

and assist in constructing their homes. Isles reported that Prevost said that since he (Prevost) felt comfortable with Isles he would like Isles to become a part of the clique.

- [3] Section 4 of the **Criminal Code** addresses offences committed partly within and partly beyond the jurisdiction. As the conversation grounding the conspiracy alleged by the Crown involving the witness Mr. Isles and Mr. Prevost occurred outside the Virgin Islands, the Crown was relying on several completed acts occurring within the jurisdiction of the Virgin Islands to establish that there was a conspiracy.
- [4] The evidence of Michael Isles was critical to the case against the respondents. He was testifying under a conditional immunity agreement with the Crown. The Crown was relying on Mr. Isles to establish that there was a conspiracy involving himself, Mr. Prevost, Mr. Power and Mr. Henry to steal money obtained in the execution of their duties as police officers. In considering the no case submission, after a review of the evidence, and highlighting several concerns over, and discrepancies and inconsistencies in, Mr. Isles' s evidence, the trial judge asked himself whether Mr. Isles had been completely discredited. Without expressly so stating, the trial judge impliedly answered that question in the affirmative and upheld the submission of "no case to answer" in relation to both respondents.
- [5] The Director of Public Prosecutions, being dissatisfied with the decision of the High Court, filed an appeal seeking to have the acquittal of the respondents set aside on the following grounds:
- (i) "That the learned trial judge erred in upholding the submission that the respondents had no case to answer by incorrectly applying the law, and evidence led in the Crown's case
 - (ii) That the learned trial judge erred in law in excluding aspects of the evidence of Michael Isles which went to the root of the Crown's case.
 - (iii) That the learned trial judge erred in law by failing to discharge the jury upon learning that a witness was charged with perjury and perverting the course of justice."

- [6] At the commencement of the appeal, Mr. Patel KC for the Crown indicated that grounds (ii) and (iii) would not be determinative of the guilt or innocence of the respondents and that the Court's focus should be on ground 1 and primarily on the evidence of Mr. Michael Isles, the Crown's chief witness. The Court raised the question, what is the role of this Court upon reviewing the decision made on² a no case submission. Pursuant to a direction given at the conclusion of the case, the parties filed and exchanged written submissions addressing the correct approach as a matter of principle to be adopted by an appellate court on hearing an appeal against a trial judge's decision on a no case to answer submission involving particularly, the judge's evaluation of the evidence adduced at that stage of the trial.

The correct approach to be adopted by an appellate court

The Crown's submissions

- [7] The Crown's written submissions focus on the statutory framework of the **Criminal Justice Act 2003 (UK)** ("**CJA**") and decisions of the Court of Appeal (Criminal Division) of England and Wales, cited as persuasive authority, along with **R v Galbraith**³, and subsequent appellate decisions on the proper role of appellate courts in reviewing rulings that withdraw cases from the jury. In English law, appeals by the prosecution against rulings upholding a submission of no case to answer are governed by sections 59 to 61 of the **CJA**. These provisions permit an appeal where the trial judge has, before the jury retires, made a ruling that effectively terminates the proceedings against the accused. The term "ruling" is defined broadly and includes rulings on submissions of no case to answer. Section 67 of the **CJA** provides that the appellate court may reverse a ruling only if it is satisfied that:

- (a) The ruling was wrong in law;
- (b) The ruling involved an error of law or principle, or
- (c) The ruling was not reasonable for the judge to have made.

² The focus being on where the High Court upheld a no case submission.

³ [1981] 1 WLR 1039.

- [8] The Crown submitted that this sets a deliberately high threshold and cited **R v B**⁴. There, the English Court of Appeal, per Sir Igor Judge P, at [19] emphasized that:

“When the judge has exercised his discretion or made his judgment for the purposes of and in the course of a criminal trial, the very fact that he has had to carefully balance conflicting considerations will inevitably mean that he might reasonably have reached a different, or the opposite conclusion to the one he did reach. Leave to appeal under section 67 will not be given unless it is seriously arguable, not that the discretionary jurisdiction might have been exercised differently, but that it was unreasonable for it to have been exercised in the way that it was. No trial judge should exercise his discretion in a way he personally believes may be unreasonable. That is not to say that he will necessarily find such decision easy. But the mere fact that the judge could reasonably have reached the opposite conclusion to the one that he reached, and that he acknowledges that there were valid arguments which might have caused him to do so, does not begin to provide a basis for a successful appeal.”

- [9] In further support of this test the Crown cited the case of **R v M & T**⁵ at paragraph 25, where the court reiterated:

“This brings us, in a sense, to the nub of the appeal. As we have said, this is an application by the prosecution in which it seeks leave to appeal against a terminating ruling of the trial judge. The position of the trial judge, particularly one as experienced as His Honour Judge Moss QC, in cases of this sort, a shooting in which a gang is said to have participated, must be acknowledged and respected. That acknowledgment finds its expression in the principle that the court will not interfere with such a terminating ruling unless the conclusion of the judge, refusing to let the case go before the jury, is outwith the range of reasonable conclusions. That high hurdle, which a prosecution must overcome is because this court is so much worse placed to make the sort of assessments and judgments this judge had to make when he was asked to stop the case against the defendants including these two, Thompson and McIntosh. If authority is needed for such a proposition, it can be found in the decision of the President of the Queen’s Bench Division, Sir Igor Judge (as he then was) in R v B [2008] EWCA Crim 114 at paragraph 19. He suggested that unless the decision was outwith the range of reasonable response, no leave to appeal pursuant to section 67 of the 2003 Act should be given.”

⁴ [2008] EWCA Crim 1144.

⁵ [2009] EWCA Crim 2848.

- [10] The Crown also referred to **R v Bush**⁶ and **R v Qureshi**⁷. In **Qureshi** at paragraphs 18 – 20, the Court of Appeal affirmed that an appeal under section 67 will only succeed where the trial judge’s ruling is so unreasonable as to be perverse, applying ‘the well-known public law test’ from **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**⁸. The court found that the Recorder took a view as to the evidential force of the allegations made and his reasoning did not leave it open to the court to find that he had arrived at a perverse conclusion.
- [11] While clearly not suggesting that the **CJA** applies to the BVI, Mr. Patel KC submitted that, in the BVI, where English authorities are treated as persuasive, the consistent approach of the Court of Appeal in England and Wales in applying section 67 may provide valuable guidance. He submitted that the potential relevance of UK authorities in the BVI lies in their persuasive clarification of how **Galbraith** should be approached on appeal. **Galbraith** defines the test at trial, that is, whether the evidence is capable of belief and sufficient to be left to the jury. Section 67, by contrast, governs the standard the appellate court must apply when reviewing whether the test was correctly applied. He submitted that taken together they assist the UK appellate courts by establishing that it is not sufficient to find that the appellate court would have reached a different conclusion; there must be a demonstrable legal error or unreasonableness in the trial judge’s ruling. Thus, **Galbraith** governs the substance of the ruling, and section 67 governs the scope of appellate oversight of that ruling. Put in a nutshell, the section 67 body of law reinforces the principle that appellate intervention must be restrained and based on demonstrable legal error and not mere disagreement. It is not enough that the appellate court might have reached a different view; the decision must fall outside the spectrum of reasonable judicial conclusions.

⁶ [2019] EWCA Crim 29.

⁷ [2012] 1 W.L.R. 694.

⁸ [1948] 1 KB 223.

[12] The respondents' written submissions commenced, clearly contextually⁹, with a reference to section 37 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**¹⁰. In relation to appeals against acquittals, reference was made to section 52 of the **Criminal Procedure Act**¹¹ and the fact that although it provides for appeals against acquittals, it is silent as to the approach to be adopted by the Court of Appeal in determining the appeal. The respondents also made reference to **Hyles v DPP**¹² at paragraphs 58-71 where the Caribbean Court of Justice opined that the approach applicable to appeals against conviction cannot be transferred to appeals against acquittal.

[13] The respondents submitted that on an appeal of a judgment evaluating evidence, an appellate court must show deference to the trial judge's factual determinations given that the trial judge was immersed in the evidence in a way that an appeal court cannot replicate. Further that an appellate court should not interfere with a judge's findings of primary fact unless they are "plainly wrong" which connotes that there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge would have reached. Reliance was placed on the decision of this Court in **Starcy Huggins v The Commissioner of Police**¹³. Reference was also made to the decision in **Malik Cox v R**¹⁴. In that case the Privy Council remarked:

"In this case, particular respect or deference should be afforded to the decision of Aziz J for three closely linked reasons. First, as the trial judge, Aziz J had the great advantage over an appellate court of seeing and hearing the live evidence of the witnesses. Secondly, the appeal turns essentially on the credibility and reliability of two main witnesses for the prosecution, Anthony Francis and Tyrone Smith. Assessment of credibility

⁹ As section 37 deals with appeals against conviction.

¹⁰ Cap. 80 of the Revised Laws of the Virgin Islands.

¹¹ Act 3 of 1873 (Revised Edition) 2013, Laws of the Virgin Islands.

¹² [2018] 93 WIR 353.

¹³ BVIMCRAP2021/004 (delivered on 25th April 2023, unreported).

¹⁴ [2023] UKPC 4.

and reliability is pre-eminently a matter on which the trial judge is in a much better position than an appellate court.”¹⁵

- [14] Specifically in relation to appeals of no case submission decisions, the respondents, like the appellant, sought to rely on several EWCA authorities for the proposition that it is insufficient for the Crown to show that the discretion jurisdiction might have been exercised differently. Rather it must be shown that it was unreasonable for it to have been exercised in that way, relying on **R v B**¹⁶ at paragraph 19 and **R v Bush** as a fair illustration of what they described as the contemporary EWCA approach to prosecution appeals of no case submissions. First, a ruling ought not to be reversed unless wrong in law, involved an error of law or principle, or was a ruling that it was not reasonable for the judge to have made. Secondly, the Court of Appeal must be deferential to the trial judge’s factual evaluation. In **R v Bush** at paragraph 135 the court stated:

“In relation to Ground 4 we endorse the approach of the Divisional Court in **R (on the application of the Inland Revenue Commissioners) v Crown Court at Kingston**. We acknowledge, as the Divisional Court acknowledged, that it is important that a trial judge in dismissing charges or upholding a submission of no case does not usurp the function of the jury. But, where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against the defendant, especially where he considers the totality of the evidence points in the opposite direction. There may be a fine balance between withdrawing a case from the jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient. Hence the margin of judgment that this Court allows to a trial judge who has heard the evidence and seen the witnesses.”

- [15] Reliance was also placed on the case of **R v Ali**¹⁷ where the EWCA considered whether leave should be granted to appeal a ruling of no case. The respondents submitted that although this was an earlier stage than the case now before this

¹⁵ It is recognised that the context was a criminal trial by judge alone. However, where the judge, even with a jury, is **properly** engaging on the issue of credibility of a witness (which is otherwise normally the province of the jury), the approach should be no different. The question will be often whether the witness’ credibility is so shot that it ought not to be left to the jury.

¹⁶ [2008] EWCA Crim 1144.

¹⁷ [2015] EWCA Crim 1279.

Court, the reasoning should be considered. There, leave was refused for absence of a reasonable prospect of success as, inter alia, despite the prosecutor advancing a “powerful” argument that the judge was wrong, the case was not strong.

[16] At this point I must observe that UK decisions cited by both parties can only be of persuasive authority if we find that the statutory threshold established by section 67 (on which those UK authorities are based) permitting appellate intervention, is reflected, in substance, by the principles permitting appellate intervention in this jurisdiction in discretionary or evaluative decisions.

[17] There therefore appears to be consensus between the parties that despite there being no equivalent to section 67 in BVI statutory law, the principles set out in section 67 reflect the correct approach to be applied by this Court. This Court agrees. The section 67 principles in substance reflect the common law principles applied by this Court. In **Starcy Huggins and The Commissioner of Police**, this Court held that an appellate court should not interfere with a judge’s primary findings of fact unless they are plainly wrong, which connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached. That was a case where the appeal was against a conviction. But there can certainly be no less stringent test in an appeal against an acquittal based on an upholding of a no case submission.

[18] Consequently, I agree with the parties that the UK authorities cited on the application of section 67 of the **CJA** may provide guidance to this Court, the basic principles allowing for or restricting appellate intervention being in substance the same.

Background

- [19] The background is not in dispute in this matter and is adequately set out and taken from the judgment of the court below.
- [20] The case against the respondents arose out of “Operation Lucan”. This operation was initiated following growing concerns about corruption within the Royal Virgin Islands Police Force. In November 2014, a team of investigators and police officers were brought to the Territory of the Virgin Islands to participate in that operation. The operation’s purpose was to investigate allegations of corruption in the police force during the years 2010 to 2014. The suspects targeted in the operation included the two respondents. Another two of the six suspects in the Lucan investigation were Mr. Michael Isles, the prosecution’s key witness in the case, and Mr. Marlon Primo, who also testified for the Crown in this matter. The focus of the investigation was several operations carried out by the Proactive Unit. The respondents, as well as Mr. Isles and Mr. Primo, were assigned to the Proactive Unit when Operation Lucan was assembled.
- [21] The Proactive Unit, comprising a small team of four to five officers, conducted intelligence-led operations primarily in relation to matters like the illegal importation of narcotics, firearms interdiction, and cash seizures. The first respondent, Mr. Prevost, was assigned to the Unit in 2010 at the rank of Detective Constable. He was later promoted to the rank of Detective Sergeant. The second respondent, Mr. Power, then Detective Constable, was assigned to the Unit in 2012. Prior to joining the Unit, he had, as a member of the Marine Unit, engaged in some joint operations with the Proactive Unit.
- [22] Mr. Primo and Mr. Isles gave viva voce evidence for the Crown. Mr. Primo was a member of the Unit from its inception in 2008. He remained a part of the Unit until sometime in mid-2014 when he was suspended from the police force on suspicion of perverting the course of justice. His suspension related to the leaking of a recording of an interview with the witness Michael Isles.

- [23] Mr. Michael Isles was assigned to the Unit in January 2013 as a Detective Constable. By the end of 2013, Mr. Isles had become a registered Covert Human Intelligence Source (“CHIS”). In mid-2014 he became a protected witness. In the judgment, the Court noted that during his time as a registered source, Mr. Isles never provided any intelligence to his superiors.
- [24] Sergeant Shawn Henry and Constable Royston DaSilva were the other officers in whom Operation Lucan had an interest. They were not members of the Proactive Unit but were relied upon to provide assistance for some of the Unit’s operations.
- [25] The respondents were jointly charged with conspiracy to steal, contrary to section 311(1) of the **Criminal Code** 1997 of the laws of the Virgin Islands which reads:
- “... a person who agrees with any other person that a course of conduct should be pursued which will necessarily amount to or involve the commission of an offense by one or more of the parties to the agreement if the agreement is carried out in accordance with their intention, is guilty of conspiracy to commit the offence in question”
- [26] The particulars of the offence are stated:
- “Pamphill Prevost and Simon Power, between the 1st day of January 2012, and the 31st day of July, 2014, in the Territory of the Virgin Islands, conspired together and with Shawn Henry and Michael Isles to steal quantities of cash obtained or seized during the execution of their duties as police officers.”
- [27] At the close of the prosecution’s case, the respondents mounted a no case submission. Mr. Williams KC for Mr. Prevost in his written submission focused on the second limb of **Galbraith** but in his oral submissions indicated that his application was based on both limbs. He divided his argument into four propositions. First, that the Crown’s case at its highest did not make out the conspiracy as indicated (**Galbraith’s** first principle); second, that without the evidence of Isles, there is no case of criminal conduct at all whether indicted or not indicted; third, which he bifurcated, (a) that the evidence of Isles was of the type that judicial experience shows that in the current circumstances it must not be relied

on, and (b) that Isles's evidence was so discredited that it fell into that category of the second principle of **Galbraith** where it should not be left to the jury; and fourth, that the Crown led prejudicial evidence that would vitiate any conviction and was such that the case should be stopped at that stage. Mr. Williams KC explained that this prejudicial evidence fell into two categories. One being evidence led as supposedly being overt acts of the conspiracy which failed in that purpose and in particular, the incidents at Leon King, Frenchman's Cay, Cane Garden Bay and Cayman Nibbs¹⁸ (more on these later-see paragraph 35). The submission was that there was a complete and total failure that these were overt acts of conspiracy and would only now be before the jury as prejudicial evidence. The second category of alleged prejudicial evidence was that the evidence of Adrian Dale (the Crown's financial expert), his opinion evidence, which he submitted on the authorities, ought not to have been led by the Crown, and having been led as evidence, the jury would have to disregard it. But that, it being such powerful evidence, it is impossible to tell the jury to disregard it. And that it tainted the case against Mr. Prevost, although it was, on the face of it, evidence presented against Mr. Power.

[28] In furthering his submissions, Mr. Williams KC extracted from Blackstone the following propositions as representing the position that has now been reached on determining submissions of no case to answer as:

- (a) If there is no evidence to prove an essential element of the defence, a submission must obviously succeed.
- (b) If there is some evidence which taken at face value establishes each essential element, the case should normally be left to the jury.
- (c) If, however, the evidence is so weak that no reasonable jury properly instructed would convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness

¹⁸ These were some of the incidents being relied upon by the Crown as overt acts occurring within the jurisdiction.

is saying, from internal consistencies with the evidence or from it being a type which the accumulated experience of the Court has shown to be of doubtful value.

[29] Mr. Williams KC submitted that conditional immunity evidence was evidence of a type which the accumulated experience of the court has shown to be of doubtful value. He further submitted that question of whether a witness is lying is really always one left for the jury, save where the inconsistencies are so great and that any reasonable tribunal will be forced to the conclusion that it will not be proper for the case to proceed on the evidence of that witness alone.

[30] The trial judge noted that Mr. Bruce, counsel for Mr. Power, indicated the concerns on behalf of his client were as follows:

- (1) The admissibility of the evidence of Mr. Michael Isles.
- (2) Whether the evidence was qualitatively and quantitatively sufficient.
- (2) The fact that the witnesses for the Crown all describe Mr. Power as conducting himself in a professional manner.
- (4) The absence of independent evidence to make what Mr. Isles said he was told by Mr. Prevost admissible against Mr. Power.

[31] Mr. Black KC, who appeared for the Crown, in the court below, submitted that there was in fact sufficient evidence for the case to go before the jury. He noted that the “caution of Caribbean jurisprudence” was similar to the position in the United Kingdom. He referred to the learning in **Archbold**¹⁹ towards the end of paragraph 4-365, citing **CPS v F**²⁰, which states that:

“...the judge must bear in mind the constitutional primacy of the jury and not usurp their function; to this end expressions such as “safe to convict” or

¹⁹ Mark Lucraft, *Archbold: Criminal Pleading, Evidence and Practice* (2022 edn, Sweet & Maxwell).

²⁰ [2011] EWCA Crim 1844.

“safely left to the jury” should be avoided; the safety of a conviction, if there is one, is a separate one, and one for the Court of Appeal only.”

[32] Mr. Black KC stated that it was only in rare or exceptional cases that the judge’s authority is exercised to stop the case under the second limb of **Galbraith**. Mr. Black KC said that things such as lies and inconsistencies are matters for the jury to resolve. This was so he said even if the evidence was in some respects unsatisfactory. A judge, he said, ought not to usurp the functions of the jury.

[33] Mr. Black KC also noted that the cases for each respondent had to be looked at separately, as the two cases did not stand or fall together, even though there were similarities.

[34] The learned judge noted relevant excerpts from **Galbraith** and referred to the learning in **Blackstone’s Criminal Practice**²¹, specifically paragraph D 16:56 relied on by Mr. Williams KC which reads as follows:

“However, the second limb of the Galbraith test does leave a residual role for the court as assessor of the reliability of the evidence. The court is empowered by the second limb of the Galbraith test to consider whether the prosecution’s evidence is too inherently weak or vague for any sensible person to rely on it. Thus, if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witnesses’ evidence, and therefore (in the absence of any other evidence) there is no case to answer”.

[35] The judge also highlighted²² the following passage (already relied upon by Mr. Williams KC) referred to at paragraph D 16.58 of Blackstone, that:

²¹ David Ormerod, David Perry, *Blackstone’s Criminal Practice* (2022 edn, Oxford University Press).

²² As submitted by Mr. Williams KC.

- (a) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from it being of a type which the accumulated experience of the courts has shown to be of doubtful value.
- (b) The question of whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone.

[36] In his judgment, after setting out the definition and elements of conspiracy and that Section 4 of the **Criminal Code** addresses offences committed partly within and partly beyond the jurisdiction, the learned trial judge highlighted that the conversation grounding the conspiracy alleged by the Crown involving the witness Mr. Isles and Mr. Prevost occurred in the Commonwealth of Dominica. Thus, the only location disclosed from direct evidence of the agreement which constitutes the conspiracy occurred outside the Virgin Islands. The Crown was therefore relying on the completed acts occurring within the jurisdiction of the Virgin Islands to establish that there was a conspiracy.

[37] The trial judge then recounted the overt acts alleged to have occurred within the Virgin Islands which were being relied on by the Crown, being five separate incidents. The Crown's case was that sums of money would have been stolen as part of the conspiracy in relation to the following incidents:

- (1) The Leon King/Sopher's Hole incident. On the 24th of January 2012, members of the Proactive Unit acting on intelligence received went to the Sopher's Hole area where Mr. Leon King was detained with a bag containing money. There were six Ziplock bags with money. When counted the cash amounted to \$136, 620.00. Bag 1 marked 30,000 had \$30, 500.00, bag 2 marked 12, 500 had \$14, 000.00, bag

3 marked 20,000 had \$16, 000.00, bag 4 marked 30,000 had \$26, 5000.00, bag 5 marked 30,000 had \$26, 000, and bag 6 marked 30,000 had \$30,120.00.

- (2) The Cane Garden Bay/Elmes Suite incident. On the 20th day of December 2012, there was a joint operation involving the police and customs to capture illegal immigrants. A pillowcase stuffed with money was retrieved. There was no evidence as to how much money was in the pillowcase.
- (3) The Julian Benson Maduro/Fish Bay Incident. On the 22nd day of June 2013, Mr. Maduro was intercepted at Fish Bay after he disembarked a speed boat upon his return from St. Thomas. He was found to have money in a cell phone box. When counted by the authorities at the Financial Investigations Unit, the money amounted to \$29,000.00. Some years afterwards, Mr. Maduro said he had \$48,000 to \$50,000 in the box.
- (4) The Ian Phipps/Fat Hogs Bay Incident. On the 10th day of April 2014, the police commenced a search at the four-storey premises at Fat Hogs Bay. A quantity of money was retrieved in the bushes in an adjacent lot the following day.
- (5) The Cayman Nibbs/ Frenchman's Cay incident. On the 23rd day of July 2014, Mr. Nibbs returned to the BVI from St. Thomas aboard an inflatable rubber dingy. After he disembarked at Frenchman's Cay and was about to ride off on his scooter, he was intercepted by the police. A quantity of money was found in a child's knapsack in his possession. The money when counted amounted to \$32, 000.00. Mr. Nibbs later said that he had \$42, 000 in the bag.

[38] After summarizing the five incidents, the judge embarked upon a review of Mr. Isles's testimony, noting that Mr. Isles's evidence was critical to the Crown's case.

[39] The judge recounted that in late October 2013, about ten months after Mr. Isles joined the Proactive Unit, he journeyed to Dominica, the land of his birth, on a charter organized by Mr. Prevost who was also from Dominica. Police constables Marvin Robinson and Royston DaSilva were among the people who travelled on the charter to Dominica. Mr. Isles testified that (in Dominica) he journeyed from the airport in a vehicle along with Mr. Prevost and Mr. DaSilva, and Mr. Prevost took them directly to Sergeant Prevost's house that was under construction. Mr. Prevost took Mr. Isles to a compound for imported vehicles and pointed to a blue Subaru vehicle that Mr. Prevost said he was in the process of getting cleared. Mr. Prevost told Mr. Isles that he had received special concessions from the Government of Dominica to import the vehicle.

[40] Mr. Isles testified that a day or two after their arrival in Dominica, Sergeant Prevost accompanied by Constable DaSilva and two other persons picked him up in the blue Subaru which had by then been cleared from the customs. They journeyed to a bus stop where they started having a drink. Mr. Isles said that Mr. Prevost then invited him to go for a drive. He testified that during the drive Sergeant Prevost said a number of things:

"Prevost told me he wanted to tell me something. He had been trying to feel me out for a while. He told me he was comfortable with me. He will like to disclose something to me. He proceeded to ask me [if I know] how he got the blue Subaru. I said I assumed he ordered it. He proceeded to tell me that himself, DC Power and DaSilva all had built homes and I was the only one in the Department who had not constructed a home. He proceeded to say he had formed a clique-he used the word clique-within the Proactive Unit. He proceeded to say in that group of persons-he called the names of the persons that were in that clique. He mentioned Shawn Henry, Simon Power and himself. He said whenever intel is disseminated to him, he took on operations involving cash money over drug operations. He said during operations involving cash, himself, Shawn Henry and Simon Power would remove money from the original sum of cash that was seized. They would meet at an undisclosed location and share the money among themselves.

He said the money from those operations will be used to help himself Shawn Henry and Power to buy vehicles and assist in constructing their homes. He said he felt comfortable with me and would like me to become part of the clique.”

- [41] The Judge recounted how Mr. Isles had narrated how Mr. Prevost spoke of two operations, one at Cane Garden Bay (Elmes Suite Apartment) and the other involving Mr. Benson Maduro. The judge recounted that in relation to the Cane Garden Bay incident, Mr. Isles said that Mr. Prevost had told him that:

“The intelligence was two pillowcases of cash were to be recovered. He said the two pillowcases of cash were actually recovered. During the search he attempted to throw one pillowcase of cash out of the window to Da Silva who was waiting outside. He was unable to throw the pillowcase out the window because a customs officer was present in the room. He said the customs officer was Frenchie Gumbs. Prevost proceeded to explain that later that evening himself, Henry and Power met at an undisclosed location and divided a quantity of cash among themselves. He told me that proceeds from that operation, he used some of it to purchase the vehicle in question that we were sitting in. He also said that some of the proceeds were used to assist him in finishing his house in Dominica and also to assist DC Power in constructing his home in the BVI.”

- [42] Regarding the Benson Maduro arrest at Fish Bay, when a quantity of cash was discovered inside of a cell phone box, the judge recounted that Mr. Isles said that Mr. Prevost explained that:

“Detective Sergeant Henry broke the bundles of cash and separated them quickly inside the opaque evidence bag. He said that he met at a location, undisclosed, with Sergeant Henry and DC Power sometime later and divided the cash among themselves. He said the amount of cash that Henry broke free was \$21, 000.00. He said it was divided equally among himself, Shawn Henry and DC Power.”

- [43] The judge recounted that Mr. Isles said:

“The conversation continued. Prevost proceeded to tell me that on future operations I will be included in the clique. He asked me if I was willing to participate. I told him “Yes”. I was put in a very precarious position and I felt it was not smart to decline the offer at that *time*”.

[44] The judge further recounted that Mr. Isles testified that they (Isles and Prevost) returned to the bus stop. Mr. Prevost called Mr. DaSilva and the other gentleman who had been left there earlier, and they all proceeded to a house in Fond Cole. According to Mr. Isles, while at the premises, he left the group and went out on the veranda. Mr. Prevost joined him there and he said:

“Prevost followed me to the veranda. He asked me if I had given any thought to anything he had said earlier. I said yes, I did. He proceeded to ask me: “Are you in?” I said “yes, I am in”. I was afraid of the consequences if I had said no. Prevost said to me that I should keep DC Primo out of it. Do not mention anything to him, because he said, Primo spoke too much. I told him I will not tell Primo anything...DaSilva was approaching us while we were having the conversation. Prevost told me *to cut the conversation* when DaSilva arrived. The conversation ended.”

[45] Mr. Isles said that after spending an hour at the house, Sargeant Prevost took him home. He did not remember meeting up with Mr. Prevost in the Commonwealth of Dominica after that. He said he spent three to four days in Dominica and that he travelled back to the Virgin Islands along with Mr. Prevost and officers Robinson and DaSilva.

[46] Mr. Isles said that he did not want to be a part of the clique. Further he wanted something to be done about the theft of cash from the police investigations. Sometime after his return in December 2013, he contacted detective Chief Inspector Katherine Adams. The meeting was arranged and Mr. Isles informed Ms. Adams about what he said Mr. Prevost had told him in the Commonwealth of Dominica about the theft of cash. Mr. Isles had a follow-up meeting with DCI Adams and Mr. Richard Taylor. The initial meeting lasted about half an hour. The meeting was audio recorded by Mr. Taylor.

[47] A decision was taken at the meeting to make Mr. Isles a registered informant. Mr. Isles said he understood his role as requiring him to make observations and report anything illegal to Ms. Adams. He continued to work at the Proactive Unit. He participated in a further 3 to 4 operations by the Unit following the meeting

with Ms. Adams. He said that he felt uncomfortable. He was in a precarious situation as he did not know to what extent he should participate in activities.

[48] Mr. Isles remembered participating in an operation in April 2014 at Fat Hoggs Bay at Mr. Ian Phipps's residence. He and DC Primo did surveillance prior to the raid. A search warrant was executed, and several Hispanic males were detained, and he provided security for the detained persons. The premises had several floors, and the search was not completed on the first day. Sometime during the night, close to midnight, Mr. Isles received instructions from Sergeant Prevost to return to Mr. Phipps' residence, along with DC Primo to secure the premises. Prior to daybreak he got out of the vehicle that he and Mr. Primo were in and went to do a check of the building. He found a backpack containing 4 bundles of cash comprising USD\$1,000.00 inside each bag. He kept the money for himself. His evidence was:

"I did not tell anybody at that time what I had done. I do not know why I took the money. I took the money to my apartment and eventually spent it."

[49] The judge recorded that Mr. Isles said later the same day he took the money from the Phipps residence (in the afternoon) he was directed to go to the Road Town police station to assist with interviewing Mr. Phipps and some other persons who were detained. After doing the interviews he proceeded to the Proactive Unit office. His evidence was:

"I met with Power and Prevost. I do not recall if I got there first or if I met them there. While there Sergeant Prevost had in his possession 3 exhibit bags containing cash. I asked him if that is all the cash recovered from the Phipps residence. He said "yes". I asked him if he is going to share any of the cash with myself and DC Power. I don't remember his response at the time. He proceeded to break the seal of the exhibit bag containing the cash. I cannot say for sure if there were two or three bags. He proceeded to remove a quantity of cash from one of the exhibit bags and place it on my desk, made-up of US denomination, \$100.00 bills. Small bundles. I counted it and it was \$ 1000.00. He proceeded to break another bag and put the bundle of cash on Power's desk in front of him. He broke the third bag with a bundle of cash and kept it. I asked him if that was it. He proceeded to tell me the box containing the cash had already been photographed by Forensics. I kept the cash that was placed *on the desk in front of me*".

[50] Mr. Isles then went on to describe his involvement along with Mr. Prevost, Mr. Power and Sergeant Henry at Frenchman's Cay when Mr. Cayman Nibbs was arrested.

Mr. Nibbs had a backpack:

"I asked him (Mr. Nibbs) what was inside of the backpack. He said \$42,000.00. I asked him what the cash was for and where did he get it. He said it was from sales of either vehicles or motorcycles. I was instructed by Sergeant Prevost to secure the cash, which at the time was in a yellow plastic bag, in a police vehicle- the pickup truck, a Nissan Frontier. I walked over to the vehicle opened the right rear passenger door and placed the bag containing the money on the back seat... the bag was on the back seat when I left the vehicle. The door was opened because Sergeant Henry was standing right there".

[51] Mr. Isles said that after performing some other duties, Sergeant Prevost said that he wanted to do a video recording with Mr. Isles securing the exhibit in the presence of Mr. Nibbs. Mr. Isles said that he found that rather unusual, because they were not in the habit of doing video recordings on a scene securing evidence. Mr. Isles said:

"The day following Mr. Nibbs, I had a conversation with Detective Constable Theophile. I called Detective Chief Inspector Adams. I spoke with her. I left the BVI"

[52] At paragraph 48 of his judgment, the learned judge identified what he considered to be several differences between the testimony of Mr. Isles and the other prosecution witnesses. The learned judge described the following as some of the notable differences:

(a) Mr. Isles said that in the Cayman Nibbs incident it was Sergeant Henry who placed the money in the evidence bag while Mr. Maduro said it was the "young officer".

(b) Mr. Isles was the only witness in the Cayman Nibbs incident who described the evidence bag the cell phone box from Mr. Nibbs with the money was placed in as being "opaque". Officer Primo described the bag as been sealed in the presence of the suspect.

- (c) Mr. Isles was the only witness who mentions the intelligence regarding the Cane Garden Bay incident as being about money rather than apprehending illegal immigrants.
- (d) Mr. Isles was the only witness who refers to there being 2 pillowcases of money at the Cane Garden Bay Incident, rather than one.

[53] The learned judge then proceeded to consider the evidence obtained upon cross examination of Mr. Isles and noted the following:

- (1) Mr. Isles agreed he was a thief before he became a protective witness. Stealing, however, was not in his nature. He disagreed that he had a dishonest side quite apart from being an ambitious person but agreed that he did dishonest things sometimes. When he reported to DCI Adams about his conversation with Prevost, he deliberately did not tell her about his dishonesty. He appreciated that Ms. Adams was in a position of trust and was relying on him to be an honest man. He agreed that he also had a duty to come “clean before” he got protection and also had a “duty to come clean” whilst he was an informant. He agreed and that he deliberately did not disclose his transgressions and so he deceived DCI Adams. He agreed that Mr. Prevost as his supervisor and Mr. Mark Hughes, who was above Mr. Prevost, trusted him to do his work honestly, but he deceived them too. He said he did not disclose to the authorities that he stole money at the Phipps’ residence until he was put in protection.
- (2) He denied that he told Mr. Allen Beach that he had seized an additional \$2000.00 from the Spanish speaking suspects who were at Mr. Phipps’ house. He was shown a document that was previously marked for identification; he then agreed “I may have said I took a further \$2, 000.00 from another suspect”. He said that Mr. Prevost told him to give back the money to the suspect. Mr.

Isles was asked whether in the space of 24 hours he benefited by \$10,000 from the Phipps incident which was one-third of his yearly salary. He said he did not know how to answer her question. He, however, agreed that he benefited materially and unlawfully from the Phipps incident.

- (3) Mr. Isles was questioned as to where the exhibit bags were on the night of the 11th of April 2013²³. In his evidence in chief, he said that after completing the interviews at the Road Town Police Station, he went to the Proactive Unit office where he met Mr. Prevost and Mr. Power, and that Mr. Power had the exhibit bags in his possession. In cross-examination, Mr. Isles acknowledged that in fact he had the exhibit bags with the money with him at the Road Town Police Station during the time he was interviewing the suspects. Those interviews went on until 11:30 pm. Mr. Isles, however, could not remember if he was the one who took the bags to the Proactive Unit office.
- (4) Mr. Williams KC questioned Mr. Isles about the inter-personal relations at the Unit. Mr. Isles said that in his view there was a separation in the office, Mr. Prevost and Mr. Power being aligned, and so too he and Mr. Primo. He thought that Mr. Power was getting more cases than he was. He also indicated that Mr. Power and Mr. Prevost went abroad to do courses, but he did not get to go. He accepted that he may have said that that there was a local preference for Mr. Power and that they were pushing him up. He may also have said that he did not know if Mr. Power passed probation and how come Mr. Power got a position. He denied that he was vexed with Mr. Prevost for a variety of things, but he blamed Mr. Prevost because he got reprimanded by Mr. Hughes for leaving

²³ This relates to the Phipps incident. This should be a reference to 2014. See para [51] of the judgment.

the territory and leaving the office short-staffed. He may have also said something when DC Primo was reprimanded for bringing a lady to the office and may have said how come Mr. Prevost does not get caught and reprimanded when young ladies visit him. He did not like how Mr. Prevost managed the Unit's vehicles. He and Mr. Primo talked about what they did not like about Mr. Prevost. He denied that it was correct that while in Dominica in 2012²⁴, Mr. Prevost spoke to him about getting close or fresh with Mr. Prevost's sister. He, however, knew which sister Counsel was referring to.

- (5) It was suggested to Mr. Isles that he was wrong, when he testified that Mr. Prevost returned from the Commonwealth of Dominica on the same flight with him. He said he could not remember if Mr. Prevost did so. He could not remember either whether it was Sergeant Henry who was in charge of the team when he returned to the Virgin Islands from Dominica.
- (6) Mr. Isles agreed that what Mr. Prevost said to him in the Commonwealth of Dominica was "shocking news" and he agreed as a policeman it was his duty to report it immediately because it was serious misconduct. He agreed it took him two weeks before he spoke with DCI Adams. He denied that when he spoke with DCI Adams it was to "curry favor" for his own advancement, or that he wanted to be in charge of the Unit, or that he thought he was brighter than Mr. Prevost or thought that Mr. Prevost had no right to be higher than him. He maintained that he did have the conversation he testified about with Mr. Prevost in the Commonwealth of Dominica. Mr. Isles said when he spoke with DCI Adams, his hope was that the investigation would begin. He

²⁴ This probably should have been a reference to 2013.

was disappointed that it did not happen, instead Mr. Prevost was sent on more overseas courses. He agreed that he may have said on a previous occasion that he stole some of the money because he was disappointed with DCI Adams.

- (7) Mr. Isles said he remembered Mr. Prevost using the word “clique” (that is in reference to the conspiracy). Everything he said was imprinted on his mind. Questioned further, Mr. Isles said he “may have said to the last jury the word “imprinted” was “team”.
- (8) Mr. Isles recalled saying that Mr. Prevost told him that the proceeds from the Cane Garden Bay incident were used to buy the blue Subaru car. He agreed that he did say to DCI Adams and Mr. Taylor that Mr. Prevost had told him it was the proceeds from the Benson Maduro incident that was used to buy the car. He said he did not know if both could be true. He denied that he made up the story and forgot part. Eventually he said he was not sure if it was the proceeds from the Benson Maduro or Cane Garden Bay incidents.
- (9) With regard to the sequence of events, Mr. Isles agreed that after he had made the report to DCI Adams, that she wanted to do more inquiries first. *“Before those inquiries were completed, I was taken into protection. It happened suddenly”*. Mr. Isles agreed that while he enjoyed the status of being a Covert Human Intelligence Source, he stole money from the Phipps incident. He then proceeded on vacation. When he returned there was the Cayman Nibbs incident. Mr. Prevost was filming what was taking place. The interview he had with DCI Adams was leaked and he was put under protection after that. Mr. Isles was aware that one of the persons who improperly accessed the content of the meeting was his friend, DC Primo.

- (10) Mr. Isles acknowledged that he gave a written statement in the Benson Maduro incident after it occurred. He said *"I may have said the phone box was put in a transparent evidence bag. I told the jury it was placed in an opaque bag."* He agreed with Counsel that he said the phone box was opaque because the story could not work if he said the phone box with the money was put into a transparent bag and for his story to make sense, the bag had to be opaque. He went on to say that his statement which said it was clear plastic bag was not true. It was inaccurate. It was a lie.
- (11) In relation to the exhibits from the Phipps residence, Mr. Isles said the money remained with the Proactive Unit over the weekend. The Financial Investigation Unit was not available on the weekend to count the money and to take it into custody. After the seals of the evidence bags were broken and the cash distributed, he did not inform DCI Adams of when it occurred and while the evidence bags with the broken seals were still at the Proactive Unit. He agreed he spent the weekend searching for similar looking evidence bags: he was instructed to do so, and he put the money into the new bags.²⁵
- (12) Mr. Isles recalled at the last trial he said the opening of the bags had occurred around 7:00 or 8:00 o'clock that night of 11th of April 2013²⁶. He said he may have been inaccurate. Mr. Isles was shown his witness statement, and he agreed that he was in fact at the Road Town Police Station that night from 5:50 pm until 11:30 pm interviewing the suspects. Following that, he spent 30 minutes writing his statement.
- (13) Regarding his role as a CHIS and now protected witness, Mr. Isles agreed that he was being dishonest to Ms. Adams and the Royal

²⁵ This was not an acceptance by the Defence that this distribution had in fact occurred.

²⁶ Should be 2014.

Virgin Islands Police Force. DCI Adams had given him instructions about what to do. *'She told me what to do and I was to come back and tell her. I was given immunity when I was into protection. I was told that if I gave evidence in accordance with my statement, I would escape charges for my crimes. I was required to come clean. I didn't come clean at the time.'*

- (14) Mr. Isles agreed that there came a point where he was told it was his "last chance" to speak of his crimes. He agreed that he has no incentive to tell of any other crimes he may have done, because he will be in trouble. He agreed that it was better that he kept it all to himself.
- (15) In further cross-examination from Mr. Bruce, counsel for Mr. Power, Mr. Isles acknowledged that his statement written in the Benson Maduro matter was written one day after the incident. He however said that his recollection 9 years later, that it was an opaque evidence bag in which the box with the money was placed rather than a transparent evidence bag, was what occurred.
- (16) Regarding the exhibit bags with the money from the Phipps incident, according to Mr. Isles:
- "I can say that I had the monies with me in the interview room until the interviews were over. I did not leave the money at the Road Town Police Station...I do not remember if I left the Road Town Police Station with the money."
- (17) Mr. Isles maintained that when he went to the Proactive Unit office, the bags were handed to him by Mr. Prevost. *"I was not the only one with the bags"* Mr. Isles said. He said he was not the only one with the bags. He agreed that he assisted with doing all the interviews. When asked about how he was able to find himself in

both the Road Town Police Station and the Proactive Unit Office, which was about a mile away, he said he did not know.

(18) Mr. Isles agreed with Mr. Bruce on a number of things: that it was not right to steal money and remain a CHIS; he should have been asked to be removed as a CHIS; he deceived the officers of the Royal Cayman Islands Police Force; he deceived the Royal Virgin Islands Police Force; he deceived DC Primo; he deceived his mother with his conduct.

(19) With regard to the Cayman Nibbs incident, Mr. Isles said:

“I put the money in the pickup truck. I opened the bag [Nibbs’ bag] to be able to see the money inside it. I can’t remember if I said [in my statement] I tied it back and put it in the pickup truck. I didn’t see any officers take any money. I opened the bag twice. I saw Henry open it. He didn’t take anything from the bag.”

[54] The learned judge recounted that the cross examination of Mr. Isles was rounded off with Mr. Isles agreeing ‘*Some aspects of my statement were inaccurate. Some aspects of my statement are not in keeping with my statement. I know that not giving evidence in keeping with my statement is violating the agreement.*’

[55] The learned judge then proceeded to consider the issue of conditional immunity that was provided to Mr. Isles. He referred to the agreement accepting the conditional immunity provided by the DPP and outlined its terms. He recounted that Mr. Williams KC submitted that the evidence received pursuant to a conditional immunity ‘is of a type that the accumulated experience has shown to be of doubtful value.’ Mr. Williams KC referred the Court to **Eiley and Others v R**²⁷, at paragraph 48:

“A judge enjoys a discretion to exclude evidence if the circumstances in which it has been obtained are such as to render its admission contrary to the interest of justice. One circumstance where it may be appropriate to do so is where the witness has received an inducement to give evidence for

²⁷ [2009] UKPC 40.

the prosecution that will render the evidence suspect- see R v turner (1975) 61 Cr App R 67 at 68. The discretion is one that should be used sparingly. Such promises, when made to an accomplice to a crime, have been described as distasteful.”

[56] Under the sub-heading “Conflict of Interest”, the learned judge then proceeded to consider the evidence of Adrian Dale. Mr. Dale had come to the BVI in 2008 after working as a police officer for thirty years in the United Kingdom. He testified initially in relation to his work as the head of the financial investigation unit. Operation Lucan provided Mr. Dale with certain financial records relating to the second defendant Mr. Power and a property comprising 2 two-bedroom apartments that Mr. Power was building in 2013. The purpose of giving Mr. Dale the documents was for him to do an analysis of Mr. Power's income and expenditure, particularly in the period January to May 2013. Following an application by the Crown, Mr. Dale was deemed an expert in the field of financial investigation.

[57] The learned judge recounted that in cross-examination Mr. Dale readily accepted a number of propositions from both counsel for the respondents. The concessions included: that it was an ethical challenge for him to give expert evidence in these circumstances; his status as a certified financial investigator in the UK had lapsed since he left in 2008; he has not been engaged in any current training in the field; he did not receive the additional documentation he required concerning Mr. Power; that his report which said Mr. power had unexplained income of \$65,000.00 was deficient; and he agreed that the deficit could be accounted for by applying the sources described by counsel.

[58] Under the sub-heading “Non-Participation”, the court recounted Mr. Bruce's contention that in the absence of any direct evidence of any conspiracy, the Crown was relying on the five incidents and Mr. Power's finances to prove Mr. Power's participation in a conspiracy. Mr. Bruce pointed out that mere presence at a scene, or even knowledge of a conspiracy, or approval of the conduct, do not amount to being part of the conspiracy. Mr. Bruce said that it must be proved that Mr. Power knew of the goals and objectives of the conspiracy and went on to join it. He referred

to the American case of **United States v Jason Korey**²⁸ for the proposition that ‘there must be intentional participation by the defendant in this specific conspiracy charged, with a view to furthering the common design and purpose of the conspiracy.’

[59] Mr. Bruce had also indicated that while he believed the case ought to be stopped against Mr. Power on the first limb of **Galbraith**, because of the inconsistencies and tenuous nature of the Crown’s case, the judge ought to intervene.

[60] Mr. Bruce had also submitted that the combined effect of the failure to prove individual elements of the overt acts, together with the absence of independent evidence of a conspiracy, along with the testimony about Mr. Power’s finances, created undue prejudice to Mr. Power, relying on the case of **Krulewitch v United States**²⁹.

[61] In response to the submission made on behalf of Mr. Prevost, Mr. Black KC had submitted that if the jury accepted the evidence of Mr. Isles the case against Mr. Prevost was a strong case. The evidence to which Mr. Black KC referred included Mr. Isles’s testimony that Mr. Prevost said a number of things to him while they were vacationing in Dominica, and that Mr. Prevost opened the evidence bag with money taken from Mr. Ian Phipps’ residence at the police station and distributed stacks of money. Mr. Black KC noted that there was no requirement in law for there to be corroboration of evidence from an accomplice. He used the term ‘a substantial body of supporting evidence’ rather than corroboration to describe the other bits of evidence that a jury can look to.

[62] The learned judge considered the overt acts in some detail. In relation to the Cane Garden Bay/Elms Sweet Apartment incident, Mr. Williams KC had submitted on behalf of Mr. Prevost that there was no evidence of theft. The Crown’s case was

²⁸ 472 F. 3d 89 (3rd Cir 2007).

²⁹ 336 US 440 (1940).

that the pillowcase appeared on the night to be fuller than what was eventually presented. The Crown's case was undermined by the photograph it tendered of the pillowcase in situ and senior customs officer Frenchie Gumbs directing that the money must travel with the prisoners. The Crown could not show that money was missing. Mr. Bruce noted that this was an intelligence driven operation, and the intelligence concerned illegal immigrants. The operation was not about money. He was of the view that if money was in fact stolen by some unknown person, it was a crime of opportunity not evidence of conspiracy. Mr. Power's conduct, he said, was always consistent with the objectives of the mission. Mr. Power had pursued and captured one of the targets who had escaped.

[63] Mr. Black KC stated that the fact-finding forum could rely on several bits of evidence as supportive of the Crown's case:

- (1) The fact that there was an operation in Cane Garden Bay.
- (2) Both Mr. Prevost and Mr. Power were there.
- (3) A pillowcase containing cash was recovered.
- (4) The fact that the customs officer Frenchie Gumbs was present when the cash was discovered as Mr. Isles stated he was told by Mr. Prevost.
- (5) Evidence which if accepted from Inspector of Police Ivo Fraser and former Customs officer Mr. Gurvin Stoutt saying that they saw cash on the counter in the apartment.

The learned judge noted that the last point of cash being on the counter was disputed by the other witnesses for the Crown who were present as well as being contrary to the photographs from the scene tendered by the Crown.

[64] In relation to the Julian Benson Maduro/ Fish Bay incident, the Court recounted that Mr. Williams KC stated that Mr. Isles twisted his evidence at the trial to say that the

money was in an opaque bag. Everyone else said it was a transparent evidence bag except Mr. Isles. Mr. Williams KC also noted that both Mr. Maduro and Mr. Nibbs were clearly couriers and part of a drug trafficking operation. They mixed truth with lies and pretended not to be involved in drug trafficking operations.

[65] Mr. Bruce relied on the testimony elicited from Mr. Maduro that his client Mr. Power conducted himself throughout as a professional policeman.

[66] Mr. Black KC in reply said that support for conspiracy in the Benson Maduro incident at Fish Bay came from the following:

- (1) The fact that there was an incident.
- (2) Both Mr. Prevost and Mr. Power were there.
- (3) A jury could conclude that it was officer Henry who placed the cash in the bag and sealed it.
- (4) Evidence of Mr. Maduro who claimed that he brought in \$48,000.00 to \$50,000.00 and the actual count being \$29,000.00. When the figure of \$21, 000.00 is added to the actual count it comes up to the sum Mr. Maduro said he had.

[67] In relation to the Ian Phipps residence/Fat Hoggs Bay Incident, Mr. Williams KC pointed to the questions which emerged from the video recordings tendered by the Crown. He noted that at one stage the Scene of Crime Officer, Mr. Lesroy Simmons, who previously had custody of the bags, is seen "hands free". He asked, "what became of the bags?" It was suggested that the individuals who had an opportunity to steal were Mr. Isles, Officer Simmons, and the person with whom Mr. Simmons left the bags. Mr. Williams KC noted that the Crown could not say at what time on the 11th of April 2014 the sharing of money by Mr. Prevost took place at the Protective Unit office as Mr. Isles testified, as the exhibit bags with the money were elsewhere - at the Road Town Police Station- with Mr. Michael Isles, as he

interviewed the suspects up until 11:30 p.m. Mr. Williams submitted that even if money was in fact missing, the person with the opportunity to steal the money was Mr. Isles.

[68] Mr. Black KC said that support that the money from Mr. Ian Phipps' incident was distributed at the police station pursuant to the conspiracy came from:

- (1) Acceptance of the evidence of Mr. Allen Beach who looked at enlargements of photographs taken by inspector Lesroy Simmons of the evidence bags and who spoke of the number of stacks he could identify.
- (2) The evidence of Mr. Adrian Dale that one of the bags contained 35 stacks and not 42 as Mr. Beach said he counted.

[69] In relation to the Cayman Nibbs/Frenchman's Cay incident, Mr. Williams KC for Mr. Prevost noted that Mr. Nibbs was a witness who undermined his own testimony by conceding his perjury. Counsel said that Mr. Isles who had custody of the suspect's bag had the opportunity to steal the money. Mr. Williams said that if Mr. Isles stole the money from Mr. Cayman Nibbs the Crown would have to show Mr. Isles distributed it in order to prove confederacy.

[70] Mr. Black KC said that support for the Cayman Nibbs incident came from:

- (1) The departure from the practice of separating the suspect from the cash when the police vehicle the suspect was in was temporarily relocated.
- (2) The money was put into an evidence bag until the suspect was brought back to the scene.
- (3) Counting of the cash- there were rumblings that some money was missing.

Mr. Black KC said that it was not an overwhelming influence to be drawn but the question to be asked was: “could a jury reasonably conclude that money was taken as part of a conspiracy?”

[71] In relation to the Leon King/Soper’s Hole incident, Mr. Williams KC submitted that one needed to only compare what the prosecutor said they were going to prove with the evidence the Crown ultimately adduced in relation to this matter. Mr. Williams KC pointed to what the Scenes of Crime officer Mr. Forbes Washington said he did at the scene. Mr. Washington took the Ziploc bags with the money out of the canvas bag and passed them to unknown officers who were behind him to hold as he photographed the exhibits. The evidence from former Detective Chief Inspector Hughes was that the money was in an exhibit bag and was taken to the station by Mr. Prevost along with the suspect. Mr. Hughes’ evidence was that the exhibit bag was sealed otherwise he would have accompanied the bag. Mr. Williams KC noted that:

- (1) The Crown could not show that Leon King exhibit bag was not sealed.
- (2) The witness Mr. Dale could not see what the number was on the Ziplock bags meant.
- (3) The improper handling of the exhibit commenced with the Scenes of Crime officer Mr. Washington. (It is noted that Mr. Washington when summoned journeyed to Sopher’s Hole in his Scene of Crime vehicle and did not have any exhibit bag with him).
- (4) The possibilities are that no money was stolen, or if money was stolen it was not necessarily by virtue of a conspiracy.
- (5) Among the officers who were behind Mr. Washington to whom he passed the Ziplock bags with the money and therefore had an opportunity to steal were Mr. Theophile and Mr. Hughes and other persons unknown. Mr. Williams KC noted that the conspiracy indicted

by the Crown named 4 specific persons and does not say "other persons unknown."

[72] Mr. Bruce, for his client, noted that commencing with the Leon King incident, the Crown was not in a position to prove that Mr. Power had any knowledge of any plan or had any intent to participate in any conspiracy. This was an intelligence driven operation by the Proactive Unit. Mr. Power was not a member of the Unit at that time. He was in the marine unit and only attended the scene when instructed to do so to take the boat to Road Town.

[73] Mr. Black KC said that the Crown was not in a position to suggest that Mr. Power was a part of the Leon King incident. He did not accept however that the incident was outside of the conspiracy as indicted. Mr. Black KC said that the jury could find supportive evidence from the following:

(1) Mr. Prevost and Mr. Henry had control of the evidence back with the money.

(2) The overlays of the bags done by Mr. Morris suggests money was removed.

[74] Specifically in relation to the case against Mr. Power, the Crown stated that the assessment for Mr. Power had to be done separately, and the outcome need not be identical to that of Mr. Prevost. Mr. Black KC said that it was up to the jury to come to a conclusion that Mr. Power was part of a conspiracy based primarily on the evidence of Mr. Isles. He said that support could be found from the following:

(1) In the circumstances outlined previously regarding the Cayman Nibbs incident.

(2) If the jury believed that there was a distribution of money to Mr. Power from the Ian Phipps evidence bag.

- (3) In the evidence in chief of Mr. Adrian Dale regarding unexplained income. (The court noted that Mr. Dale conceded that there was a gap in the financial information provided to him when he made his conclusion and that information needed that he regarded as significant was never provided to him by the Operation Lucan team).

[75] The court went on to consider separately in the judgment submissions from the defence team on (a) who were the conspirators, (b) the issue of rolled up acts, and from the Crown, the issue of the proper method to cure prejudicial evidence. At paragraph 112 of the judgment (under the sub-heading “Who Were the Conspirators”) the learned judge noted that Mr. DaSilva was listed as a witness on the original indictment but had been removed. However, he went on to highlight a number of issues that he identified as arising from the aspect of Mr. Isles’s testimony regarding Mr. DaSilva which he clearly considered to be relevant:

- (1) While Mr. DaSilva worked along on operations with the Proactive Unit, he was never identified as a member of the Unit except for the reference in Mr. Isles’s testimony when Mr. Isles said that Mr. Prevost spoke of members of the Department who built houses.
- (2) In addition to the reference to Mr. DaSilva building a house, Mr. Isles testified that he was told that Mr. DaSilva was waiting at Cane Garden to collect money which was to be thrown to him. These, the judge stated, pointed to an involvement in an enterprise.
- (3) On the day that Mr. Isles said Mr. Prevost spoke with him, Mr. DaSilva was also in Dominica, but according to Mr. Isles, Mr. Da Silva was left at the bus stop while he [Mr. Isles] and Mr. Prevost went for a drive during which “joining the clique” was discussed.

- (4) After Mr. Prevost returned to the bus stop and picked up Mr. DaSilva, they all went to someone's house. Mr. Isles said Mr. Prevost then spoke to him on the veranda asking him whether he had thought about their earlier conversation and if he was "in". However, as Mr. DaSilva approached where they were, Mr. Prevost "told me to cut the conversation".

[76] The learned judge asked, why would Prevost take steps to keep Mr. DaSilva out of the conversations with Mr. Isles about the "clique" by first leaving Mr. DaSilva at the bus stop to go for a drive and then instructing Mr. Isles to "cut the conversation" when Mr. DaSilva approached them on the veranda if Mr. DaSilva was in fact a beneficiary and participant in the confederacy? The learned judge clearly thought that did not make sense. The learned judge continued with the question, were there efforts to keep away the man who allegedly built a house from proceeds of the operations and was to catch the bag at Cane Garden Bay from a discussion in furtherance of the conspiracy? Was it that the "clique" was therefore a new and separate conspiracy going forward?

[77] At paragraph 123 of the judgment the learned judge considered the "Caribbean Jurisprudence" that Mr. Black KC had referred to as arising out of the case of **Ovando Anderson v R**³⁰ where Harris JA stated:

"The trial judge has an inherent power and duty to withdraw a case from the jury if he is of the opinion that the evidence of a witness or witnesses is thoroughly discredited rendering reliance on it nugatory. However, such power should only be exercised in circumstances where there is no evidence upon which a prima facie case has been made out. A judge ought not only to withdraw a case from the jury if there is no evidence upon which, a reasonable jury properly directed could properly convict."

³⁰ JM 2006 CA 58.

[78] Having set out the arguments of counsel and the evidence reviewed in relation to the alleged conversation in Dominica and the five events, the learned judge set out his findings, commencing at paragraph 125 of the judgment. These can be summarized as follows:

- (1) In relation to the conflict-of-interest argument mounted against Mr. Adrian Dale, the learned judge noted that the fact there is a risk of bias or lack of objectivity that is subliminal as opposed to conscious will not prevent an expert from giving evidence. Mr. Dale's knowledge and experience entitled him to be deemed an expert even though his certification in his home country was not current-there is no such requirement in the BVI for certification of financial investigators.
- (2) In relation to the conditional immunity argument, the learned judge held that there was nothing wrong with a witness being provided with immunity. It was a mechanism which has been utilized in appropriate cases and such a decision can be justified in the public interest. Immunity has been granted to accomplices and members of gangs to testify usually against the principals.
- (3) The indictment stated that there was a conspiracy involving four parties from a date unknown between the 1st of January 2012 and the 31st of July 2014. The Crown has not been able to show that the four parties were involved in the conspiracy from January 2012. Mr. Isles is the only witness who testified about the clique, and he was not invited to do so (i.e. to become a member) until October to November of 2013.
- (4) The Crown, which is alleging theft from a series of five incidents and the sharing of proceeds as a circumstance evidencing the existence of a conspiracy, potentially offered direct evidence separate from the Prevost-Isles conversation in relation to one of these-the breaking of the bags in the Mr. Ian Phipps incident. By this, it appears that the learned judge was prepared to assume that there was evidence which, if believed, could allow a jury to return a verdict of guilty.

(5) Mr. Isles's testimony required extremely close scrutiny. He was, on the basis of the indictment, an accomplice whose testimony would attract an accomplice warning. He was given a conditional immunity to testify and that is the type of evidence that judicial experience has shown one needs to be careful with³¹. There was a noticeable absence of independent confirmation of his evidence. This was a matter in which not just a corroboration warning but a very strong caution with regard to the absence of corroboration appears to be necessary³²; that Mr. Isles was a witness with an interest to serve; and to consider whether or not Mr. Isles admitted that he lied in previous judicial proceedings in connection with this matter. Mr. Isles admitted to stealing money at Mr. Ian Phipps' residence even while enjoying the status of being a registered CHIS. None of the thousands of dollars that he stole from Mr. Phipps' residence were shared with any of the co-conspirators, which suggests he was operating separately and apart from the conspiracy of which he testified. His evidence was not just inconsistent with other evidence presented by the Crown but offended basic common sense. Could a fact-finding forum trust a witness who is telling lies- not merely forgetting particulars or being mistaken? Has Mr. Isles in those circumstances been completely discredited?

[79] The learned judge's observations set out at sub-paragraph (5) above are crucial to this appeal as they explain his views and conclusion on Mr. Isles's evidence, that it was not only inconsistent with other evidence presented by the Crown but offended basic common sense. This appears to be the basis upon which the learned judge impliedly answered his own question of whether Mr. Isles had been totally discredited, in the affirmative. At paragraph [132] of the judgment the learned judge relied on an excerpt from **Archbold**, at paragraph 4-365:

³¹ It should be noted that, that is as high as the learned judge took the effect of the conditional immunity, not as a ground for rejecting Mr. Isles's evidence.

³² But as the Crown pointed out corroboration was not necessary.

“The judge should assess the evidence and if the evidence of the witness on whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness.”

[80] The learned judge continued at paragraph [133]:

“A decision by a Trial Judge under the second limb of Galbraith must be exercised sparingly; and it must be exercised judicially. A judge has a duty to act fairly, decisively and intervene when the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury properly directed could convict.”

[81] The learned judge then asked himself the question, “Should the case against the Defendants Mr. Pamphill Prevost and Mr. Simon Power, be left to the jury: The answer is no.”

[82] The learned judge did not at this point identify the inconsistencies with the other evidence presented by the Crown, or what parts of Mr. Isles’s evidence he considered to offend basic common sense. However, earlier in his judgment, he had referred to ‘differences between the testimony of Mr. Isles and the other Prosecution witnesses’ and observed that ‘Some of the noticeable differences were’³³:

“(a) Mr. Isles said that in the Cayman Nibbs incident it was Sergeant Henry who placed the money in the evidence bag; Mr. Maduro said it was “the young officer”.

(b) Mr. Isles is the only witness in the Cayman Nibbs incident who describes the evidence bag the cell phone box from Mr. Nibbs with the money was placed in as being “opaque”. Officer Primo described the bag as being sealed in the presence of the suspect.”

(c) Mr. Isles is the only witness who mentions the intelligence regarding the Cane Garden Bay incident as being about money rather than apprehending illegal immigrants.

(d) Mr. Isles is the only witness who refers to there being two pillowcases of money at the Cane Garden Bay incident, rather than one.”

³³ See paragraph 48 of the judgment.

[83] The learned judge was clearly approaching the no case submission by considering the residual role left for the judge under the second limb of **Galbraith**, as the assessor of the reliability of the evidence. Per **Blackstone's Criminal Practice**³⁴.

"The court is empowered by the second limb of the Galbraith test to consider whether the prosecution's evidence is too inherently weak or vague for any sensible person to rely on it. Thus if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonably jury properly directed could rely on the witness's evidence, and therefore (in the absence of any other evidence) there is no case to answer".

[84] The learned judge noted at paragraph [130] of the judgment:

"Prosecuting Counsel as well as Counsel representing both Defendants acknowledged and accepted what the Lord Chief Justice of England and Wales said in **CPS v F**, at paragraph 36:

'The authority of Galbraith, with its emphasis on the responsibilities of the jury as the fact finding body responsible for delivering the verdicts, is undiminished...In accordance with the second limb of Galbraith there will continue to be cases where the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury properly directed, could convict. In cases like these it is the judge's duty to direct the jury that there is no case to answer and to return a "not guilty" verdict. But in making this judgment, the judge must bear in mind the constitutional primacy of the jury and not usurp its functions.'

[85] The Crown's complaint is that the learned judge misapplied the law and the evidence. As pointed out, the learned judge identified earlier in his judgment what he considered to be some of the notable differences between Mr. Isles's testimony and that of other prosecution witnesses, inconsistencies or contradictions in various parts of Mr. Isles's testimony, and certain parts of Mr. Isles's testimony that the learned judge apparently found, without expressly so stating, to offend basic common sense. I am left to conclude that although no explanation was given at the end, it was a combination of the foregoing factors

³⁴ See reference at paragraph 77 of the judgment.

that led the learned judge to conclude that Mr. Isles's testimony was so transparently unreliable that it was devoid of any credibility, justifying his withdrawal of the matter from the jury. The question for this Court is not whether this Court would have arrived at the same conclusion, but was the learned judge's ruling plainly wrong? Was it a ruling that no reasonable judge could have made based on the evidence?

[86] In relation to the learned judge's assessment of Mr. Isles's credibility, several concerns arise in relation to his treatment of certain parts of the evidence:

- (1) The learned judge appeared to place emphasis on the fact that Mr. Isles was the only witness who referred to there being two pillowcases of money at the Cane Garden Bay/Elmes Suite incident, rather than one. The criticism of Mr. Isles appeared to be more applicable to a witness who was present at the scene. Mr. Isles was recounting what he stated he had been told by Mr. Prevost in Dominica. He was not present at that incident. How else would Mr. Isles have known about pillowcases featuring in the incident (whether one or more) or of customs officer Frenchie Gumbs being present? Either Isles was lying and Prevost never told Isles about any such incident, or Prevost had told Isles a lie—there were never two pillowcases, or there were 2 pillowcases recovered and everyone else was lying. The latter is highly unlikely. In relation to the second option, if Prevost was taking Isles into his confidence and did tell Isles about the incident, why would he lie about the number of pillowcases? The issue here is that the analysis carried out by the learned trial Judge was as if Isles was present at the incident. He was not.
- (2) The learned judge also appeared to have placed emphasis on Mr. Isles agreeing that he was a thief before he became a protective witness. The learned judge noted when Isles reported to DCI Adams about his conversation with Prevost, he deliberately did not tell her about his dishonesty and deliberately deceived her. And he did not tell DCI Adams

about stealing money until he was put in protection. But the foregoing is somewhat out of context. There was no evidence that at the time Mr. Isles returned from Dominica and reported (some 2 weeks later) to DCI Adams what Prevost had allegedly told him in Dominica, that Mr. Isles was already a thief. He admitted stealing but this occurred sometime after he had made the initial report of what Prevost had told him.³⁵

- (3) An important question must be, why would Mr. Isles fabricate the Dominica conversation, it being such a damning story against Mr. Prevost, in the first place? That this was a relevant question certainly did not escape the defence. It was therefore necessary for the defence to explain why Mr. Isles would make up such a story. In a clear attempt to address this, Mr. Williams KC questioned Mr. Isles about the interpersonal relations at the Proactive Unit. As noted earlier, Mr. Isles said that in his view there was a separation in the office: Mr. Prevost and Mr. Power being aligned, and so too he and Mr. Primo. He thought that Mr. Power was getting more cases than he was; he also indicated that that Mr. Power and Mr. Prevost went abroad to do courses but he did not get to go. He accepted that he may have said that that there was a local preference for Mr. Power and that they were pushing him up. He may also have said that he did not know if Mr. Power passed probation and how come Mr. Power got a position. He denied that he was vexed with Mr. Prevost for a variety of things, but he blamed Mr. Prevost because he got reprimanded by Mr. Hughes for leaving the territory and leaving the office short-staffed. He may have also said something when DC Primo was reprimanded for bringing a lady to the office and may have said how come Mr. Prevost did not get caught and reprimanded when young ladies visit him. He did not like how Mr. Prevost managed the Unit's vehicles. He and Mr. Primo talked about what they did not like

³⁵ Record of Appeal Vol 5 at pages 153-157.

about Mr. Prevost. He denied that it was correct that while in Dominica in 2012³⁶, Mr. Prevost spoke to him about getting close or fresh with Mr. Prevost's sister. He, however, knew which sister Counsel was referring to.

- (4) This appeared to be an attempt to provide a motive for Mr. Isles making a false report against Prevost. The difficulty with this is, apart from the learned judge mentioning the fact of the cross-examination of Isles on the interpersonal relations within the Unit and noting the answers he provided, the learned judge did not make any finding that Isles had any motive for fabricating the Dominica story. On one view, that it would be unreasonable to find that any professional dislike for, dissatisfaction with, or jealousy of Prevost, for the reasons being implied by the defence, would cause Mr. Isles to fabricate such a damning story against Prevost. This conclusion is further bolstered by the fact that Isles would have been placing himself in an uncomfortable, precarious and possibly dangerous position by making such a report.
- (5) Clearly related to the learned judge's assessment of the believability of Isles's Dominica story was the time taken for Isles to report the alleged conversation to his superiors. The learned judge referred to and appeared to have relied on the fact that Mr. Isles agreed that what Mr. Prevost said to him in the Commonwealth of Dominica was "shocking news" and he agreed as a policeman it was his duty to report it immediately because it was serious misconduct, yet it took him two weeks before he spoke with DCI Adams. One gets the impression that this would fall within the parts of the evidence found by the learned judge to have offended basic common sense. But with the utmost respect to the learned judge, it was not a rational conclusion that because what Mr. Prevost allegedly told Isles was accepted by Mr. Isles to be "shocking" and because it took

³⁶ The Judge used 2012, but this may have been 2013.

Mr. Isles two weeks to report the Dominica conversation to DCI Adams, that he must have been lying. Mr. Isles testified that he felt he was in a precarious position. The learned judge noted that Mr. Isles said when he spoke with DCI Adams, his hope was that the investigation would begin and was disappointed that it did not happen. Instead Mr. Prevost was sent on more overseas courses. He agreed that he may have said on a previous conversation that he stole some of the money because he was disappointed with DCI Adams. Isles expressed disappointment that nothing was being done against Mr. Prevost and the reason he gave for stealing some of the money was not unbelievable. His disappointment that the investigation did not begin is in keeping with the defence's suggestion that Isles's interview with DCI Adams was leaked and it was that leak that prompted the investigation.

[87] Now certainly the learned trial judge identified several instances where Mr. Isles was either caught out in a lie, admitted that he had lied in previous proceedings or on previous occasions, or where his evidence was contradictory or transparently unreliable. In relation to the instances where he admitted without hesitation that he had lied previously, it is important to note that he was not being caught out in a lie in this trial.

[88] The following incidents where Mr. Isles was either caught out in a lie, or where his evidence was contradictory or transparently unreliable, were noted by the learned trial judge:

- (a) He lied about *the fact* that he had told Mr. Allen Beach that he had seized an additional \$2000.00 from the Spanish speaking suspects who were at Mr. Phipps' house, and he only agreed when he was shown a document that was previously marked for identification that "I may have said I took a further \$2,000 from another suspect".
- (b) There was a discrepancy in Isles's evidence in chief as to where the exhibit bags were on the night of the 11th of April 2014. In his evidence

in chief, he said that after completing the interviews at the Road Town Police Station, he went to the Proactive Unit office where he met Mr. Prevost and Mr. Power, and that Mr. Power had the exhibit bags in his possession. In cross-examination he acknowledged that in fact he had the exhibit bags with the money with him at the Road Town Police Station during the time he was interviewing the suspects. Those interviews went on until 11:30 pm. Mr. Isles, however, could not remember if he was the one who took the bags to the Proactive Unit office.

- (c) Mr. Isles said he remembered Mr. Prevost using the word “clique” during the Dominica conversation. Everything he said was imprinted on his mind. Questioned further, Mr. Isles said he “may have said to the last jury the word “imprinted” was in fact “team”.
- (d). Mr. Isles recalled saying that Mr. Prevost told him that the proceeds from the Cane Garden Bay incident were used to buy the blue Subaru car. He agreed that he did say to DCI Adams and Mr. Taylor that Mr. Prevost had told him it was the proceeds from the Benson Maduro incident that was used to buy the car. He said he did not know if both could be true. He denied that he made-up the story and forgot parts. Eventually he said he was not sure if it was the proceeds from the Benson Maduro or Cane Garden Bay incidents.
- (e) Mr. Isles agreed that while he enjoyed the status of being a Covert Human Intelligence Source, he stole money from the Phipps incident.
- (f) Mr. Isles acknowledged that he gave a written statement in the Benson Maduro incident after it occurred. He said “I may have said the phone box was put in a transparent evidence bag. I told the jury it was placed in an opaque bag.” He agreed with defence Counsel that he said the phone box was opaque because the story could not work if he said the phone box with the money was put into a transparent bag and for his

story to make sense, the bag had to be opaque. He went on to say that his statement which said it was clear plastic bag was not true. It was inaccurate. It was a lie. In response to cross-examination by Mr. Bruce for Mr. Power, Mr. Isles acknowledged that his statement written in the Benson Maduro matter was written one day after the incident. He said that his recollection nine years afterwards was that it was an opaque evidence bag. The learned judge would certainly be justified in concluding that Mr. Isles's suggestion that his recollection some nine years after the incident was superior to that the day after when he gave his statement offended basic common sense. It is therefore reasonable to conclude that his change of testimony to say the bag was opaque was an intentional lie to make his story work.³⁷

(g) In relation to the exhibits from the Phipps residence, Mr. Isles said the money remained with the Proactive Unit over the weekend. The Financial Investigation Unit was not available on the weekend to count the money and to take it into custody. After the seals of the evidence bags were broken and the cash distributed, he did not inform DCI Adams of when it occurred and while the evidence bags with the broken seals were still at the Proactive Unit, he agreed he spent the weekend searching for similar looking evidence bags: he was instructed to do so and he put the money into the new bags³⁸.

(h) In relation to the alleged sharing of monies from the Phipps incident, Mr. Isles recalled at the last trial he said the opening of the bags had occurred around 7:00 or 8:00 o'clock that night of 11th of April 2013. He

³⁷ We note that his answers to Mr. Williams KC that he agreed that the bag had to be opaque to make his story work was not an agreement that he was lying, but simply for the story to work the bag had to be opaque.

³⁸ Now the judge could not be using this to suggest that Isles should have informed DCI Adams as that would only be possible if the judge accepted that Isles was in fact telling the truth. This must be connected to the discrepancy in the timeline stated by Isles for the sharing of the money and his inability to explain how he could be in two places at the same time, or that his very failure to inform DCI Adams, with the other gaps in his evidence made his story unbelievable.

said he may have been inaccurate. Mr. Isles was shown his witness statement, and he agreed that he was in fact at the Road Town Police Station that night from 5:50 pm until 11:30 pm interviewing the suspects. Following that, he spent 30 minutes writing his statement. Isles could not have been in two places at the same time, and he offered no explanation for this inconsistency. When asked about how he was able to find himself in both the Road Town Police Station and the Proactive Unit Office, which was about a mile away, he said he did not know.³⁹

[89] So, in the instant matter there were several crucial bits of evidence where the court could reasonably conclude that Isles was not simply forgetting but was being untruthful. Was this sufficient for the court to find that Isles was entirely without credibility? Was the justified finding of lack of credibility on some fundamental points sufficient to infect and destroy the credibility of Isles in every material respect?

[90] In **Director of Public Prosecutions v Selena Varlack**⁴⁰ Lord Carswell stated:

“The essential statement of the law for present purposes is a sentence from the judgment of Lane CJ in *Galbraith* at page 1042:

“Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of the witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

“This has long been regarded as a canonical statement of the law and was so accepted by both parties to the appeal before the Board.”

Lord Carswell stated:

“20. The case for the appellant before the Board was that the Court of Appeal had failed to apply the correct test when considering

³⁹ This was a crucial part of the prosecution’s case.

⁴⁰ [2008] UKPC 56.

whether the judge should have withdrawn the respondent's case from the jury. They had, as the Director of Public Prosecutions submitted in a cogent argument, substituted their own view of what inferences could properly be drawn rather than focusing on those which a jury could legitimately draw.

21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Kane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to the testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable to cases such as the present, concerned with the drawing of inferences."

At paragraph 22 of the judgment Lord Carswell described as "an accurate statement of the law" a passage from the judgment of King CJ in the Supreme Court of Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASA 1, 5, the following:

"It follows from the principles formulated in *Billick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to answer to choose between inferences which are reasonably open to the jury. He must decide on the basis that the jury will draw such inferences which are reasonably open, as are most favourable to the prosecution⁴¹. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence...He is only concerned with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence..."

⁴¹Contrast this statement with that in *R v Bush*, "But, where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against the defendant, especially where he considers the totality of the evidence points in the opposite direction".

[91] As to credibility and inconsistencies of witnesses, a statement of the principle in relation to inconsistencies in evidence given at the trial is set out in the case of **R v Barker**⁴² where Lord Widgery C.J. said:

“It is not the judge’s job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks a witness is lying.”

[92] In **Attorney General v Michael Spicer and Alexander Benedetto**⁴³, the case against one defendant L, (like in this case) stood or fell on the reliability of one witness P. It was accepted that P was a confidence trickster, a person with numerous convictions for dishonesty, a man who was married ten times, and a person who might have an interest to serve. He was also one who allegedly did on L (namely testified as to a confession made to him), a repeat performance of what he did to another cell mate in Hawaii some 6 years ago. Singh JA commented:

[15] “I would accept, that these “degrees” behind Plante’s name, would **prima facie** alert a trier of fact to approach his evidence with extreme caution. However, I do not agree that such credibility disqualifications **without more**, would be enough to satisfy a no case submission.” (emphasis added)

[16] A notorious criminal, or even a “pathological liar”, as Mr. Fitzgerald described Plante, could still at times be truthful. It is therefore necessary to scrutinize his evidence in order to determine its character, its alleged weaknesses, vagueness or inconsistencies, in order to determine this issue, always remembering, that credibility was for the jury.”

[93] So, the question of whether a witness is lying is nearly always one for the jury. However, there may be exceptional cases (**R v Shippey and Ors**⁴⁴) where inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone.”⁴⁵ And as impliedly accepted by Singh JA, where other material factors exist that supplement what the distinguished and

⁴² [1975] 65 Cr App R 287.

⁴³ BVIHCRA2011/0006 (delivered 14th January 2002, unreported).

⁴⁴ (1988) Crim LR 767.

⁴⁵ David Ormerod, David Perry, *Blackstone’s Criminal Practice* (2010 edn, Oxford University Press) at D15.56.

learned Justice of Appeal described as “credibility disqualifications”, together they could amount to enough to satisfy a no-case submission. Each case will no doubt turn on its own facts⁴⁶.

[94] In this case, were the inconsistencies so great that the learned judge acted reasonably in withdrawing the case from the jury? The learned judge looked at the evidence. Although he did not say so, it is pellucid that he was influenced by the instances where the lies and inconsistencies were material and manifest (the “opaque bag” testimony including the suggestion that his recollection was better some nine years after the event, the alleged sharing of money while being at the Proactive Office and the Road Town Police Station at allegedly the same time on July 11th 2014, Mr. Isles at first denying and then admitting when cornered with his previous statement that he had stolen money from persons at the Phipps residence) and where he thought the story offended basic common sense (for example the alleged efforts by Prevost while in Dominica to keep DaSilva out of the conversations with Mr. Isles about the clique) to conclude that Mr. Isles could not be believed at all. Was the learned judge’s approach to assessing the credibility of Mr. Isles wrong? Were the inconsistencies here so great that the judge was reasonably forced to the conclusion that Isles could not be trusted?

[95] Assessing the credibility of a witness is considered more an art than a science.⁴⁷ It can be a difficult and imprecise exercise with a judge taking multiple factors into consideration. These factors vary, along with the weight to be attached to each factor, in each case. Much has been written on the approaches to be adopted when assessing a witness’s credibility⁴⁸. Demeanour is normally considered important, but it is not determinative. As was stated by the British Colombia Court of Appeal in **Faryna v Chorny**⁴⁹:

⁴⁶ In *Attorney General v Michael Spicer and Alexander Bendetto*, P gave evidence of an alleged confession made by L, and L in his evidence before the jury admitted substantially that conversation with P, except for the incriminating parts, and therefore whether P or L was lying was properly left to the jury.

⁴⁷ *R. v S. (R.D.)* [1997] 3 SCR 484 at para 128.

⁴⁸ See for example, 25th May 2020 “Assessing Witness Credibility: A Reminder of the Basic Principles”.

⁴⁹ [1951] B.C.J. No 152.

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth...the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[96] Lord Bingham in his extra judicial writings⁵⁰ stated:

“The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of lords in **Onasis v Vergottis**⁵¹.

‘Credibility involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems, first, is the witness a truthful or untruthful person” Secondly, is he, though a truthful person telling something less than truthful on this issue, or though an untruthful person, telling the truth on this issue”. Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly, and, if so, has he memory correctly retained them” Also, has his recollection being subsequently altered by unconscious bias or wishful thinking or by over much discussion with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely....always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing up the credibility of a witness. And motive is one aspect of probability. All of these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”

⁵⁰Bingham, ‘*The Judge as Juror: The Judicial Determination of Factual Issues*’ published in ‘*The Business of Judging*’ (Oxford 2000) Vol. 38 1985 p 1-27.

⁵¹ [1968] 2 Lloyd’s Rep. 403 at p 431.

[97] Lord Bingham in setting out the test for assessing the credibility of a witness stated that the main tests needed to determine whether a witness is lying or not, are the following, although their relative importance will vary widely from case to case:⁵²

1. The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred.⁵³
2. The internal consistency of the witness's evidence.⁵⁴
3. Consistency with what the witness has said or deposed on other occasions.⁵⁵
4. The credit of the witness in relation to matters not germane to the litigation.⁵⁶
5. The demeanour of the witness.

[98] It is undeniable that there is an element of subjectivity in the determination by any judge of what weight should be accorded to any factor. As was accepted by Lord Bingham above, the "relative importance" of the factors will vary widely from case to case. As was stated by Mahoney JA in **Soulemezis v Dudley (Holding) PTY Ltd**⁵⁷:

"That leads to, as I have described, the subjective element in the fact finding process. A fact is found in a particular case if the judge is satisfied that it is so...I do not mean by this that decisions are, or are to be, made upon the basis of matters essentially idiosyncratic to the particular judge.

⁵² Supra note 50.

⁵³ Note specifically here the learned judge's notation of where Mr. Isles's evidence departed from that of other prosecution witnesses.

⁵⁴ Note here where the learned judge noted the inconsistency in Mr. Isles's evidence as to whether the bag was transparent or opaque and who had the cash the night of, the time when the cash was allegedly distributed, and what Mr. Isles stated he was doing (interviewing persons between 5:00 and 11:30 p.m. on the night of and how was he able to find himself in two places at the same time.

⁵⁵ Supra at note 49.

⁵⁶ Germane to the litigation but not central, note the learned judge's consideration of Isles stealing while a CHIS and not coming clean to his superiors, at first denying then admitting in cross examination that he had admitted that he had stolen money from persons at the Phipps residence.

⁵⁷ (1987) 10 NSWLR 247.

The determination of facts is deemed to be objective. But it would be to misunderstand the basis of a decision, and in particular decisions in matters of assessment, weight and the like, to assume that decisions can always, or perhaps ordinarily, be justified by objective rather than subjective considerations.”⁵⁸

[99] Bearing the foregoing in mind, how then is the appellate Court to approach an appeal based on an assertion that the judge’s conclusion that the credibility of the Crown’s crucial witness was completely destroyed, was blatantly wrong. A finding on credibility is afforded a high degree of deference on the basis that the trial judge is in a far superior position to assess it.⁵⁹ In a paper delivered by Mr. Justice Mostyn⁶⁰ he remarked:

“If I were to ask you what the key factor in finding facts in a trial is you might reply “credibility”. Who does the judge believe? The primacy of the factor of credibility has an iconic, almost canonical, status. Thus, Posner wrote⁶¹:

‘No legal catchphrase is more often repeated than that determinations by a trial judge (or jury) whether to believe or disbelieve a witness can be overturned on appeal only in extraordinary circumstances. The reason is said to be the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony, since the transcript eliminates clues to veracity that are supplied by tone, voice, hesitation, body language, and other nonverbal expressions.’”

[100] Such a line was taken in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd**.⁶², a decision of the Privy Council on an appeal from Trinidad

⁵⁸ See also Wells J, Supreme Court of South Australia, “The Finding of Facts,” 1983 Canberra Judicial Conference, cited in “The Methodology of Judging” by J.P.O. Barry, Judge of the Family Court of Australia, “I suppose the most subjective function a judge is called upon to perform is to assess the personal worth of a witness. We must assess whether he is frank and honest, whether he can be relied on to report accurately and comprehensively what he has been asked to recall. It would not be possible short of writing a full-scale thesis to examine all the various forms of expression or demeanour or circumstance which lead us to reach conclusions about the credibility of a witness. We each I am sure have our own highly personal reasons for accepting or rejecting a witness; all we can be sure of is that those reasons will vary from person to person, and from case to case.”

⁵⁹ R v Howe 2005 Can LII 253 (ONCA) Per Doherty JA, at para 46.

⁶⁰ Justice of The High Court, England and Wales, Family Division, “The craft of judging and legal reasoning”. Given in the context of civil proceedings.

⁶¹ Posner, ‘Reflections on Judging,’ Harvard University Press, 2013.

⁶² [2014] 4 All ER 418.

and Tobago. Lord Hodge cited the following passage from the Canadian supreme Court decision in **Housen v Nikolaisen**⁶³:

“The trial judge has sat through the entire case, and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.”

[101] This of course does not excuse a material error of law. At the same time, an appeal is not to be used as a “veiled invitation to reassess the trial judge’s credibility determinations”⁶⁴. This is entirely in keeping with the requirement that the appellant is required to demonstrate that the learned judge arrived at a conclusion that is without the ambit of reasonable disagreement, that is, his decision was one that no reasonable judge could have reached based on a proper appreciation of the evidence⁶⁵. In **Beacon Insurance**, Lord Hodge cited Lord Bridge of Harwich in **Whitehouse v Jordan**⁶⁶:

“[The] importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at the one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.”

[102] Lord Hodge concluded⁶⁷:

“Where the honesty of the witness is a central issue in the case, one is closer to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be closer to the latter end of the spectrum.”

⁶³ 2002 SCC 33 (CanLII) at [14].

⁶⁴ R v Aird 2013 ONCA 447 (Can LII) per Laskin JA at para 39.

⁶⁵ Such proper appreciation also granting to that judge latitude in the weight to be attached to the evidence.

⁶⁶ [1981] 1 WLR 246 at 269-270.

⁶⁷ Note 62 at para 17.

[103] Judge Mostyn concluded that the more reliable the technique of fact finding, the more it is susceptible to appellate review.

[104] Now the foregoing discussion is in the context of the judge as the finder of fact in civil matters, and in criminal matters tried by judge alone⁶⁸. In criminal proceedings the jury is the finder of fact. Except for the very rare case when the credibility of a witness has been so clearly undermined, the issue of whether a witness is lying should be left to the jury. But there is that grey area, or as explained in **R v Bush**, ‘... a fine balance between withdrawing a case from the jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient’ where there must be margin of judgment that an appellate court allows to the trial judge who has heard the evidence and seen the witnesses.

[105] I am cognizant of the fact that it is not important whether I would have arrived at the same conclusion, but whether the conclusion of the learned trial judge was within the ambit of reasonable disagreement. It was his task to evaluate the evidence of Mr. Isles and the other evidence. He went through it in detail. He was aware that he could and should interfere only in an exceptional case. He would have seen and heard Mr. Isles and appreciated the way he gave his evidence in a way this Court cannot replicate. At paragraphs 132 and 133 of the judgment the trial judge stated:
[132] “Archbold 2022 helpfully states, inter alia, at paragraph 4-365:

“The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all commonsense then such evidence was tenuous and suffered from inherent weakness.”

[106] A decision by a Trial Judge under the second limb of Galbraith must be exercised sparingly; and it must be exercised judicially. A Judge has a duty to act fairly, decisively and intervene when the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury properly directed could convict.”

⁶⁸ See R v G. F. 2021 SCC 20 (CanLII) [2021] 1 SCR 801, R v R.W [1992] SCJ No. 56 (SCC).

[107] In relation to his apparent treatment of parts of the evidence, as explained above, there is some criticism that could be levelled at the trial judge. It would be very easy to suggest that the trial judge ascribed too much or too little weight to a particular matter in his treatment of that evidence as a way of imposing this Court's subjective view of how he should have dealt with the no case submission. To do that, this Court would have to find that the error was glaring, and had it not been made it would have necessarily resulted in a different conclusion. Even considering the criticisms levelled at the trial judge's treatment of parts of the evidence, there was material to support the trial judge reaching the conclusion that he did. Even if I might have reached a different conclusion, I am unable to say that his decision was one that no reasonable judge could have reached, and that the trial judge was plainly wrong.

Disposition

[108] In the circumstances the threshold for appellate intervention has not been met and the appeal is dismissed.

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.
Petra Nicola Byer
Justice of Appeal [Ag.]

By the Court

Chief Registrar