

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
21st – 25th November 2016

APPLICATIONS AND APPEALS

Case Name: Lorn Greene
v
Margaret Greene
[BVIHCVAP2016/0011]

Date: Monday, 21st November 2016

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. Marie-Lou Creque

Respondent: Mr. Richard Rowe

Issues: Application for leave to appeal against an interlocutory order – Application for stay execution pending appeal

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order:

1. It is hereby ordered that leave to appeal is denied.
2. A request for stay of execution pending appeal is denied.
3. No order as to costs.

Reason: This was an application in which the applicant sought the leave of the Court to appeal against an interlocutory order made by Wallbank J [Ag.]. The

application also included a request for a stay of execution, pending the result of the appeal which would only come into play if leave to appeal was granted.

The threshold for the grant of leave to appeal is that the applicant must demonstrate that he has a reasonable prospect of succeeding on the appeal if leave is granted.

The Court looked at the application made, the affidavit in support and the submissions filed by both parties and came to the conclusion that the applicant did not have a realistic prospect of succeeding on appeal.

The Court was of the view that Wallbank J [Ag.], in making the order that he did, was making a case management order on an application for ancillary relief, which application had been previously heard by Byer J.

Byer J had made an order which contained directions that “witness statements” were to be filed by 20th May 2016. The Court was of the view that the document filed by the respondent on 20th May 2016 contained evidence which the respondent wished to put before the court. While Byer J had used the term “witness statements” to describe documents which could be used in court as evidence which the maker of the document wished to give, she could have given leave for the parties to put in “affidavits” by 20th May 2016. She chose, however, to say “witness statements”. This, counsel for the applicant conceded, was not the normal language used in applications for ancillary relief. The terminology that would normally be used is “affidavits”, and the parties would put in affidavits whether by themselves or by any witnesses that they wished to call in an application for ancillary relief. However, the fact that Byer J referred to the documents as “witness statements” did not change at all the substance of the documents nor the right of the parties to put in their evidence up until the deadline date of 20th May 2016. The Court disagreed with learned counsel for the applicant when she submitted, in effect, that only persons other than the parties could have made use of the leave to put in “witness statements”.

The Court therefore believed that there was no basis for it to interfere with the case management directions given by the learned judge and accordingly, leave to appeal was denied.

The Court saw no need to consider the application for stay of execution, nor to consider whether or not the judge was correct to have declined to strike out the affidavit filed by the respondent.

Case Name:

[1] Sylvia Maduro-Dale

[2] Lucia Chalwell

v

The Registrar of Lands

[BVIHCVAP2010/0022]

Date:

Monday, 21st November, 2016

Coram:

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Paul Webster, Justice of Appeal

The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Ms. Patricia Archibald-Bowers

Respondent:

Ms. Jo-Ann Williams-Roberts, Solicitor General

Issues:

Ownership of land – Prescriptive title – Application by counsel for appellants to be removed as solicitors on record

**Type of Oral
Result/Order
Delivered:**

Directions

Result / Order:

It is hereby ordered:

1. The application by counsel for the appellants to be

removed from the record as solicitors for the appellants is adjourned to the next sitting of the Court of Appeal in the Virgin Islands during the week commencing on 10th July 2017.

2. Notice of the hearing of the appeal shall be advertised in a newspaper of general circulation in St. Thomas, USVI which is the last known place of residence of the appellants.
3. The advertisement is to be placed within 14 days of the date of this order specifying the date of the hearing of the appeal and advising the appellants to contact their solicitors J.S. Archibald & Co. prior to the hearing of the appeal.
4. The solicitors for the appellants are to file an affidavit of service no later than 30 days before the hearing of the appeal and affidavit of compliance.
5. The appellants have carriage of this order.

Case Name:

**Julian Christopher
v
The Queen**

[BVIHCRA2012/0009]

Date:

Monday, 21st November 2016

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Patrick Thompson (the appellant was also present)

Respondent:

**Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel,
Office of the Director of Public Prosecutions**

Issues:

Appeal against conviction and sentence – Indecent assault – Rape – Virtual complainant aged 15 at time of giving evidence – Whether learned judge erred in failing to carry out enquiry mandated by section 18 of

the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) to determine if child is possessed with sufficient intelligence to justify reception of her evidence and to determine if child is competent to know nature and consequences of giving false evidence – Whether trial judge’s failure to carry out determination rendered conviction unsafe and unsatisfactory – Whether order should be made for retrial

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

1. The amended notice of appeal filed 25th June 2016 is hereby deemed to have been properly filed.
2. It is hereby ordered that there be no retrial.
3. The appellant’s conviction is vacated and his sentence is set aside.

Reason:

The learned trial judge erred in failing to carry out the enquiry mandated by section 18 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) to determine if the child was possessed with sufficient intelligence to justify the reception of her evidence and to determine if she was competent to know the nature and consequences of giving false evidence. The virtual compliant was 15 years old at the time she gave evidence and the trial judge’s failure to carry out the determination rendered the conviction unsafe and unsatisfactory. Learned Principal Crown Counsel conceded this ground of appeal and the Court therefore held that the appellant should succeed on this ground.

In the circumstances, the Court was of the view that it was not necessary for it to look at the other grounds of appeal (namely, grounds 2 and 3, which dealt with the appellant’s conviction and sentence). As a result, the sole issue remaining was whether the Court should order a retrial.

The Court considered the submissions (both oral and written) by counsel on both sides. In addition, it

considered the factors which it should take into consideration when ordering a retrial. It looked at the strength of the prosecution's case and noted that the only real evidence against the appellant was evidence of the virtual complainant, which evidence, in the circumstances of this case, had been improperly received.

On retrial, a presiding judge would have an opportunity to correct the error made by the trial judge in this case. The Court noted that apart from the ground of the failure of the trial judge to do the enquiry that ought to have been done before the evidence of the virtual complainant was allowed, there was also a second ground challenging the conviction of the appellant for the offence of rape. This ground stated that the trial judge misdirected the jury on how they were to return with the alternative verdict of unlawful sexual intercourse with a girl under the age of 16; that the manner in which the trial judge directed the jury effectively deprived the appellant of an alternative conviction of unlawful carnal knowledge instead of the conviction for rape. The thrust of the submission of counsel for the appellant on that issue was, if a jury was properly directed, it may have returned a verdict of guilty for unlawful sexual intercourse rather than a verdict of guilty for rape and if they had so done the sentence which could have been properly imposed on the appellant would have been one considerably less than the sentence imposed for the offence of rape. This factor was of some relevance to a decision which the court needed to consider on the question of whether an order for a retrial should be made.

Concerning the issue of the seriousness and prevalence of the offence, the Court heard learned counsel for the appellant on this point and found it interesting that he sought to make a submission which sounded like the offence of rape was not necessarily that serious an offence; that all offences are serious and there is nothing more specifically serious about the offence of rape compared to other criminal offences. The Court took the view that (in the absence of statistics to show otherwise) rape was a serious and prevalent offence, giving consideration to the number of appeals which have come before the Court of

Appeal. This too was a factor to be taken into consideration when considering an order for retrial.

Taking into account the public interest as well as the interests of justice, the Court ought not only to look at the interest of the virtual complainant but also the interest of the appellant. In this case, he was tried for an offence which occurred almost 6 years ago and was found guilty and sentenced almost 4 years ago and has been in prison since that conviction in December 2012. This conviction has now been vacated.

The Court believed that the interest of the appellant would be seriously affected if a retrial was ordered and the justice of the case in relation to the appellant was a significant factor in making a determination as to whether in the circumstances there ought to be a retrial. The main factor in terms of the length of time would be the lapse of about 6 years since the offence and 4 years since the appellant's trial and conviction.

The Court accepted the submission of counsel for the appellant that if the jury was properly directed they may have reached an alternative verdict; and that any sentence that would have been imposed on the appellant for unlawful sexual intercourse with a girl under the age of 16 would have been considerably less than a sentence for the offence of rape.

The Court took into consideration all the circumstances of the case and in particular, the time that had elapsed since the commission of the offence as well as any possible time for an actual retrial to take place. The Court also took into account that the appellant would have served what is considered prison time of a sentence of nearly 6 years which would have very well been the kind of sentence that might have been imposed were he to have been found guilty of the offence of unlawful carnal knowledge or which may not have been much less than a sentence which might have been imposed. Having regard to the submissions made on behalf of the appellant and the Crown's concession that the sentence imposed was in fact harsh, the Court believed that the interests of justice would be best served if no retrial of the case was ordered.

Case Name:

**[1] John Shrimpton
[2] Pitcairn Limited
Claimants/Appellants**

v

**[1] Dominic Scriven
[2] Alexander Pasikowski
[3] International Finance Corporation
[4] Societe De Promotion Et Participation Pur
La Cooperation Economique
Defendants**

**[5] Dragon Capital Group Limited
Defendant/Respondent**

[BVIHCMAP2016/0031]

Date:

Monday, 21st Novmeber 2016

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of
Appeal [Ag]**

Appearances:

Appellants: Mr. James Collins, QC, with him, Ms. Marcia McFarlane

Respondent: Mr. Stephen Atherton, QC

Issues:

**Interlocutory appeal – Fees of foreign lawyers –
Whether learned judge erred in law in disallowing costs
of foreign lawyers by applying case of *Dmitry
Vladimirovich Garkusha v Ashot Yegiazaryan et al*
BVIHCMAP2015/0010 (delivered 6th June 2016,
unreported)**

Type of Oral

N/A

**Result/Order
Delivered:**

Result / Order:

Judgment reserved.

Case Name:

**ABN AMRO Fund Services (Isle of Man)
Nominees Limited (formerly FORTIS (Isle of
Man) Nominees Limited) and Others**

v

**[1] Kenneth Kryz and Charlotte Caulfield (as
Joint Liquidators of Fairfield Sentry Limited)**

[2] Fairfield Sentry Limited (in Liquidation)

[BVIHCMAP2016/0023]

[BVIHCMAP2016/0011]

**ABN AMRO Fund Services (Isle of Man)
Nominees Limited (formerly FORTIS (Isle of
Man) Nominees Limited) and Others**

v

**[1] Kenneth Kryz and Charlotte Caulfield (as
Joint Liquidators of Fairfield Sigma Limited)**

[2] Fairfield Sigma Limited (in Liquidation)

[BVIHCMAP2016/0024]

[BVIHCMAP2016/0012]

Bank Julius Baer & Co Limited and Another

v

**[1] Kenneth Kryz and Charlotte Caulfield (as
Joint Liquidators of Fairfield Lambda Limited)**

[2] Fairfield Lambda Limited (in Liquidation)

[BVIHCMAP2016/0025]

[BVIHCMAP2016/0013]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA
[5] UBS Deutschland AG / Dresner
Lateinamerika AG
[6] UBS Fund Services (Cayman) Limited
[7] UBS (Grand Cayman) Limited
[8] UBS Fund Services (Ireland) LTD
[9] UBS Zurich

v

[1] Kenneth Krys
[2] Charlotte Caulfield
(as Joint Liquidators of Fairfield Sentry
Limited)
[3] Fairfield Sentry Limited (in Liquidation)

[BVIHCMAP2016/0026]

[BVIHCMAP2016/0016]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA
[5] UBS Deutschland AG and/or Dresdner
Lateinamerika AG
[6] UBS Fund Services (Ireland) Limited
[7] UBS Zurich

v

[1] Kenneth Krys
[2] Charlotte Caulfield
(as Joint Liquidators of Fairfield Sigma Limited)
[3] Fairfield Sigma Limited (in Liquidation)

[BVIHCMAP2016/0027]

[BVIHCMAP2016/0015]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited

v
[1] Kenneth Kry
[2] Charlotte Caulfield
(as Joint Liquidators of Fairfield Lambda
Limited)
[3] Fairfield Lambda Limited (in Liquidation)

[BVIHCMAP2016/0028]
[BVIHCMAP2016/0014]

Date: Monday, 21st November 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Mark Hapgood, QC, with him, Mr. Alan Roxburgh,
Ms. Claire Goldstein and Ms. Kimberly Crabbe (for the
ABN AMRO appellants)

Lord Falconer of Thoroton, with him, Mr. Stephen
Rubin, QC, Mr. Piers Plumptre and Ms. Nadine Whyte
(for the UBS appellants)

(collectively, “the s. 273 appellants”)

Respondents: Mr. Gabriel Moss, QC, with him, Mr. Stephen Midwinter
and Mr. William Hare for the Joint-Liquidators

Issues: Application to vary order of single judge – Application
to determine preliminary issues

**Type of Oral
Result/Order
Delivered:** Oral Judgment or Decision & Directions

Result / Order: Application to Vary Order of Single Judge

It is hereby ordered by consent:

1. The order of Baptiste JA made on 28 June 2016 be amended to delete paragraph 1 and paragraph 2 and

that paragraph 3 be consequentially amended to read that the “hearing of the s. 273 appeals be listed for hearing during the week commencing 21 November 2016”.

2. Costs to be borne by the s. 273 appellants to be assessed if not agreed within 14 days.

Application to Determine Preliminary Issues

It is hereby ordered:

1. The application for determination of preliminary issues is dismissed.
2. The costs on the application shall be the costs to the s. 273 appellants to be assessed if not agreed within 14 days.

It is further directed that:

1. The hearing of the substantive appeal shall be fixed for hearing over the course of 3 days commencing 23-25 of January 2017 in the Territory of the Virgin Islands.
2. The appellants shall have 1 ½ days.
3. The respondents shall have 1 ½ days.
4. The respondent Joint-Liquidators shall have 7 days to file a respondent’s-notice limited to the issue of ‘recipient bad faith.’
5. The appellants shall have 14 days to file any notice of objection together with any further skeleton arguments.
6. The Joint-Liquidators shall file their skeleton arguments in reply by 10 January 2017.

Reason:

The Court was of the view that proceeding to hear preliminary issues would not have resulted in either time or costs savings and would not necessarily have been dispositive of all the issues in the appeals.

Case Name:

**Kenneth Kryz and Charlotte Ward-Caulfield
(as Joint Liquidators of Fairfield Sentry
Limited, Fairfield Sigma Limited and Fairfield
Lambda Limited)**

Appellants / Respondents

v

[1] UBS AG New York

[2] UBS AG Zurich

[3] UBS Jersey Nominees Limited

[4] UBS (Luxembourg) SA

**[5] UBS Deutschland AG / Dresner
Lateinamerika AG**

[6] UBS Fund Services (Cayman) Limited

[7] UBS (Grand Cayman) Limited

[8] UBS Fund Services (Ireland) LTD

[9] UBS Zurich

Proposed Intervenors / Applicants

[BVIHCMAP2016/0008]

Date:	Monday, 21st November 2016	
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]	
Appearances:		
	Appellants / Respondents:	Mr. Gabriel Moss, QC, with him, Mr. Stephen Midwinter and Mr. William Hare for the Joint-Liquidators
	Respondents / Applicants:	Lord Falconer of Thoroton, with him, Mr. Stephen Rubin, QC, Mr. Piers Plumptre and Ms. Nadine Whyte
Issues:	Application of jurisdiction recognised in <i>Taylor v Lawrence</i> [2003] QB 528 – Application to intervene in appeal (the Sanction Appeal) – Application for permission to apply to re-open appeal – Application for order of Baptiste JA dated 30th June 2016 allowing appeal (the Sanction appeal) to be set aside – Application for appeal to be listed for further hearing during week of November 2016 Court of Appeal Sitting	
Type of Oral	Oral Judgment or Decision	

**Result/Order
Delivered:**

Result / Order:

It is hereby ordered that:

- 1. The application to intervene and for set-aside of the order made in appeal no. 2016/0008 (the Sanction Appeal) be dismissed with costs to the respondents to be assessed if not agreed within 14 days.**

Reason:

The applicants were not inclined to pursue the application at this stage.

JUDGMENTS

Case Name:

**Glenroy Pierre
v
The Commissioner of Police**

[BVIMCRAP2014/0008]

Date:

Tuesday, 22nd November 2016

Coram:

**The Hon. Dame Janice Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Mr. Patrick Thompson (the appellant was also present)

Respondent: Mr. O'Neil Simpson, Crown Counsel

Issues:

Magisterial criminal appeal – Unlawful possession of cannabis with intent to supply – Possession and importation of a controlled drug – Offering to supply a controlled drug – Illegal entry – Applicability of force majeure – Distress as defence to charges – Whether vessel entered territorial waters of the British Virgin Islands as a result of distress – Whether vessel

immune from local jurisdiction and laws for offences occasioned by its presence – Whether magistrate erred in finding that force majeure was not operative in this case

**Result &
Reason:**

Held: allowing the appeal against conviction and sentence in respect of the charge of illegal entry, setting aside the sentence imposed and dismissing the appeal against conviction in respect of the drug charges and affirming the conviction, that:

1. It is well established that a ship in distress entering a port or territorial waters of a State can attract immunity from the operation of local laws. For this to operate, the distress must be urgent and something of great necessity. The distress must not be self-induced and there need not be an actual physical necessity, a moral necessity would suffice. Additionally, the burden of proof to establish distress is on a balance of probability and lies on the person claiming exemption from the local law. In this case, the Grace Crest entered the territorial waters of the British Virgin Islands as a result of distress. There was no evidence that the distress was contrived or self-induced.

The “Eleanor” (1809) 165 ER 1058 applied; *Merk and Djakimah v the Queen* Supreme Court of Helena, Supreme Court case No. 12, 1991 applied.

2. Immunity from local jurisdiction and local laws is not absolute and must be of limited import. The immunity should not apply to all local laws. It would apply to those violations committed by a ship in distress and inevitably resulting from the distress. In the circumstances, the Grace Crest cannot claim immunity from local jurisdiction in relation to the drug offences as it was patently engaged in illegal activity but can claim immunity in respect of the charge of illegal entry. While the illegal entry was a violation committed by the distressed Grace Crest and inevitably resulted from the distress, the same cannot be said for the drug charges.

APPLICATIONS AND APPEALS

Case Name: [1] Zorin Sachak Khan
[2] Afaque Ahmed Khan
[3] Sasheen Anwar
v
[1] Gany Holdings (PTC) SA
[2] Asif Rangoonwala
[BVIHCMAP2014/0018]

Date: Tuesday, 22nd November 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Richard Wilson, QC, with him, Mr. Nicholas Brookes and Mr. Nicholas Burkill

Respondents: Mr. Christopher Tidmarsh, QC (by video link), with him, Ms. Arabella di Iorio (for the 1st respondent)

Issues: Application to settle order and proposal of new trustee

Type of Oral Result/Order Delivered: N/A

Result / Order: The decision is reserved for delivery on a date later this week. The parties will be notified of the date of delivery.

Case Name: **Millicom Tanzania N.V.**
v
[1] Golden Globe International Services Limited
[2] Yusuf Manji
[BVIHCMAP2016/0036]

Date: **Tuesday, 22nd November 2016**

Coram: **The Hon. Dame Janice Pereira, DBE, Chief Justice**
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: **Mr. Neil Calver, QC**

Respondent: **Mr. James Collins, QC, with him, Ms. Tameka Davis (for the 1st respondent)**
Mr. David Lord, QC, with him, Mr. Renell Benjamin (for the 2nd respondent)

Issues: **Forum non conveniens – Whether the British Virgin Islands is appropriate forum for trial of appellant’s claim against respondents – Whether learned judge misapplied “real risk” test**

Type of Oral Result / Order Delivered: **N/A**

Result / Order: **The decision is reserved.**

Case Name: **[1] Department of Customs**
[2] Attorney General
v
Shawn Chinnery
[BVIHCVAP2015/0018]

Date: Tuesday, 22nd November 2016

Coram: The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Vareen Vanterpool, Principal Crown Counsel

Respondent: Ms. Karen Reid, with her, Ms. Ayodeji Bernard

Issues: Application to amend grounds of notice of appeal – Delay in applying to amend grounds – Significant legal principle of illegality omitted from notice of appeal – Whether respondent prejudiced by amendment – Importance of issue of illegality – Whether Court should exercise discretion to amend notice of appeal based on new allegation of illegality – Viability of notice of appeal

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result/Order: It is hereby ordered:

1. The application to amend the grounds of the notice of appeal is refused.
2. The appeal is dismissed.
3. The judgment of the master is confirmed except that the interest on the judgment should be at the statutory rate at 5%.
4. Costs of the appeal are awarded to the respondent; 2/3 of the amount awarded by the Court below.

Reason: The respondent is the owner of a commercial boat that he uses in his business of selling tours of the Virgin Islands. The boat was seized by the appellants during the course of a criminal investigation. It was released to the respondent after approximately 6 months. No charges were preferred against the respondent.

The respondent brought a claim against the appellants for damages including a claim for the loss of income. The appellants filed a defence to the claim but then conceded liability with damages to be assessed. Damages were assessed by the master and the appellants appealed the award of damages.

The appeal is now limited to the award of \$398,648.00 for loss of income. The prosecution of the appeal was beset with various missteps by the appellants. The notice of appeal was filed on 24th December 2015 but was not served. The appellants applied for and got an extension of time to serve the notice of appeal. The extension was granted and notice of appeal was served on 30th May 2016 and the record of appeal was filed on 24th September 2016. Thereafter, the appellants filed their skeleton arguments and the respondent filed his skeleton arguments in reply, on the 28th October 2016. The hearing of the appeal was set for the week of 21st November 2016.

On 4th November 2016, the appellants applied to amend their notice of appeal. Counsel for the appellants, Ms. Varen Vanterpool, explained the lateness of the application was due to internal events in her department. She submitted that the application to amend could be granted because there were good reasons for the delay in making the application. There was no prejudice to the respondent, but if there was any prejudice it could be compensated by an award of costs.

The Court found that there was no good reason given for the lateness of the application to amend. The reason for the amendment was to restate the grounds of the appeal which had not been properly set out in the original notice of the appeal. The main thrust of the amendment of the notice of the appeal was to focus on the defence of illegality. The illegality arose from the fact that the respondent was alleged not to have been licensed under the legislation and therefore he should not be able to recover damages for the loss of income.

Ms. Reid, for the respondent, opposed the application for amendment. She submitted that:

- (i) illegality in the sense of depriving the respondent of loss of income was not pleaded and there was no evidence led to support the allegation and the burden of proof was on the appellants.
- (ii) the appellants had conceded liability and had declined to cross-examine the respondent.

In the circumstances, it was too late to raise the issue of illegality. Ms. Reid also replied on the grounds of unreasonable delay which I referred to above, and both counsel relied on the authority of *Marinor Enterprises Limited et al v First Caribbean International Bank (Barbados) Ltd.* DOMHCVAP2013/0003 (delivered 6th July 2016, unreported), which sets out the criteria for a late amendment.

There is little doubt that if an amendment is granted the respondent would have to face on this appeal an issue which was not raised and dealt with in the court below. So we find there is prejudice to the respondent. Further, the text and substance of the amendment are not satisfactory. We were asked to exercise our discretion to allow the amendment anyway because it raises the issue of illegality. Ms. Vanterpool relied on the case of *Les Laboratoires Servier and Another v Apotex Inc v Others* [2014] UKSC 55 which states that, on the issue of illegality, the court can raise the issue of its own motion. However, we are not satisfied that there is sufficient material before us to exercise that discretion in favour of the appellants. The issue of illegality was not pleaded and there was no evidence or finding of fact that any illegality had been committed and because of those circumstances the Court declined to exercise its discretion in favour of the appellants.

In the circumstances, the application to amend is dismissed. This leaves the notice of the appeal as filed on 24th December 2015. The essential issues before the Court are therefore the same as in the original appeal and even in its amended form it has no real prospect of succeeding.

Case Name:

Petra Cooper (nee Klvacova)

v

Peter Cooper

[BVIHCVAP2012/0010]

Date:

Wednesday, 23rd November 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

**Appellant /
Applicant:**

In person (by video link)

Respondent:

No appearance

Issues:

Application for stay of execution – Application for leave to appeal to Her Majesty in Council – Application for permission to file and serve additional grounds of appeal – Whether learned trial judge erred in holding that sum of £50,000.00 amounted to money loaned to appellant by respondent which ought to be repaid – Challenge to findings of fact made by learned trial judge

**Type of Oral
Result/Order
Delivered:**

Oral Judgment or Decision

Result / Order:

- 1. The appellant/applicant is hereby granted leave to appeal the decision of the Court of Appeal made on 14th January 2016 to Her Majesty in Council, the said application lying as of right from a decision of the Court in that it satisfies conditions 1(a) and (b) of The Virgin Islands (Appeals to Privy Council) Order 1967, the application having been made timely within the 21 day period set out under section 4 of the said Order and the permission to appeal is made subject to the following conditions:
 - i. The applicant, Petra Cooper, shall within 90****

days from the date of hearing of the application for leave to appeal on today's date, lodge with the Court in the Territory of the Virgin Islands, the United States dollar equivalent of £500 Pounds Sterling as security for the due prosecution of the appeal to Her Majesty in Council and the payment of all such costs as may become payable by the applicant in the event of the applicant not obtaining an order granting her final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the appellant to pay the costs of the appeal as the case may be.

- ii. The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Directions 4.2.1 to 4.3.2 and Practice Direction 5; the same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
 - iii. The applicant shall make an application to the Court for final leave to appeal to Her Majesty in Council, supported by the certificate of the Registrar in the Virgin Islands that the security for costs and prosecution of the appeal hereby ordered has been given by the time prescribed by this order to the satisfaction of the Registrar.
- 2. The application for a stay of execution of the decision of the Court pending the appeal to Her Majesty in Council is hereby granted.
 - 3. The costs occasioned by this application shall be costs in the appeal to Her Majesty in Council.
 - 4. The Registrar of the Court will transmit to the parties, a sealed copy of the Certificate of the decision of the Court.
 - 5. The application made on 31st October 2016 to file and serve additional grounds of appeal is, with consent, hereby withdrawn.
 - 6. There be no order as to costs.

Reason: The applicant confirmed that she would take up her arguments on the additional grounds with Her Majesty's Privy Council and that there was therefore no need to pursue her application filed on 31st October 2016 (for permission to file and serve additional grounds of appeal).

The applicant noted that obtaining leave to appeal to Her Majesty in Council consisted of two phases and the next steps to be taken were as annunciated by the Court.

Case Name: Spectrum Galaxy Fund Ltd.
v
Xena Investments Ltd.
[BVIHCVAP2011/0040]

Date: Wednesday, 23rd November 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:	Mr. Jerry Samuel (of Conyers Dill & Pearman, legal practitioners for the appellant, Spectrum Galaxy Fund Ltd.) No appearance for Spectrum Galaxy Fund Ltd.
Respondent:	No appearance

Issues: Legal practitioner to be removed from record

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order: It is hereby ordered that:

1. Permission is hereby granted to Conyers Dill & Pearman to be removed as legal practitioners for the appellant, Spectrum Galaxy Fund Ltd., from the record in these proceedings.
2. The order granting removal shall be served on the Appellant and the legal practitioners for the Respondent in accordance with the Rules of Court.
3. There shall be no order as to costs.

Reason:

Counsel confirmed that the relevant certificate of service would be filed in due course.

Case Name:

**Melvin Rymer
v
Clearlie Todman-Brown
[BVIHCVAP2011/0028]**

Date:

Wednesday, 23rd November 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

**Appellant /
Respondent:**

Ms. Mishka Jacobs

**Respondent /
Applicant:**

Mr. Jamal Smith

Issues:

Breach of contract – Building contract between appellant and respondent – Whether learned trial judge erred in finding that appellant was in breach of contract – Whether learned judge erred in finding that building contract was entire contract – Whether learned judge erred in finding that appellant had repudiated building contract by leaving worksite in December 2008 – Whether learned judge erred in not finding that

respondent had rendered it impossible for contract to continue by her inability to finance building project and her refusal to consider appellant's offer to meet with bank officials in January 2009 – Whether learned judge erred in failing to find that it was respondent who had repudiated contract by her refusal to meet with appellant at bank and that appellant had accepted such repudiation by not returning to worksite after January 2009 – Whether learned judge erred in determination of quantum of damages for breach of contract – Whether learned judge erred in calculation of damages for residential and business rent – Leave to appeal to Her Majesty in Council – Application for extension of time to comply with order of court granting conditional leave to appeal to Her Majesty in Council

Type of Oral
Result/Order
Delivered:

N/A

Result / Order
& Reason:

The matter is stood over until 2:00 p.m. to enable counsel for the respondent/applicant to confer with his client.

JUDGMENTS

Case Name:

André Penn

v

The Queen

[BVIHCRAP2014/0006]

The Queen

v

Andre Penn

[BVIHCRAP2015/0002]

Date: Wednesday, 23rd November 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Valerie Gordon holding papers for Mr. Jerome Lynch, QC

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, holding papers for the Director of Public Prosecutions

Issues: Criminal appeal – Unlawful sexual intercourse – Whether learned trial judge erred in directions to jury – Whether sentence imposed was lenient

Result & Reason: Held: dismissing the appeal against conviction and the Crown’s appeal against sentence, that:

1. The general rule is that a direction as to the relevance of good character to a defendant’s credibility is to be given where he is of good character and has testified or made pre-trial statements. A direction as to the relevance of good character to the likelihood of a defendant having committed the offence charged is to be given where he is of good character whether or not he has testified or made pre-trial answers or statements. In this case, the appellant gave evidence on oath as to his good character and in keeping with the general rule, the trial judge directed the jury on credibility and propensity. The judge directed the jury that the evidence about the appellant’s good character was uncontradicted and they must take his good character into account in his favour. The jury would have been left with no doubt that the appellant’s good character operates positively in his favour both as to propensity and credibility and it was for them to decide what weight they should give to it and in making that assessment they are to take into account everything they heard about the appellant. Accordingly, this ground of appeal fails.

Teeluck and John v The State [2005] UKPC 14 applied; *Hunter and Others v The Queen* [2015] EWCA Crim 631 applied; *R v Vye and Others* [1993] 1 WLR 471 applied; *R v Aziz* [1996] AC 41 applied.

2. Section 146 of the Evidence Act, 2006 provides that where there is evidence, the reliability of which may be affected by self-interest the court shall, unless there is good reason otherwise, warn the jury that the evidence may be unreliable, inform the jury on matters which may cause the evidence to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be attached to that evidence. It would not be proper for a judge to direct the jury to regard the evidence of a witness with caution in the absence of a careful consideration whether there is a foundation for regarding the particular evidence as unreliable. The necessary foundation has to be established for regarding the complainant's evidence as unreliable. In this case there was no evidence on which a section 146 warning was required as the complainant's complaints against the appellant and the circumstances in which they came to be made, far from evincing self-interest, manifested the very antithesis of self-interest. The absence of a section 146 warning on self-interest does not inexorably lead to the conclusion that the resulting conviction is unsafe. Much may depend on the circumstances of the case including the nature of the evidence in question regarding the matter with respect to which the warning was not given

Section 146 of the Evidence Act, 2006 applied.

3. Section 145 of the Evidence Act, 2006 provides that it is not necessary that evidence, on which a party relies, be corroborated. It is not necessary for the court to warn the jury that it is dangerous to act on uncorroborated evidence or give a warning as to the absence of such corroboration. It is within a trial judge's discretion whether he should give any warning and if so its strength and terms must depend upon the content and manner of the

witness's evidence, the circumstances of the case and the issues raised. Judges are not required to conform to any formula and an appeal court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content. The trial judge highlighted the tender age of the complainant at the time the allegations were first made, that her evidence might be unreliable and the need for the jury to exercise caution in deciding whether to accept her evidence. It cannot be said that the trial judge's exercise of his discretion was *Wednesbury* unreasonable. There is therefore no reason to interfere with the exercise of the discretion of the trial judge in his directions on corroboration.

Regina v Makanjuola [1995] 1 WLR 1348 applied.

4. As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge but with the jury. If, therefore, there is a case to answer and, after proper directions, the jury has convicted, it is not open to the appellate court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury. In this case, there is nothing in the evidence or the trial process which leads to the inexorable conclusion that the trial of the appellant is unsafe.

R v Pope [2012] EWCA Crim 2241 applied.

5. Ordinarily but not invariably, a successful appellant should not receive a longer sentence after

conviction on a re-trial than he or she received at the original trial. Where the judge at the new trial considers that the circumstances of the case do call for a longer sentence he will not be absolutely fettered by the approach prima facie to be adopted. He is both at liberty, and indeed obliged, to give effect to his own assessment. Therefore, the trial judge cannot be properly criticised for imposing a longer sentence on the retrial.

R v Bedford (1986) 5 NSWLR 711 applied.

Case Name:

[1] Wendell Anthony

[2] Marvin Robinson

v

The Commissioner of Police

[BVIMCRAP2014/0016]

Date:

Wednesday, 23rd November 2016

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Ms. Valerie Gordon holding papers for Mr. Hugh Wildman

Respondent:

Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, holding papers for Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues:

Criminal appeal against conviction – Assault occasioning actual bodily harm – Section 58 of the Evidence Act, 2006 – Admittance of statement of virtual complainant into evidence – Discretion of learned magistrate

**Result &
Reason:**

Held: dismissing the appeal and making no order as to costs, that:

1. Section 58(1)(b) of the Evidence Act, 2006 states that in any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as primary evidence of that fact if the person who supplied the information recorded in the statement in question is dead. On that basis, Brandon's witness statement was admissible into evidence. Nonetheless, the court retains a discretion to exclude a witness statement if this is necessary to secure a fair trial of the accused. In this case, the magistrate had no discretion in determining whether the statement was admissible, but he had a discretion as to whether it should be admitted on the facts and circumstances of the case.

Section 58(1)(b) of the Evidence Act, 2006 applied; *Winston Barnes et al v The Queen* [1989] UKPC 10 applied.

2. Generally, evidence led in court is subject to the discretion of the magistrate to allow or disallow. A magistrate need not announce every time any evidence is presented that he is exercising his discretion to allow it in for any reason or that in exercising his discretion he took some particular factor or factors into consideration. If, however, the magistrate decides to disallow any evidence presented, then there would be an onus on him to indicate why he is exercising his discretion to disallow it, particularly if his disallowance of it is challenged by one of the parties to the case. In this case, counsel who appeared for the appellants in the lower court expressly stated his non-objection to the admission of the statement. Therefore, there was no need for the learned magistrate to expressly announce that he had exercised his discretion to allow it.
3. An appellate court will only overturn a factual finding made by a lower court if it can be shown that

the finding is so against the weight of the evidence as to be obviously and palpably wrong. There was ample evidence in this case on the basis of which the magistrate could and did make the finding that the appellants assaulted Brandon and that in so doing they were not acting in self-defence. The learned magistrate addressed and assessed, quite extensively, the evidence led in court, both by the prosecution and the defence, including Brandon's statement, before making his finding. In the circumstances, the finding by the magistrate that self-defence was not available to the appellants cannot be said to be so against the weight of the evidence as to be obviously and palpably wrong and so justify appellate interference.

4. A magistrate, as the judge of the facts and the law, must be taken to have been aware of and to have applied basic principles relative to the admission and treatment of evidence, unless the contrary is shown to be the case or his reasoning and decision were so clearly based on a lack of awareness or lack of application of the relevant legal principles. In this case, nothing to the contrary was shown. In such circumstances, the appellate court would not intervene in the magistrate's decision.
5. A statement made to a witness in a context where the maker of the statement cannot or does not give evidence of its content may be inadmissible hearsay evidence when the object of the evidence is to establish the truth of the statement, but not so if the object is to establish the fact that it was made. The relevant statement was not relied on as proof of the truth of its contents, but rather for the fact that it was made to Chief Inspector Frank Devonish as justifying the investigation of and subsequent filing of charges of unlawful assault against the appellants.

Subramaniam v Public Prosecutor [1956] 1 WLR 965 applied; *Kearley v R* [1992] 2 AC 228 applied; *Ratten v The Queen* [1972] 2 AC 378 applied; *R v Safi (Ali Ahmed) and Others* [2003] EWCA Crim 1809 applied.

APPLICATIONS AND APPEALS

Case Name: SFC Swiss Forfaiting Company Ltd.
v
Swiss Forfaiting Ltd.
[BVIHCMAP2015/0012]

Date: Wednesday, 23rd November 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant / Applicant:	Mr. Stephen Moverley Smith, QC, with him, Mr. Jonathan Addo
Respondent:	Mr. David Welford, with him, Mr. Simon Hall

Issues: Application (by appellant) for conditional leave to appeal to Her Majesty in Council – Application (by respondent) to strike out (appellant’s) motion for leave to appeal to Her Majesty in Council – Part 42 of the Civil Procedure Rules 2000 (“CPR”) – Rules 42.2, 42.8, 42.9, 42.10, 62.24 of CPR – Whether Certificate of Result of Appeal constitutes the decision/opinion of the Court

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order: The order of the Court is that:

1. The decision of the Court of Appeal in this matter was rendered and given to the parties on 4th July 2016 on which date the decision took effect.
2. The application to strike out leave to appeal is hereby granted as the application for leave was out

of time, the Court having no power to extend the time under The Virgin Islands (Appeals to Privy Council Order) 1967.

3. The respondent, Swiss Forfaiting Ltd., should have their costs on both applications, that is, the application to strike and the application for leave to appeal to Her Majesty in Council, which costs are to be assessed if not agreed within 21 days.

Reason:

The Court stated that the Civil Procedure Rules 2000 ("CPR") made it clear under Part 42 when a decision of the Court is made, when that decision takes effect and when the parties are bound.

CPR 62.24 makes further provision for a Certificate of Result of Appeal to be provided to each party to an appeal. The arguments made by counsel point to certain internal procedures and the question of when exactly a decision of the Court is officially rendered. The Court has made a note of this and will address the matter for the certainty of all.

Case Name:

**Melvin Rymer
v
Clearlie Todman-Brown
[BVIHCVAP2011/0028]**

Date:

Wednesday, 23rd November 2016

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

**Appellant /
Respondent:**

Ms. Mishka Jacobs

**Respondent /
Applicant:**

Mr. Jamal Smith

Issues:

Breach of contract – Building contract between appellant and respondent – Whether learned trial judge erred in finding that appellant was in breach of contract – Whether learned judge erred in finding that building contract was entire contract – Whether learned judge erred in finding that appellant had repudiated building contract by leaving worksite in December 2008 – Whether learned judge erred in not finding that respondent had rendered it impossible for contract to continue by her inability to finance building project and her refusal to consider appellant's offer to meet with bank officials in January 2009 – Whether learned judge erred in failing to find that it was respondent who had repudiated contract by her refusal to meet with appellant at bank and that appellant had accepted such repudiation by not returning to worksite after January 2009 – Whether learned judge erred in determination of quantum of damages for breach of contract – Whether learned judge erred in calculation of damages for residential and business rent – Leave to appeal to Her Majesty in Council – Application for extension of time to comply with order of court granting conditional leave to appeal to Her Majesty in Council

**Type of Oral
Result/Order
Delivered:**

Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

1. The application for the extension of time to comply with the conditions of the order of the Court granting conditional leave to appeal to Her Majesty in Council made on 4th April 2016, pursuant to Section 5(a) of The Virgin Islands (Appeals to Privy Council Order) 1967 is hereby dismissed on the basis that the Court has no power to extend the period of 90 days contained therein.
2. The order of the Court granting conditional leave to appeal made on 4th April 2016 is hereby rescinded.
3. The costs of this application are hereby fixed in the sum of \$1,500.00 to be paid within 14 days.

Reason: The Court took note of the circumstances which engendered the application to extend time. However, it was constrained within the law to apply the applicable rules as it had no jurisdiction under the Virgin Islands (Appeals to Privy Council) Order 1967 (S.I. No. 234 of 1967) to extend time. If there is no power to administer justice within the law, no matter the circumstances, then there is nothing the Court can do; it cannot operate outside the law.

Despite robust arguments from counsel for the respondent/applicant for the Court to invoke the provisions of CPR on principles of equity and justice, appeals to Her Majesty in Council are governed by statute. There is no jurisdiction or other gateway to grant leave to appeal where the statute circumscribes the time and procedures.

Case Name: Cukurova Holding AS
v
Sonera Holding BV
[BVIHCMAP2016/0005]

Date: Wednesday, 23rd November 2016

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Kenneth MacLean, QC, with him, Ms. Arabella di Iorio, Mr. James Nadin and Mr. David Caplan
Respondent:	Mr. Ben Valentin, QC, with him, Ms. Lynette Ramoutar

Issues: Interlocutory appeal – Effect of foreign arbitral awards – Enforcement of award pursuant to arbitration agreement contained in letter agreement – Exercise of discretion of learned judge – Whether order for sale

ought to have been made in respect of appellant's 100% shareholding in Cukurova Finance International Limited – Effect of foreign arbitral award pursuant to Draft Share Purchase Agreement (“DSPA”) – Whether issue of whether to recognise DSPA Partial award was live – Whether effect should have been given to DSPA Partial award – Material change of circumstance – Contractual consequences of DSPA Partial award

Type of Oral
Result/Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

**Telecommunications Regulatory Commission
v
Caribbean Cellular Telephone Limited
[BVIHCVAP2016/0002]**

Date:

Thursday, 24th November 2016

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]
The Hon. Mr. Michael Fay, QC, Justice of Appeal [Ag.]

Appearances:

Appellant /
Applicant:

Ms. Arabella di Iorio and Mr. Simon Hall

Respondent:

Ms. Tana'ania Small, with her, Ms. Pauline Mullings

Issues:

Application to adduce fresh evidence – Whether appellant may introduce evidence showing that its CEO received approval from appellant's Board regarding CEO's rejection of respondent's application to register for Spectrum Award 2015

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

1. Leave is granted to the appellant to adduce fresh evidence by way of affidavits of Michael Thomas dated 23rd September 2016 and Delroy Thomas dated 23rd September 2016.
2. Leave to adduce the Press Release dated 10th May 2016 is refused.
3. Costs to be costs in the appeal.

Reason:

The Court had before it the evidence that the appellant wished to adduce as well as the submissions of the parties. In making a determination on the application, the Court took into consideration the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 but more specifically, the reasons set out by the Hon. Chief Justice for the decision of the Court in *Honourable Guy Joseph (In his personal capacity and in his capacity as Parliamentary Representative for Castries South East) v The Constituency Boundaries Commission et al* (SLUHCVP2015/0013 (delivered 24th June 2015, unreported)).

The Court held that in the circumstances it was appropriate to exercise its discretion in favour of the applicant. In spite of the generic terms of the 4th ground of appeal on the issue of the undertakings which were to be given to the appellant, when this is read together with the skeleton arguments of the appellants and the respondents, it can be said that there is an appeal against the alternative ground (set out in paragraph 160 of the judgment) on which the trial judge relied to quash the decision of the appellant refusing the respondent's application to register its allocation.

JUDGMENTS

Case Name:

**In the Matter of Tian Li Holdings Limited
and
In the Matter of the BVI Business Companies
Act 2004**

**Anjie Investments Limited
Appellant / First Defendant**

**Tian Li Holdings Limited
Second Defendant**

v

[1] Cheng Nga Yee

**[2] Cheng Nga Ming Vincent
Respondents / Claimants**

[BVIHCMAP2016/0003]

Date:

Thursday, 24th November 2016

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of
Appeal [Ag.]**

Appearances:

Appellant: Mr. Mark Forte

Respondents: Mr. Mark Rowlands

Issues:

**Commercial appeal – Forum non conveniens –
Fraudulent misrepresentation – Ownership of shares –
Whether learned judge erred in holding that BVI was
appropriate forum for trial of claim**

Result &

Held: allowing the appeal and ordering that the learned

Reason:

judge's order dismissing the application to stay or strike out the claim on grounds of forum non conveniens be set aside; granting a stay of the substantive claim on grounds of forum non conveniens; setting aside the costs award made by the learned judge to the respondents in the court below; awarding the appellant the costs of its application in the court below, which costs are to be assessed if not agreed within 21 days; awarding the appellant its costs in the appeal but excluding the costs on the fresh evidence application, to be calculated at two-thirds of the costs in the court below; and awarding the respondents costs in this Court in relation to the appellant's fresh evidence application, to be assessed if not agreed within 21 days, that:

1. The resolution of disputes concerning the most appropriate forum for conducting the trial of a claim is pre-eminently a matter for the trial judge and an appeal should be rare and an appellate court should be slow to interfere in such instances. Where, however, the appellate court is satisfied that the learned judge made a significant error of principle or a significant error in the considerations taken or not taken into account and as a consequence thereof the decision exceeds the generous ambit within which reasonable disagreement is possible and is in fact plainly wrong, it may interfere with the decision of the judge.

Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460 applied; *VTB Capital plc v Nutritek International Corp and Others* [2013] UKSC 5 applied; *Dufour et al v Helenair Corporation Ltd et al* (1996) 52 WIR 188 followed.

2. The place of commission of the alleged tort is a relevant starting point when considering the appropriate forum for a tort claim. It will normally establish a prima facie basis for treating that place as the appropriate jurisdiction.

VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied.

3. The learned judge made an error of principle when

he found that the alleged primary wrong committed by the respondents was the use of the Documents in the BVI resulting in the entry of the appellant's name on the Register of Members. This amounted to a mischaracterisation of, or a failure to properly identify, the essential and underlying wrong that would engage a court in the trial of this action. The primary wrong in this case was, on the pleadings, related to the fraudulent representations and these were made in Hong Kong and not the BVI. In the circumstances, Hong Kong would be, *prima facie*, the appropriate forum for the trial of this claim. The learned trial judge's conclusion that the BVI was the most appropriate forum was incorrect.

VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied.

4. The residence/convenience of witnesses is a factor which is at the core of the question of the appropriate forum for the trial of a claim. Its importance is not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings. This is a consideration which would be applicable to matters concerning the membership and administration of such companies, which were not the issues involved in this case. The issues in this case concerned the alleged negotiations and representations which took place in Hong Kong and documents which were signed in Hong Kong. These are not domestic issues in respect of which persons should have to contemplate travel to the BVI.

VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied; *Nilon Limited and Another v Westminster Investments S.A. and Others* [2015] UKPC 2 applied.

Case Name:

Hilary Shillingford
v

[1] Angel Peter Andrew
[2] Gloria Burnette nee Shillingford

[DOMHCVAP2011/0032]

[1] Gloria Burnette nee Shillingford
[2] Rashida N. Pierre
v
Angel Peter Andrew

[DOMHCVAP2011/0033]

Date: Thursday, 24th November 2016

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Michael Maduro (for the 1st appellant)
Mr. Patrick Thompson (for the 2nd appellant)

Respondents: Mr. Jack Husbands

Issues: Civil appeal – Agency – Power of attorney – Delegation of authority under power of attorney to third party by agent – Ratification by principal of agent’s delegation of authority to third party – Appellate court’s approach to factual findings and findings of credibility by trial judge

Result & Reason: Held: dismissing the appeals and ordering the appellants to pay prescribed costs as set out at paragraph 72 of the judgment, that:

1. Delegation by an agent is generally prohibited by the maxim *delegatus non potest delegare* without the express authority of the principal, or authority derived from statute. There normally may be no delegation where there is personal confidence placed in or skill required from an agent, unless

urgent necessity compels the relinquishing of responsibility to another. However, an authority to delegate will be implied in the case of purely ministerial acts where no special discretion or skill is required and in the case of acts subsidiary to the main purpose. In the present case, the main power granted to Gloria by the power of attorney was to sell the lands. During the duration of the exclusive agreement with Hilary, that power was delegated by Gloria to Hilary and Angel did not expressly or impliedly authorise that delegation.

Allam & Co. Ltd. V Europa poster Services Ltd [1968] 1 All ER 826 applied; *John McCann & Co (a firm) v Pow* [1974] 1 WLR 1643 applied.

2. An unauthorized act may be said to be ratified where there is a clear manifestation by one on whose behalf the unauthorized act has been done that he treats the act as authorized and becomes party to the act in question. Ratification may also be implied from conduct where the conduct of the one on whose behalf the unauthorized act has been done is such as to amount to clear evidence that he adopts or recognizes such act or transaction and does so with full knowledge of all the essential facts. Generally, every act, other than one which is void at its inception may be ratified. In the instant case, there was no express ratification by Angel of the impugned delegated authority nor could it be said that ratification was implied by any conduct on his part. In any event, the learned trial judge properly found that the delegation to Hilary by Gloria of the power granted under the power of attorney was invalid and as such Angel could not have lawfully ratified this act. In the circumstances, the learned judge cannot be properly criticized for not making a finding of ratification.
3. An appellate court should be reluctant to interfere with findings of fact and credibility by the first instance judge and is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of witnesses. An appellate court should not interfere with a judge's conclusion on primary facts unless satisfied that he was plainly wrong.

Caution not only applies to the findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them.

Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 applied; *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230 applied; *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21 applied; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 applied.

4. An appellate court can and sometimes does test the trial judge's factual findings against the contemporaneous documentation and inherent probabilities. Where findings depend on the reliability and credibility of the witnesses, an appellate court will generally defer to the trial judge who has had the advantage of seeing and hearing the witnesses give their evidence. The question an appellate court should consider is whether the findings made by the trial judge were open to him on the evidence.

In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 applied.

5. In the present case, the learned trial judge made a number of important negative findings in respect of the credibility of Gloria, Rashida and Hilary. He made factual findings in relation to the exclusive agreement with Hilary, the payments to Rashida and the credibility and honesty of Hilary. The judge's conclusions with respect to the central issues in the case were clearly open to him on the evidence and could not be said to be against the weight of the evidence.

APPLICATIONS AND APPEALS

Case Name:

Alcedo Tyson

v
The Queen

[BVIHCRA2013/0008]

Date: Thursday, 24th November 2016

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Patrick Thompson

Respondents: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel,
with her, Mr. Garcia Kirt Kelly, holding papers for Mr.
O'Neil Simpson, Crown Counsel

Issues: Appeal against conviction and sentence – Murder

Type of Oral Result/Order Delivered: Directions

Result / Order: It is hereby ordered:

1. The amended notice of appeal filed by the appellant on 5th August 2016 is deemed to have been properly filed and served.
2. The appellant shall file and serve written submissions on or before 30th December 2016 on the issue of the capacity of this Court to determine a constitutional question not raised in the Court below.
3. The respondent shall file and serve written submissions in response on or before 13th January 2017.
4. The hearing of the appeal is fixed for the next sitting of this Court in the Territory of the Virgin Islands during the week commencing 30th January 2017.

Case Name:

Wendell Varlack

v

The Queen

[BVIHCRAP2012/0001]

Date:

Thursday, 24th November 2016

Coram:

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Patrick Thompson

Respondents:

Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues:

Appeal against conviction and sentence – Causing death by dangerous driving – Whether jury given any or any sufficient direction as to how to deal with evidence of alcohol consumption by appellant – Whether appellant's case put fairly or at all to jury – Whether jury was properly directed on issue of whether appellant's vehicle may have been unlicensed at time of accident – Whether sentence of 18 months imprisonment too severe

**Type of Oral
Result/Order
Delivered:**

Directions

Result / Order:

It is hereby ordered:

- 1. The appellant shall file written submissions / skeleton arguments in support of his appeal on or before 31st December 2016.**
- 2. Should the appellant fail to file his submissions / skeleton arguments by the said 31st December 2016 the appeal stands dismissed for want of prosecution.**
- 3. If the appellant files his submissions / skeleton arguments by the date ordered above the respondent shall file their skeleton**

arguments/written submissions in response on or before 28th February 2017.

4. The hearing of this appeal is fixed for the sitting of this Court in the Territory of the Virgin Islands during the week commencing 10th July 2017.

Case Name:

Joel Sprauve

v

The Queen

[BVIHCRAP2011/0006]

Date:

Thursday, 24th November 2016

Coram:

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues:

Appeal against conviction – Indecent Assault – Incest – Whether inquiry into question of whether virtual complainant could give sworn evidence properly conducted by learned trial judge – Whether Crown should have been permitted to ask virtual complainant after she had given her evidence whether her evidence was true – Whether trial judge erred in permitting doctor to lead inadmissible hearsay evidence of what virtual complainant said to him when he examined her – Whether indictment upon which appellant was tried was defective as it included 2 counts of incest as alternatives to the 2 counts of rape – Whether said defect was material irregularity which rendered appellant's conviction on incest unsafe – Whether jurors wrongly directed that incest was alternative to rape

**Type of Oral
Result/Order
Delivered:**

Directions

Result / Order:

It is hereby ordered:

- 1. The transcript of the trial proceedings shall be provided to the appellant free of charge by 2nd December 2016.**
- 2. Written submissions/skeleton arguments shall be filed by the appellant on or before 28th February 2017.**
- 3. Written submission/skeleton arguments shall be filed by the respondent on or before 31st March 2017.**
- 4. Hearing of this appeal is fixed for the sitting of this Court in the Territory of the Virgin Islands during the week commencing 10th July 2017.**

Case Name:

Jessroy McKelly

v

The Queen

[BVIHCRAP2014/0002]

Date:

Thursday, 24th November 2016

Coram:

**The Hon. Mr. Davidson K. Baptise, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal**

Appearances:

Appellant:

In person

Respondent:

Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues:

**Appeal against conviction and sentence – Murder –
Whether Crown ought to have been permitted to
adduce identification evidence in breach of s. 110 of
the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the**

Virgin Islands) – Whether trial judge erred in finding that identification parade would not serve useful purpose – Whether trial judge erred in inviting jurors to return verdict before deliberations were complete or before jurors had indicated that they had difficulty returning verdict – Whether sentence of life imprisonment with eligibility for parole after 40 years manifestly excessive -

Type of Oral
Result/Order
Delivered:

Directions

Result / Order:

1. This appeal is set down for a status hearing at the next sitting of this Court in the Territory of the Virgin Islands during the week commencing 30th January 2017.
2. It is ordered that the following persons appear at status hearing for the purpose of assisting the Court with the assignment of counsel to represent the appellant at the hearing of this appeal. The following persons being:
 - a. The Chairman of the Legal Aid Board
 - b. Chief Social Development Officer – Mrs. Annie Malone-Frett
 - c. Ms. Scherrie Griffin
 - d. Mrs. Althica Dawson
3. The Registrar of the High Court shall serve this order and the notice of the hearing on the abovementioned officers.

Case Name:

Olive Group Capital Limited

v

Mr Gavin Mark Mayhew

[BVIHCMAP2016/0020]

Date:

Friday, 25th November 2016

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

The Hon. Mr. Michael Fay, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Mark Rowlands

Respondent: Ms. Tameka Davis

Issues:

Interlocutory Appeal – Costs – Whether respondent entitled to pre-litigation costs awarded in court below – Recoverability of lawyers’ fees – Test of necessity in *Michael Wilson & Partners Limited v Temujin International Limited and Others* (BVIHCV2006/0307 (delivered 25th August 2008, unreported)) – Test in *Grand Pacific Holdings Limited v Pacific China Holdings Limited* (BVIHCV2009/0389 (delivered 3rd December 2010, unreported)) – Whether respondent entitled to costs of engaging foreign corporate lawyer – Whether burden of proof applied correctly or at all since doubts that fees claimed were reasonably incurred pursuant to rule 65.2 of the Civil Procedure Rules 2000 not resolved in appellant company’s favour in circumstances where no other evidence or records were adduced to support claimed costs – Whether more costs awarded in relation to fees claimed than had actually been claimed

Result / Order:

1. The appeal is allowed insofar as paragraph 213(1) of the judgment and order of the Honourable Justice Barry Leon (Leon J) dated 29th April 2016 (the “Judgment”) be set aside and the respondent’s costs of the claim, including the injunction and proceedings and application be assessed and fixed in the amount of US\$275,000.00.
2. The appeal in relation to paragraphs 213(2) to (4) of the judgment is dismissed.
3. The appellant is to pay the respondent’s costs of the appeal in the sum of US\$45,000.00.

Case Name:

**Steadroy Matthews
v**

Garna O'Neal

[BVIHCVAP2015/0019]

Date: Friday, 25th November 2016

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Terrance Neale, with him, Ms. Elizabeth Ryan

Respondent: Dr. Alecia Johns

Issues: Personal injury – Damages – Appeal against award of damages made by learned master – Whether learned master erred in principle in calculating general damages from date of accident – Whether learned master erred in determination of multiplicand – s. 7 of West Indies Associated States Supreme Court (Virgin Islands) Act (Cap. 80, Revised Laws of the Virgin Islands 1991) – Whether pre-judgment interest available on general damages in personal injury claims

Type of Oral Result / Order Delivered: N/A

Result / Order: The decision is reserved.

Case Name:

[1] Lucien Callwood
[2] Urman Callwood
[3] Gertrude Callwood-Coakley
[4] Wendell Callwood
v
[1] Registrar of Lands
[2] Sheila Callwood Shulterbrandt

[3] Beatrice Innis Orr
[4] Estate of Sheradina Callwood alias
Geraldine Callwood (deceased)
[5] Estate of Doris Kelly (deceased)
[6] Estate of Keturah Callwood (deceased)
[7] Estate of Theopholous Callwood
(deceased)

[BVIHCVAP2012/0008]

Date: Friday, 25th November 2016

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Sydney Bennett, QC, with him, Ms. Anthea Smith

Respondent: Ms. Jo-Ann Williams-Roberts, Solicitor General

Objectors: Mr. Dave Marshall (for the 2nd Objector, John
Schulterbrandt)

Issues: Prescriptive Title – Registered Land Act – Whether
learned trial judge erred in partially upholding decision
of Registrar of Lands – Whether wrong to refuse grant
of prescriptive title to all disputed parcels of land

**Type of Oral
Result / Order
Delivered:** N/A

Result / Order: The decision is reserved.

Case Name: Jerome Allen
v
The Commissioner of Police

[BVIMCRAP2014/0001]

Date: Friday, 25th November 2016

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Andrew Morrison
(the appellant was also present)

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Appeal against conviction and sentence – Unlawful importation of firearms – Unlawful importation of explosives – Unlawful possession of explosives – Possession of prohibited firearm – Whether sentence imposed was excessive having regard to sentences imposed for similar offences in courts of equal jurisdiction – Application for leave to file amended notice of appeal

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order: It is hereby ordered:

1. Time is extended to allow the appellant to file amended ground for notice of appeal within 7 days of this order.
2. The respondent shall file and serve written submissions with authorities on the appellant's legal practitioners on or before 12th December 2016.
3. Hearing of the appeal is set down for the next sitting of the Court of appeal in the Territory of the Virgin Islands during the week commencing 30th January 2017.

Case Name:

**Violet Delville Hodge
v
The Commissioner of Police**

[BVIMCRAP2015/0005]

Date:

Friday, 25th November 2016

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

**Mr. Patrick Thompson
(the appellant was also present)**

Respondent:

**Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel,
with her, Mr. O'Neil Simpson, Crown Counsel**

Issues:

**Appeal against conviction and sentence – Conspiracy –
Application for bail pending appeal**

**Type of Oral
Result/Order
Delivered:**

Oral Judgment or Decision

Result / Order:

The appeal is dismissed.

Reason:

This was an application for bail pending the determination of an appeal before this Court in relation to the appellant's conviction for the offence of conspiracy pursuant to section 3.11 of the Criminal Code, 1997 (Act No. 1 of 1997, Laws of the Virgin Islands). The appellant, after a trial, was sentenced to a term of 6 years imprisonment and was fined the sum of \$100,000.00, in default six months imprisonment. The appellant appealed against her conviction and sentence and sought bail pending the determination of that appeal.

Learned counsel for the appellant submitted that the principles on which the Court would grant bail pending

an appeal are those set out in the case of *The State v Lynette Scantlebury* (1976) 27 WIR 103 from the Court of Appeal in Guyana and also relied on the authorities referred to by the Crown including *R v Watton* (1978) 68 Cr App Rep 293 and *Careem Bedminster v The Queen* ANUHC VAP2008/0022 (delivered 20th January 2009). There is no dispute as to the principles which the Court should apply when considering an application for bail pending appeal – the appellant must show that there are exceptional circumstances for the grant of bail. Learned counsel for the appellant advanced the following grounds as being exceptional circumstances:

- 1) The appellant's appeal has a realistic prospect of success and
- 2) Having regard to the medical condition of the appellant, bail should be granted.

The Court considered the submissions made on behalf of the appellant as well as those made in opposition by the Crown, and, having considered the relevant legal principles and having taken into account to the undertakings that were given by the Crown in relation to the medical needs of the appellant, it was satisfied that adequate arrangements would be made for the appellant to receive necessary medical treatment pending determination of her appeal.

In relation to second limb advanced by counsel for the appellant (i.e. that the appeal had a realistic prospect of success), the Court was of the view that, having regard to the nature of the issue in the matter (the interpretation to be placed on certain statutory provisions) and having regard to the fact that the Court not been presented with any legal authority in which a provision had been interpreted by this Court, or by any other court for that matter, the Court stated that while there may be a likelihood of success, it was not persuaded that there is a strong prospect of success. In coming to a decision on the matter the Court also took into account the fact that the record of appeal would be ready by the end of this year and therefore the substantive appeal was very likely to be heard at the sitting of this Court in the Territory of the Virgin Islands scheduled for July 2017, approximately 8 months away. It further stated that it was aware and

had taken into consideration that arrangements could be made for the appeal to be heard at an earlier date either by videoconference or perhaps in another jurisdiction.

Accordingly, the Court held that it was not persuaded that the application of bail should be granted.

Case Name:	The Commissioner of Police V [1] Kion Leonard [2] Kai DeCastro [BVIMCRAP2014/0019]
Date:	Friday, 25 th November 2016
Coram:	The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. John Carrington, Justice of Appeal
Appearances:	
Appellant:	Ms. Tiffany Scatliffe-Espit, Principal Crown Counsel
Respondents:	Mr. Patrick Thompson (both respondents were also present)
Issues:	Appeal by Crown against sentence imposed by learned magistrate – Possession of explosives – Possession of firearm
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order:	It is hereby ordered that the sentence imposed by Magistrate John upon the conviction of the respondents be varied so that in addition to the fine imposed by Magistrate John of \$3,000.00, each of the respondents is sentenced to 12 months imprisonment,

such sentence to be suspended for two (2) years.

Reasons:

This was an appeal by the Crown against the sentence imposed for the conviction of the respondents of the offences of possession of a firearm and possession of explosives.

The Crown, in its submissions, gave the background to the matter which involved, among other things, a police chase which apparently took place in the dead of night, during which an object was thrown out of a moving vehicle which turned out to be a loaded gun. The conviction was not appealed by the respondents. The Crown appealed on the matter of sentence.

The learned magistrate imposed a fine of \$3,000.00 on each of the respondents, to be paid within 14 days, failing which they would be imprisoned for a period of 36 months. The fines were paid. The evidence before the Court was that since that conviction, neither of the respondents had been involved in any infraction of the law. The Crown started its submissions by stating that one of the reasons for the appeal was for this Court to provide some guidance for sentencing under the relevant provisions of the firearms legislation. However, the Court noted that that legislation had been amended since that conviction and therefore it felt that it was not in a position to provide guidance on the amended legislation. The Court further stated that any sentencing for the offence would be best done under the regime of the current (amended) legislation rather than the past legislation.

The Crown made it clear very early in its submissions that it was not seeking a custodial sentence for the respondents, but a sentence which they felt was more consistent with the seriousness of the offence and which was comparable to sentences imposed on other persons charged with similar offences.

The Crown drew the Court's attention to two cases in particular, in which different sentences were imposed for equivalent offences. The Crown indicated that at the end of the day it would be satisfied if a suspended sentence of one year's imprisonment suspended for

two years, would be imposed.

Counsel for the respondents basically submitted to the Court that since the Crown was not seeking a custodial sentence and in light of the fact that two years had been pronounced by the magistrate, without any infraction on the part of the respondents, he would not be against the position adopted by the Crown. In light of that fact, as well as the seriousness of the offence and the prevalence of the offence (as pointed out in the evidence of Mr. Charles which was not contested by the respondents, the Court took the view that the proposal by the Crown should be accepted, and that in all the circumstances, the sentence of 12 months being suspended for two years, would be appropriate by way of variation of the sentence imposed by the learned magistrate. This would reflect the seriousness and prevalence of the offence in the Territory both of which matters this Court, in *Desmond Baptiste v The Queen* (Saint Vincent and the Grenadines High Court Criminal Appeal SVGHCRA2003/0008 (delivered 6th December 2004, unreported)), indicated should be taken into consideration when sentencing. The Court noted that the magistrate, on the face of the record, did not go into any detail or provide any reasons for the sentence he imposed. The Court opined that in those circumstances it was open to it to vary the sentence as prayed by the Crown. Accordingly, the Court ordered that the sentence imposed by the magistrate upon the conviction of the respondents be varied so that in addition to the fine of \$3,000.00 that was imposed on the respondents, each of the respondents is sentenced to 12 months imprisonment, such sentence to be suspended for two years.

Case Name:

The Commissioner of Police

v

[1] Lester Terrence DeCastro

[2] Isaac Bellony Caena

[BVIMCRAP2013/0016]

Date: Friday, 25th November 2016

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Respondent: Mr. Lester Terrence DeCastro (in person)

Issues: Appeal against decision of learned senior magistrate to uphold no case submission in favour of respondents – Whether decision of learned magistrate unreasonable or cannot be supported having regard to the evidence – Possession of cocaine – Conspiracy to import heroin – Unlawful possession of heroin with intent to supply – Unlawful possession of heroin

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order & Reason: It is hereby ordered that a notice of discontinuance having been filed by the Crown on 7th November 2016, the appeal is hereby discontinued and accordingly dismissed.

Case Name: Saniel Durant
v
Kharid Frett
[BVIMCVAP2014/0001]

Date: Friday, 25th November 2016

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal
[Ag.]

Appearances:	Appellant: Mr. Sanieel Durant (in person) Respondent: Ms. Kharid Frett (in person)
Issues:	Whether learned magistrate erred in ordering that appellant pay respondent sum of \$2,350.00 plus \$600.00 costs – Whether decision of learned magistrate unreasonable or cannot be supported having regard to evidence
Type of Oral Result/Order Delivered:	N/A
Result / Order:	It is hereby ordered that the hearing of the appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 30 th January 2017. This is the final adjournment of this matter.
Reason:	To allow the appellant to retain legal counsel to represent him.
Case Name:	Nealon Francis v Alice Morancie [BVIMCVAP2015/0002]
Date:	Friday, 25 th November 2016
Coram:	The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]
Appearances:	Appellant: Mr. Jamal Smith (appellant Nealon Francis was also

present)

Respondent: Ms. Alice Morancie (in person), with her, Ms. Sinead Harris as her Next Friend

Issues: Child maintenance – Whether order of learned magistrate can be supported having regard to uncontroverted evidence before the court – Whether learned magistrate erred in making child maintenance order

Type of Oral Result/Order Delivered: Oral Judgment or Decision

Result / Order: It is hereby ordered by consent that the appellant, Nealon Francis, shall pay to the respondent, Alice Morancie, the following sums:

1. \$200 per month for maintenance of the child commencing from 31st January 2017 and payable on the last day of each month thereafter.
2. \$80 per month tuition expenses commencing from 31st January 2017 and payable on the last day of each month for so long as the child continues to attend private school.
3. One-half of the medical expenses of the child (not covered by insurance NHI) and one-half of educational expenses excluding tuition fees.
4. There shall be no order as to costs.

Reason: The parties consented to the above order.