

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
11th – 15th January 2016

JUDGMENTS

Case Name:

**[1] Rosalind Nicholls
[2] Constance v. Mitcham
[3] Pearline O. Sylvester
v**

**[1] Richard Rowe and Mark Secrist
(and those whom they represent)
[2] Roy and Gen Benton
[3] Paul and Chae Dunn**

and

**[1] The Attorney General of St. Christopher and
Nevis
[2] The Authorized Officer for the Angelus Report**

[SKBHCVAP2011/0015]

Date:

Monday, 11th January 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]**

Appearances:

**Appellants: Mr. Daniel Wise holding papers for counsel for the
appellants**

**Respondents: Ms. Kaidia Edwards-Alister, Crown Counsel, holding papers
for the Attorney General of St. Christopher and Nevis**

Issues:

Civil appeal – Compulsory acquisition of lands by

Government – Interpretation of provisions of Land Acquisition Act – Entitlement to compensation for land acquired – Section 8 of The Saint Christopher and Nevis Constitution – Effect of non-registration of memorandum of transfer – Whether a person holding an unregistered memorandum of transfer has an interest in land and is entitled to compensation on a compulsory acquisition of land – Equitable interest – Effect of provisions of Title by Registration Act – Indefeasibility of title

Result and Reason:

Held: allowing the appeal against the ruling of Thomas J on the effect of section 17 of the LAA and upholding the award of the Board of Assessment, that:

- 1. The Court must adhere to the stringent provisions of the TRA. The legislative intention in section 5(3) of the TRA is clear. Section 5(3), expressly prescribes:, (i) that an unregistered memorandum of transfer cannot create a right or interest in land; (ii) that the only legal effect such an instrument has is that it operates as a contract only; and (iii) that the only right it creates is the right to enforce the contract against the other party to the contract or against persons claiming under that party. By virtue of section 5 (3), as well as the enactments in the sections of the TRA, the right the appellants possess by way of their unregistered memoranda of transfer is no higher than a contractual right. It is a right to bring an action in personam in law or in equity for damages or specific performance of the contract. Whether this may seem “inequitable” is not a material consideration when the TRA makes it inevitable. Further, it is clear from the definition of ‘dealing’ in the First Schedule to the TRA that the appellants’ unregistered memoranda of transfer is a ‘dealing’ in land, which is incapable of conferring any right or interest in respect of land. It was required to be presented for registration and to be registered in order to have legal effect as a completed sale to the appellants. Unless presented for registration, the sale of the Units remained incomplete with the consequence that the proprietorship of the land was never affected by the alleged beneficial interest. There was no evidence adduced to show that the appellants attempted to or presented their memoranda of transfer for registration as required by section 20 of the TRA. Therefore by parity of reasoning, the appellant’s unregistered memoranda of**

transfer cannot confer on them an interest in the Angelus Lands.

Section 5 (3) Land Acquisition Act applied; *Frazer v Walker* [1967] 1 All ER 649 applied.

2. On a compulsory acquisition of lands brought under the operation of the TRA, one must look to the scheme of TRA in order to determine what constitutes interests in land. It is only interests in land as so ascertained, which are protected on a compulsory acquisition by the right to compensation under section 8(1) of the Constitution of Saint Christopher and Nevis and pursuant to the provisions of the LAA. These consist of the absolute interest of the holder of the certificate of title, ranging down to the interest of a legal or equitable mortgagee, and encompassing all lesser interests in land that have been presented for registration and noted on the certificate of title as encumbrances. Registration and noting on the certificate of title are the sine qua non of the existence of interests in land under the TRA and this is so whether the interest has its origins in law or in equity. To grant recognition to an unregistered dealing as constituting an interest in land would undermine the indefeasible nature of registered interests and throw into a state of flux if not chaos, the scheme and principles of the TRA. In light of this, the Board was right in ruling that the appellants were not entitled to compensation based on the appellants' unregistered memorandum of transfer.

Sections 8-10 of the Title by Registration Act.

3. Section 26 of the LAA seemingly provides a legitimate pathway for a claimant to prove an entitlement to compensation by being deemed the owner of the land providing the criteria there specified is met. The appellants failed to assert a claim in reliance on the provisions of section 26, and also failed to adduce any evidence that could form the factual matrix for a finding in their favour pursuant to section 26.

Section 26 Land Acquisition Act considered.

APPLICATIONS AND APPEALS

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

Date: **Monday, 11th January 2016**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Paul Webster, QC, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: **Mr. Christopher Parker, QC, with him, Mr. Jonathan Addo**

Respondent: **Mr. Raymond Davern**

Issues: **Civil appeal – Insolvency Act, 2003 – Whether assignee of redemption proceeds can attain character of creditor with locus standi to seek liquidation of a company – Application for leave to appeal to Her Majesty in Council – Respondent to be held liable for remuneration**

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

Result / Order: **The motion to appeal to Her Majesty in Council is, with the leave of the Court, withdrawn.**

Reason: **An order dated 7th January was filed by the parties, which order the Court duly noted.**

Case Name:

E. M. Watts Development Company Ltd

V

The Government of the Virgin Islands

[BVIHCVAP2015/0003]

Date:

Monday, 11th January 2016

Coram:

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

The Hon. Mr. Paul Webster, QC, Justice of Appeal

**The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. James Morrin

Respondent: Ms. Maya Barry, Crown Counsel, for the Attorney General

Issues:

Compulsory acquisition of land – Appeal against award of Board of Assessment (exercising jurisdiction provided by section 12 of Land Acquisition Act (Cap. 222, Revised Laws of the Virgin Islands 1991)) – Whether value given by Board of Assessment to land and rights compulsorily acquired was wrong and contrary to evidence – Whether Board of Assessment erred in refusing to award interest – Whether Board of Assessment erred in refusing to award sum of \$6,725.58 in respect of travel and associated costs – Application for leave to file submissions – Application for conditional leave to appeal to Her Majesty in Council

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

Oral Judgment or Decision

Result / Order:

The Applicant is hereby granted leave to appeal to Her Majesty in Council against the order of the Court pronounced on the 28th day of September 2015 on condition that:

- 1. The Applicant within ninety days from the date of hearing of the application for leave to appeal, shall enter into good and sufficient security to the satisfaction of the Court in the sum of £500 Sterling for the due prosecution of the appeal 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 it 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) such security to consist of a deposit of the said amount at the court office.

2. 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.
3. Within 90 days of the date hereof, the Appellant do take the necessary steps for the purpose of procuring the preparation of the record, the settling of such record with the solicitors for the Respondents to this Application, and certification of the record by the Registrar of the Court of Appeal.
4. 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 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.
5. The cost of this Application shall be cost in the Appeal to Her Majesty in Council.

Case Name:

Ng Man Sun

v

[1] Peckson Limited

[2] Chen Mei Huan

[BVIHCMAP2013/0026]

Date: Monday, 11th January 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellant / Respondent:	Mr. Christopher Parker, QC, with him, Mr. Jonathan Addo
Respondents / Applicants:	Mr. Raymond Davern

Issues: Ownership of shares – Claim for rectification of share register of 1st respondent company under s. 43 of the BVI Business Companies Act, 2004 (Act No. 16 of 2004, Laws of the Virgin Islands) – Whether it was open to learned trial judge to find that beneficial interest in shares in 1st respondent had been transferred to 2nd respondent – Whether learned judge was entitled to reject appellant’s explanation as to why he had transferred legal title in shares to 2nd respondent – Whether shares held on resulting trust for appellant by 2nd respondent – Whether learned trial judge erred in finding on the facts that 2nd respondent was contractual owner of shares in absence of amended pleadings to include claim for ownership in contract – Application for conditional leave to appeal to Her Majesty in Council – Application for variation of terms for security for costs – Application for stay on interim costs application

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

Result / Order: It is ordered that:

1. Madam Chen:
 - a) is granted conditional leave to appeal to Her Majesty in Council against the order of this Court pronounced herein on 2nd October 2015 whereby Mr. Ng’s appeal against the order of the Honourable Justice Bannister QC was allowed with costs.

- b) shall within 90 days of the date of this order enter into good and sufficient security to the satisfaction of the Court by paying into the court a sum of 500 pounds sterling (or its US dollar equivalent) for the due prosecution of the appeal and the payment of all such costs as may become payable by Madam Chen in the event that she does not obtain an order granting her final leave to appeal or of the appeal being dismissed for want of prosecution or of the Privy Council ordering her to pay the cost of the appeal as the case may be.**
 - c) shall apply for final leave to appeal to the Privy Council supported by the certificate of the Registrar that the condition of payment of security for cost and prosecution of the appeal at 1.b above has been given within the time prescribed by this order or to the satisfaction of the Registrar.**
- 2. The Record of Appeal shall be prepared in accordance with Rule 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Directions 4.2.1 to 4.3.2, the same to be translated to the Registrar of the Privy Council without delay where final permission to appeal has been granted.**
- 3. The costs of and occasioned by the Notice of Motion for conditional leave to appeal shall be costs in the appeal to the Privy Council.**
- 4. The terms upon which Mr. Ng may provide the security ordered by the Privy Council order may be varied in that Mr. Ng provides the security by depositing the security (or its equivalent in Macau, Hong Kong or UK currency) in an account in the name of Harneys, Westwood and Riegels, London account in the name of Harneys Westwood & Riegels, solicitors for Mr. Ng.**
- 5. The condition at paragraph two of the Privy Council order shall be met upon Harneys filing and serving a notice of compliance and undertaking in the form annexed hereto as Schedule 1.**
- 6. The US\$150,000 deposited by Mr. Ng with the Court as security for cost in the appeal herein be released forthwith by way of cheque made out to Harneys, Westwood & Riegels.**

- 7. Madam Chen do pay Mr. Ng the costs of the Variation Application fixed in the sum of U \$7,500 to be paid within 14 days.**
- 8. Madam Chen do pay into Court by way of an interim payment on account of costs in favour of Mr. Ng the sum of US\$1,000,000 the said sum to be paid within 28 days of the filing and service of the notice of compliance and undertakings required pursuant to Paragraph five of this composite order.**
- 9. Madam Chen do pay Mr. Ng the costs of the Interim costs Application at US\$18,000 to be paid within 14 days.**
- 10. The costs of Madam Chen's application for a stay dated 6 October 2015 and Mr. Ng's application for the stay to be discharged dated 9 December 2015 before the Privy Council be reserved:**
 - a) and remitted to the Privy Council if final permission to appeal is granted; or**
 - b) to Madam Chen's application for final leave to appeal, if final leave is not granted; or**
 - c) to any dismissal of Madam Chen's application for permission to appeal or appeal, if dismissed for want of prosecution.**
- 11. The stay requested is hereby refused.**

The Court further orders today:

- 1. The terms upon which Mr. Ng provides the security ordered by the Privy Council be varied in that Mr. Ng provides a security by depositing the security (or its equivalent in Macau, Hong Kong or UK currency) in the London account of Harneys, Westwood & Riegels, Solicitors for Mr. Ng.**
- 2. The conditions at paragraph 2 of the Privy Council order shall be met upon Harney's filing and serving a notice of compliance and undertaking in the form annexed hereto and marked as schedule 1. This variation is not opposed by Madam Chen.**
- 3. Upon filing the notice of compliance and the undertaking in the form required by this order the stay be deemed to**

have been lifted unconditionally. It follows that paragraph five of the Court of Appeal's order relating to assessment of costs may be carried into effect and as well the request for an interim payment for costs on account.

Reason:

Apart from Madam Chen's application for leave to appeal to Her Majesty in Council and the other applications disposed of at the day's hearing, the Court heard an application by Mr. Ng for an interim payment on account of costs occasioned in the court below and in the Court of Appeal which he said was in the region of \$3,367,804.86. He requested that an interim payment on account be made in the sum of US\$2,000,000.00. Mr. Ng relied on the authorities of *Mars UK Limited v Teknowledge Limited* [1999] 2 Costs LR 44 and a line of cases from the English Courts where interim costs orders had been made. He also relied on rule 17.1.(1)(g) of the Civil Procedure Rules 2000 ("CPR") and Part 69B.13 of CPR. The Court held that Rules of Court relied on as well as the English cases were sufficient authorities for establishing the Court's jurisdiction to order interim payments on account of costs. The ordinary position is that there should be an interim payment in general (see *Mars UK Limited*). However, the Court has a discretion which it must exercise taking all the circumstances into account. The authorities also showed, and the Court agreed, that the court does not have to wait for a detailed assessment so as to exercise the discretion but should make a reasonable assessment of what the likely costs would be when assessed. Having heard counsel on both sides, and taking all the circumstances into account as advocated by counsel for both the applicant and the respondent, the Court was satisfied that no basis had been advanced for departing from the ordinary position to make an interim payment on account of costs. The Court stated that it had considered the bill of costs presented and it was persuaded that Mr. Ng will recover a minimum of \$1,000,000.00 on an assessment. This was the sum which was accordingly ordered as an interim payment on account of his costs.

Having regard to the allegations and counter allegations of impecuniosity which left an unclear position regarding the financial circumstances of both parties, the Court was of the view that the interim payment on an account of costs should be paid into court within 28 days of filing and service of the

notice of compliance and undertakings.

Accordingly, a composite order was made in the terms above.

Case Name:

**[1] Mark Byers
[2] Mark McDonald
(as joint liquidators of the above-named company)
[3] Pioneer Freight Futures Company Limited (in
liquidation)
v
Chen Ningning
(Also Known as Diana Chen)**

[BVIHCVAP2015/0011]

Date: Monday, 11th January 2016 & Tuesday, 12th January 2016

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Stephen Smith, QC

Respondent: Mr. Victor Joffe, QC

Issues: Whether Miss Chen owed fiduciary duties to third appellant (“PFF”) as de iure director at time of repayment of Zenato loan – Alternatively, whether Miss Chen owed to PFF fiduciary duties as de facto or shadow director at time of repayment of Zenato loan – Alternatively, whether judge should have found that given Miss Chen’s pivotal role in the third appellant (including as sole signatory on the company’s bank accounts), she owed fiduciary duties to the company of which she was in breach – Whether evidence of Eddie Chen should have been rejected, including in particular about whether Miss Chen was director of PFF after May 2009; about Miss Chen’s lack of involvement in

transfers to Zenato; and about his email deletion system – Whether there was evidence that Miss Chen arranged repayment of Zenato loan, which should have been accepted – Whether judge erred in finding that there were no documents showing involvement of Miss Chen in affairs of PFF after July 2009 and in any event, in holding that any absence of such documents was reason for finding that she was not so involved – Whether learned judge erred in finding that Insolvency Act claim could not succeed if claim for breach of fiduciary duty failed – Whether learned judge's strong predisposition to find in favour of Miss Chen was serious procedural error which rendered trial unfair

Type of Oral
Result/Order
Delivered:

N/A

Result / Order:

Judgment reserved.

STATUS HEARING

Case Name:

Julian Christopher

v

The Queen

[BVIHCRA2012/0009]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Status of matter – Appeal against conviction and sentence –
Indecent assault – Rape

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

Directions

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The matter is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences on 4th April 2016;**
- 2. The Transcript is 90% complete only a few words are missing. The Registrar of the High Court is directed to send a gentle reminder to the learned judge in order for there to be verification of the missing words from the transcript with a view to the finalisation of the record.**

Reason:

The Crown had not yet received the transcript which was only 90% complete. The missing pages which were to be reconstituted from the judge's notes required the trial judge's verification. The trial judge was, however, sitting in another jurisdiction.

Case Name:

**Raymond Harrison
v
The Queen**

[BVIHCRAP2014/0003]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

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

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

**Status of matter – Appeal against conviction – Rape –
Unlawful sexual intercourse with girl under age of 16 –**

Possession of child pornography – Whether learned trial judge erred in discharging jury foreman after trial had commenced – Whether effect of learned trial judge’s decision to discharge jury foreman ‘deprived appellant of voice in jury room’ which may have been material to jury deliberations and renders appellant’s conviction unsafe

Type of Oral
Result/Order
Delivered:

Directions

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The Registrar of the High Court is directed to liaise with the Court Reporting Unit so as to ensure that the transcript is completed with expedition;
2. The application is adjourned for further report at the next sitting of the Court in the Virgin Islands during the week which commences 4th April 2016.

Reason:

There was no indication of status of the transcript for the record of appeal.

Case Name:

Rodney Simmonds Jr.

v

The Queen

[BVIHCRA2014/0004]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Michael Maduro (the appellant was not present)

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Appeal against conviction and sentence – Conspiracy to

commit murder

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

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. Matter fixed for report at the next sitting of the Court in the Virgin Islands during the week which commences 4 April 2016.**

Reason:

The appellant wished to proceed with his appeal. However, the record of appeal was still outstanding.

Case Name:

**[1] Henry Osmond Hodge
[2] Reuben Rufus Hodge
[3] Elliot McKinley Hodge**

V

**[1] Sylvia Hodge
[2] Gordon M. Phillip
[3] Ruby Jacinta Phillip**

[BVIHCVAP2012/0030]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellants: Ms. Patricia Archibald-Bowers (the appellants were not present)

Respondents: No appearance

Issues:

Status of matter – Whether learned judge erred in finding that there was agreement between parties for settlement of proceedings BVIHCV2004/0065

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

Oral Judgment or Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appellant is granted 14 days leave to comply with the para. 2 of the order dated 29th September 2015 and the matter is fixed for further report at the sitting of the Court in the Virgin Islands during the week which commences 4th April 2016.

Case Name:

**[1] Sylvia Maduro-Dale
[2] Lucia Chalwell
v
The Registrar of Lands
[BVIHCVAP2010/0022]**

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant:

Ms. Patricia Archibald-Bowers

Respondent:

Jo-Ann Williams-Roberts (the respondent was not present)

Issues:

Status of matter – Ownership of land – Prescriptive title

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

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

1. Hearing of this application is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences on the 4th of April 2016;
2. In the meantime the parties are to get together with a view

- to reconstructing the notes of evidence utilising the personal notes that were taken during the trial in the hope of using these as part of the final record;
3. That shall be the final adjournment.

Reason: The appellant indicated that he was still interested in the matter and would like to proceed with the appeal. There had been some difficulty obtaining the transcript however.

Case Name: Dwight Minott
v
The Queen
[BVIMCRAP2014/0023]

Date: Monday, 11th January 2016

Before: The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: In person

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues: Appeal against conviction and sentence – Unlawful importation of controlled drug – Unlawful importation of controlled drug with intent to supply – Fourth trial commenced after three previously aborted trials – Whether abuse of process and unfair to appellant – Whether there was miscarriage of justice – Whether verdict unreasonable and cannot be supported by the evidence – Whether sentence imposed too severe

Type of Oral Result/Order Delivered: Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The Registrar of the High Court is directed to communicate with the Senior Magistrate Her Worship Ms. Tamia Richards with a view to the finalisation of the record of appeal in an expeditious manner.
2. The Registrar is to provide a copy of this order to the Senior Magistrate within 14 days of this order.
3. The matter is fixed for further report during the sitting of the Court in the Virgin Islands during the week which commences on the 4th April 2016.

Reason:

The Crown confirmed that it had received a notice of intention to proceed but that the record of appeal was still outstanding. There was no indication on the status of the transcript. The appeal was filed in December 2014. The appellant was in custody.

Case Name:

**Shaun Williams
v
The Commissioner of Police
[BVIMCRAP2014/0020]**

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (the appellant was also present)
Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Status of matter – Keeping unlicensed firearm – Unlawful possession of explosives – Whether decision of learned magistrate to convict appellant unreasonable and cannot be supported having regard to evidence – Whether ammunition is ‘explosive’ within meaning of Explosives Act (Cap. 124, Revised Laws of the Virgin Islands 1991) – Whether learned magistrate erred in so holding – Whether decision bad in law and ought to be set aside

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

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The matter is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences on 4th April 2016.**
- 2. The Registrar of the High Court is directed to ascertain from the Senior Magistrate the status of the preparation of the transcript;**
- 3. The Registrar shall serve a copy of this order on the Senior Magistrate.**

Reason:

No transcript had been received. There was no indication of when the record would be received from the Magistrates' Court.

Case Name:

The Commissioner of Police

V

[1] Hugh Erickson

[2] Gerry Freeman

[3] Jomo Jack

[4] James Telford John

[5] Leon King

[BVIMCRAP2014/0015]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel

Respondents: Mr. Hugh Wildman (for the 1st and 2nd respondents, who were present)

No appearance of the 3rd respondent, Mr. Jomo Jack (unrepresented)

Mr. Stephen Daniels (for the 4th respondent, who was not present);

Ms. Valerie Gordon holding papers for Mr. Leon King (for the 5th respondent, who was present)

Issues:

Status of matter – Appeal against decision of learned magistrate to offer respondents bail and sever trial of respondents – Possession of proceeds of criminal conduct – Importation of cocaine – Being concerned in supply of controlled drug – Whether learned magistrate erred in rejecting legal evidence which substantially affected merits of case – Whether learned magistrate’s decision unreasonable or cannot be supported having regard to evidence

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

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The Registrar of the High Court is directed to inquire of the Senior Magistrate the reason for the delay in the preparation of the record of appeal;
2. The Senior Magistrate is directed to take the necessary steps to ensure that the record of appeal is prepared with expedition;
3. The hearing of this application is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences on 4th April 2015.

Reason:

The transcript was still outstanding. The Crown filed the appeal in October 2014 and notice of intention to proceed in December 2015. The Crown subsequently received confirmation that counsel in the matter had changed. Concerning the transcript, the Crown had made inquiries but received no indication on its status.

Case Name:

**Edmond Colaire
v
Commissioner of Police
[BVIMCRAP2014/0021]**

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: No appearance

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Status of matter – Appeal against conviction and sentence – Early guilty plea – Appellant unrepresented in court below – Definition of firearm – Whether learned magistrate erred by failing to establish that instrument in appellant’s possession was one which met definition of firearm – Whether appellant appreciated that in order for instrument to be determined a firearm it must be one which can discharge some type of missile – Instrument in appellant’s possession very old and no test done on it to determine whether it could discharge any type of missile – Whether appellant was served with notice from Registrar – Whether he intends to proceed with his appeal

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

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appellant and counsel for the appellant being absent, the Registrar is directed to ensure that service is effected on the appellant personally with a view to ascertaining whether the appellant intends to prosecute his appeal;**
- 2. Inquiries are to be made of Mrs. Creque, Attorney-at-law as to whether she represents the appellant in the appeal and the Registrar or Clerk of Court Ms. Dianah George is to report to the Court at the next sitting of the Court in the Virgin Islands;**
- 3. The application is adjourned to the next sitting of the**

Court in the Virgin Islands during the week which commences 4th April 2016.

Case Name:

[1] Eric Lake
[2] Glen Flanders
v
Commissioner of Police
[BVIMCRAP2014/0010]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellants: No appearance

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Status of matter – Whether learned magistrate misapprehended import of section 37B of Proceeds of Criminal Conduct Act, 1997 (Act No. 5 of 1997, Laws of the Virgin Islands) as amended – Whether learned magistrate erred in finding that cash which was subject of application in court below was proceeds of or intended for criminal conduct – Whether decision of learned magistrate cannot be supported by evidence

Type of Oral
Result/Order
Delivered:

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The Registrar of the High Court is directed to notify the 2nd appellant Mr. Flanders of the Status Hearing that is fixed for the next sitting of the Court in the Virgin Islands during the week which commences 4th April 2016;
2. The Registrar is at liberty to serve the Notice on Mr. Flanders by way of advertisement in the newspaper in St.

Marteen;

- 3. The matter is fixed for report at the next sitting of the Court in the Virgin Islands during the week which commences on the 4th April 2016.**

Reason:

The Crown indicated that they had been informed that Mr. Eric Lake had passed away. Mr. Flanders was residing in St. Marteen. Although at the time of the appeal Mr. Daniels was their counsel, the current status of their representation was uncertain.

Case Name:

[1] Kevin Greaves

[2] Nigel Registe

V

The Commissioner of Police

[BVIMCRAP2014/0022]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

**Appellants: Mr. Stephen Daniels (for the 1st appellant, who was not present)
No appearance for the 2nd appellant**

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues:

Status of matter – Proceeds of Criminal Conduct Act, 1997 (Act No. 5 of 1997, Laws of the Virgin Islands) – Whether learned magistrate erred in interpreting Proceeds of Criminal Conduct Act

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

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The matter is adjourned for report at the next sitting of the Court in the Virgin Islands during the week which commences on the 4th April 2016, in order for the Court to be advised whether Mr. Greaves intends to prosecute his appeal and for the Court to be accordingly advised.

Reason: The record of appeal was still outstanding. Counsel (Mr. Daniels) apologised for Mr. Greaves' absence, informing the Court that he was on house arrest in USVI. He indicated, however, that Mr. Greaves did wish to proceed with the appeal. Counsel did not make contact with the second appellant, Mr. Registe.

Case Name: Frankly Malone
v
Commissioner of Police
[BVIMCRAP2014/0013]

Date: Monday, 11th January 2016

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:
Appellant: Mr. David Penn (the appellant was present also)
Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues: Status of matter – Possession of firearm – Right of election – Offence of possession of firearm contrary to s. 11 of Firearms and Air Guns Act (Cap. 126, Revised Laws of the Virgin Islands 1991) as amended by s. 2 of Firearms (Amendment) Act, 1993 (Act No. 6 of 1993, Laws of the Virgin Islands) triable either way – Whether learned magistrate erred in not allowing appellant to elect mode of trial – Whether learned magistrate erred in determining that prosecution could determine mode of trial for offence triable either way – Whether learned magistrate erred in interpreting s. 2 of Firearms (Amendment) Act, 1993 which interpretation led to conclusion that said section gave prosecution election

as to mode of trial as opposed to court or appellant

Type of Oral
Result/Order
Delivered:

Directions

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The Senior Magistrate is directed to ensure that the preparation of the transcript of the proceedings is expedited and to indicate to the Court the status of the transcript in relation to the appeal;
2. The matter is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences 4th April 2016;
3. The Registrar is to serve the Senior Magistrate with a copy of this order.

Reason:

Ms. Scatliffe indicated that the Office of the Director of Public Prosecutions had not been served with the appeal nor the record of appeal.

Case Name:

Saniel Durant

v

Kharid Frett

[BVIMCVAP2014/0001]

Date:

Monday, 11th January 2016

Before:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Stephen Daniels (the appellant was also present)

Respondent: In person (unrepresented)

Issues:

Status of matter – 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:

1. The matter is adjourned to the next sitting of the Court in the Virgin Islands during the week which commences 4th April 2016 at which time the parties are to report on the way forward;

Reason:

The nature of the matter was such that mediation should be explored or it should be negotiated by the parties. The matter was adjourned to allow the parties time to ascertain if they wish to proceed with the appeal. Mr. Daniels indicated that he was representing Mr. Durant on a pro bono basis and was willing to seek to have the matter resolved amicably.

APPLICATIONS AND APPEALS

Case Name:

**Frank Bunbury
v
Mike Bontiff**

[BVIMCVAP2015/0003]

Date:

Tuesday, 12th January 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal**

Appearances:

Applicant: Ms. Charmaine Rosan-Bunbury

Respondent: Ms. Stacy L. Abel

Issues: Application for extension of time to appeal – Application for leave to adduce fresh evidence – Agreement between appellant and respondent for repair of (respondent's) vehicle – Challenge to findings of fact made by learned magistrate – Whether learned magistrate erred in fact and law and misdirected himself in finding that appellant was bailee for hire in bailment situation and responsible for safe keeping of respondent's vehicle, the respondent having granted access to vehicle to several other persons without appellant's consent – Whether decision of learned magistrate unreasonable and/or cannot be supported having regard to the evidence

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

Result/Order: It is hereby ordered:
1. The application for extension of time to appeal is refused, which makes it unnecessary to deal with the application to adduce fresh evidence;
2. Costs of the appeal awarded to the respondent in the sum of \$2,000.00 to be paid by 11th March 2016.

Reason: The decision of the learned magistrate was delivered on 24th November 2014 and the application for leave to adduce fresh evidence and to extend time to appeal was filed on 2nd October 2015, so there was a delay of just over 10 months in the filing of the application for extension of time. The Court stated that in order for the applicant to succeed on the application, he must satisfy the Court that: (1) the delay was not inordinate; and (2) there was a good reason for the delay.

The Court was satisfied that 10 months was an inordinate delay. It stated, however, that that does not cause the applicant to fail, provided there is a good reason for the delay. The explanation given was that the applicant was seeking corroborative evidence to support his case that was before the magistrate in November 2014. A report was made to the police and he was awaiting the result of police investigation into the matter. A report was received from the

police on 10th April 2015 showing the result of the investigation. It read as a final report from the police; there was no indication that any further report was forthcoming. This was in April 2015 and there was a further delay of 5 months before the application for leave to appeal was filed. The applicant provided no explanation for the further delay. The suggestion from counsel for the applicant was that they were waiting for a further report from the police. The Court stated that it did not think that a litigant who was successful in the Magistrates' Court, judgment having been entered in his favour, should have to wait months and months for the unsuccessful party to bolster his claim. The Court accordingly found that there was no good reason for the delay in filing the appeal.

The Court stated that there were two other requirements which needed to be satisfied for the grant of the application for extension of time to appeal, but the applicant having failed on grounds 1 and 2 meant that the application necessarily failed.

The third requirement would have been that the draft grounds of appeal must show that the applicant has a good prospect of success. The Court opined that having taken a look at the police report, it did not think the draft grounds took the applicant's case any further.

Finally, the Court held that there was obvious prejudice to a claimant who has been successful and should have the benefit of his judgment. The respondent/claimant, a daily paid construction worker, has been put to the expense of starting execution proceedings in January 2015 and on each occasion the hearing had been adjourned. On each occasion when he went to court he would lose his salary. The Court accordingly refused the application for extension of time to appeal and stated that it was therefore unnecessary for it to deal with the application for leave to adduce fresh evidence.

Case Name:

Thornton Smith Trust Corporation

v

T-Tobba Company Limited

[BVIHCVAP2015/0015]

Date: Tuesday, 12th January 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal

Appearances:

Applicant: Mr. Jamal Smith

Respondent: Mr. Robert Nader

Issues: Application for leave to appeal order of learned master granting addition of parties

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

Result / Order: Permission for leave is refused. The matter is remitted to proceed in accordance with the Rules of Court.

Reason: The Court held that the applicant did not meet the required threshold for the grant of leave to appeal.

Case Name:

Ming Shui Sum, Lawrence
Applicant/2nd Defendant
v

[1] Ming Siu Hung, Ronald
[2] Shaw Siu Kuen, Bertha
[3] Ming Shiu Tong
Respondents/Claimants
and

J.F. Ming Inc

1st Defendant

[BVIHCMAP2015/0016]

Date: Tuesday, 12th January 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal

Appearances:

Applicant / Appellant:	Mr. Paul Chaisty, QC, with him, Mr. Richard Evans
Respondent:	Mr. Christopher Parker, QC, with him, Mr. Stuart Cullen

Issues: Application for leave to appeal decision of learned judge – Application to adjourn made by respondents during trial to enable them to formulate and make at later date application to further amend their claim – No supporting documents – Whether learned judge erred in adjourning trial of action on third day and reserving costs and refusing to order provision of any security in respect of costs thrown away – Whether learned judge erred in exercise of his discretion

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

Result / Order: It is hereby ordered:

1. Leave to appeal is granted and the hearing of the application treated as the hearing of the appeal;
2. The appeal is allowed.
3. The order to adjourn is set aside.
4. The matter is remitted to the learned trial judge for it to be listed and the trial to continue with expedition.
5. Costs of the appeal to the appellant to be assessed unless agreed within 30 days.
6. Costs also to the appellant on the adjournment including the amendment of the amendment application heard on 3rd December 2015 to be assessed unless agreed within

30 days.

Reason:

An appellate court should only interfere with the exercise of a trial judge's discretion if the judge failed to take into account relevant factors or took into account irrelevant factors or got it plainly wrong, or if the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible (*Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188). The Court stated that it had no doubt that in the present matter, the learned trial judge did not take into account the relevant factors as provided in rule 20.1(3) of the Civil Procedure Rules 2000 in granting the adjournment in the court below. This therefore placed the Court in a position to exercise its discretion afresh. Taking into account all factors, the Court held that no reasonable trial judge would have exercised his/her discretion to grant an adjournment and the appeal should therefore be allowed.

Case Name:

East Pine Management Limited

V

[1] Tawney Assets Limited

[2] Oldril Holdings Limited

[3] Guildron Trading Limited

[BVIHCVAP2012/0035]

Date:

Tuesday, 12th January 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Robert Nader

Respondents: Ms. Renee de Gannes Penn (for the first respondent)

Issues:

Application for conditional leave to appeal to Her Majesty in

Council

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

N/A

Result / Order:

It is hereby ordered that:

- 1. The motion to appeal to Her Majesty in Council is hereby adjourned in terms of the draft consent order.**

Case Name:

**Dmitry Vladimirovich Garkusha
v
[1] Ashot Yegiazaryan
[2] Vitaly Gogokhia
[3] Hamfast Investment Limited
[4] Hackham Invest and Trade Inc
[5] Limerick Business Holdings Limited**

[BVIHCMAP2015/0010]

Date:

Wednesday, 13th January 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Brian Doctor, QC

Respondent: Mr. Joe Smouha, QC, with him, Mr. Andrew Wanambwa, Mr. Nicholas Brookes and Mr. Drew Holiner

Issues:

Appeal of costs order – Application (by first respondent) for security for costs – Learned judge in court below awarded first respondent costs of proceedings having set aside appellant’s application for permission to serve first respondent out of jurisdiction and having struck out claim

against first respondent

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

Oral Judgment or Decision

Result / Order:

1. The first respondent's application for security for costs is refused;
2. In respect of the assessment of costs on the application for security as well as the application for an adjournment, it is hereby directed that the parties shall file and serve brief written submissions by Monday, 25th January 2016;
3. The Court will reserve the decision on the appellant's/claimant's appeal and the parties shall be advised by notice of the date of delivery.

Case Name:

**Roro Edoure
v
The Queen**

[BVIHCRAP2014/0005]

Date:

Wednesday, 13th January 2016

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: Mr. Michael Maduro

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues:

Appeal against conviction and sentence – Manslaughter – Smuggling of migrants – Whether learned trial judge erred in failing to give credit for time spent on remand

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

The appeal is allowed to the extent that the sentence is varied to run from the date the appellant was remanded into custody, being 6th December 2010.

Reason:

The appellant was convicted of 8 counts of manslaughter and 1 count of human smuggling. He was sentenced to 10 years imprisonment on each count of manslaughter to run concurrently and 4 years imprisonment on the count of human smuggling.

The appellant appealed against the sentence of manslaughter on several grounds. However, at the hearing of the appeal he relied solely on his fourth ground, that the learned trial judge erred in failing to give him any credit for the time which he spent on remand. The Court, having read and considered the written and oral submissions of counsel on each side, stated that it was of the view that this appeal raised the narrow issue of when the sentence of 10 years commenced.

The Court stated that the principles of law that a trial judge should apply when dealing with the issue of time spent on remand are set out in the Privy Council case of *Callachand and Another v State* [2008] UKPC 49 and the Caribbean Court of Justice case of *Romeo Da Costa Hall v The Queen* [2011] CCJ 6 (AJ). These principles were also applied in *Shonovia Thomas v The Queen* BVIHCRA2010/0006 (delivered 27th August 2012, unreported), a case which emanated from this Court in the Virgin Islands.

The Court stated that having examined the record of appeal as it related to sentencing, it was satisfied that the learned trial judge, in sentencing the appellant, did not conduct the exercise that was required in the circumstances. The trial judge merely stated that he had taken into consideration that the appellant was in custody for almost 2 years. In the Court's view, this approach of the learned trial judge did not meet the requirements as outlined in the authorities. The judge was required to conduct a mathematical calculation of the time spent on remand and to order that the sentence was to take effect from such time as had been spent on remand,

unless there were some unusual circumstances. The Crown conceded however, that there were no unusual circumstances. The sentence should have clearly indicated that the deduction was made for the time spent on remand.

Case Name:

Keno Allen

v

The Queen

[BVIHCRA2013/0005]

Date:

Wednesday, 13th January 2016

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: Mr. David Penn

Respondents: Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Ms. Melissa Brewley, Crown Counsel

Issues:

**Appeal against conviction – Robbery – Attempting to choke
– Indecent assault**

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

Oral Judgment or Decision

Result / Order:

- 1. The appeal is allowed and the conviction is quashed and the sentence is set aside.**
- 2. Leave is granted to the Director of Public Prosecutions to retry the appellant, if the DPP so desires.**

Reason:

The appellant was convicted of the offences of attempting to choke, robbery and indecent assault. He was sentenced to 15 years, 10 years and 2 years imprisonment for the offences, respectively.

The appellant appealed against his conviction on several grounds. The Court, having reviewed the submissions of counsel on both sides as well as the record of appeal, requested to hear counsel on both sides on the learned trial judge's treatment of the following:

- 1) the appellant's defence of alibi
- 2) the identification evidence
- 3) the elements of the offences

The Court noted that alibi was the appellant's sole defence. The learned Principal Crown Counsel conceded (rightly, in the Court's view) that the learned trial judge did not address the issue of alibi in his summation to the jury. The Court was of the view that this was a misdirection which resulted in a miscarriage of justice and that therefore the appellant's conviction was unsafe.

The learned Principal Crown Counsel urged the Court to apply the proviso in spite of this misdirection by the learned trial judge. The Court considered applying the proviso, but ultimately held that in a case where the appellant's sole defence was not put to the jury, its application was not appropriate. The learned trial judge had a duty to put the appellant's defence fairly to the jury.

After hearing submissions from both counsel in relation to having the matter retried and, having regard to the principle in relation to retrials as outlined in the cases of *Dennis Reid v The Queen* [1980] AC 343 and *Sherfield Bowen v The Queen* ANUHCRA2005/0004 (delivered 20th June 2007, unreported), the Court held that it was appropriate for leave to be granted to the Director of Public Prosecutions to retry the appellant if he so desired.

Case Name:

James Anthony
(as Personal Representative of the Estates of
Abraham, deceased and Clarita Anthony, deceased)
V
[1] Eileen Papone
[2] Lourie Anthony

**(claiming on their own behalf and also as Personal
Representatives of the Estates of Abraham
Anthony, deceased and Clarita Anthony)**

[BVIHCVAP2011/0038]

Date: Wednesday, 13th January 2016

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury

Respondents: Ms. Monique Peters

Issues: Res judicata – Abuse of process – Estoppel – Whether learned trial judge erred in failing to find that respondents' claim was abuse of process and that respondents were accordingly estopped from bringing claim – Whether respondents' claim was time barred under Limitation Act (Cap. 43, Revised Laws of the Virgin Islands 1991) – Whether learned trial judge erred in making findings that appellant had acted in breach of trust and dishonestly – Whether procedure adopted on trial of claim enabled learned judge to arrive at findings of breach of trust and dishonesty on part of appellant

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

Directions

Result / Order:

1. The supplemental skeleton filed on 8th January 2016 and supplemental list of documents and authorities filed on 13th January 2016 are deemed properly filed and served.
2. The respondent shall file and serve skeleton arguments in reply within one month of the date of this order.
3. Leave is granted to the appellant to file and serve a reply skeleton argument within one month of service of the respondent's skeleton arguments.
4. The appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 4th April 2016.

Case Name:

André Penn

v

The Queen

The Queen

v

Andre Penn

[BVIHCRAP2014/0006]

[BVIHCRAP2015/0002]

Date:

Thursday, 14th January 2016

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

**The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Wayne Rajbansie, Director of Public Prosecutions

Respondents: Mr. Andre Penn, in person

Issues:

Appeal against conviction – Appeal (by Crown) against sentence imposed on appellant – Indecent assault – Unlawful sexual intercourse with girl under age of 13 – Buggery – Widespread and sustained adverse publicity over extended period in relation to case – Whether learned trial judge failed to ensure that measures were taken to guarantee that retrial of appellant was fair and not oppressive – Whether conviction unsafe as a result – Jury selection – Whether jury members were selected in accordance with laws of Virgin Islands – Fairness of retrial – Whether statements made by learned Director of Public Prosecutions during retrial impacted on fairness of retrial – s. 146(1)(c) of Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Whether learned trial judge failed to warn jury about how evidence of virtual complainant may have been affected by self interest – Whether learned trial

judge failed to direct jury on fact that there was no corroboration of virtual complainant's account of events – Whether learned trial judge failed to put or to put adequately defence to jury in summing up – Sentence of 15 years imposed with total discount of 5 years for delay giving final sentence of 10 years imprisonment – Whether sentence in totality unduly lenient – Whether learned trial judge erred in law as to his powers of sentencing

Type of Oral
Result/Order
Delivered:

Directions

Result / Order:

1. It is hereby ordered that the applicant or his counsel is to file and serve streamline skeleton submissions along with authorities on or before 15th February 2016.
2. The respondent is to file and serve skeleton submissions along with authorities on or before 15th March 2016.
3. The appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 4th April 2016.

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: Thursday, 14th January 2016

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Patricia Archibald-Bowers

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

Issues: Consent Order

Type of Oral Result/Order Delivered: N/A

Result / Order: By consent 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 4th April 2016.

Case Name:

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

Date: Thursday, 14th January 2016

Coram: The Hon. Mr. Davidson Kelvin Baptise, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Mishka Jacobs

Respondent: 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

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

Oral Judgment or Decision

Result / Order:

- 1. The appeal is allowed in so far as there was no breach of contract on the part of the appellant.**
- 2. The sum of \$438,650.00 awarded for damages to the respondent is set aside.**
- 3. Costs of the appeal is 2/3 of the prescribe costs awarded in the court below being \$61,515.00.**
- 4. The appellant is entitled to the costs of the appeal in the amount of \$61,515.00.**

Reason:

The appellant appealed against findings of fact and law made in a judgment by Madam Justice Charles given on 11th May 2011 after a trial.

There were 6 grounds of appeal:

- 1. The learned judge erred in finding that the building contract was an entire contract.**
- 2. The learned judge erred in finding that the appellant repudiated the building contract by leaving the**

worksite in December 2008. In particular the learned judge failed to consider or to consider properly:

- (a) that none of the correspondences from the respondent in January 2009 referred to the appellant's abandonment of the work.
 - (b) the appellant's uncontroverted evidence that he continued work on the site until the end of January 2009.
 - (c) the respondent's evidence that she did not visit the site during the course of January 2009.
 - (d) the terms of the appellant's correspondence in January 2009.
 - (e) Her own finding that the appellant was willing and ready to continue the project.
 - (f) the respondent's correspondence in January 2009 which demonstrated that she considered the contract as ongoing.
3. The learned judge erred in not finding that the respondent rendered it impossible for the contract to continue by her inability to finance the project and her refusal to consider the appellant's offer to meet with the bank officials in January 2009 and that even if the appellant had been in breach of the contract in December 2008, the respondent did not accept such breach prior to the appellant's letter of 31st January 2009.
 4. The learned judge erred in not finding that it was the respondent who repudiated the contract by her refusal to meet with the appellant and the bank and the appellant accepted such repudiation by not returning to the worksite after January 2009.
 5. The learned judge erred in the determination of the quantum of damages for breach of contract in that having stated the proper measure of damages that is the damages are the difference between contract price and the cost of completion, she failed to apply that test by including in the contract price the reasonable cost for the variations undertaken by the appellant at the request of the respondent.
 6. The learned judge erred in awarding damages for residential and business rent without considering, and as setting off from those figures the cost of the

mortgage that would have been incurred in lieu of such rents.

The learned trial judge in her judgment found that the defendant/appellant was in breach of contract and at paragraph 110 of her judgment awarded damages to the claimant/respondent in the sum of \$438,650.00. The Court noted that the breach that the learned trial judge found was that the appellant had abandoned the property and had failed to complete the project as per the contract. The Court examined this finding as well as those at paragraph 24(3) of the judgment where the learned trial judge noted that the appellant stopped work on the project in December 2008 because of a lack of funds. This lack of funds was due to the increased costs brought about by the variations to the house that the claimant/respondent tacitly or expressly authorised.

Having regard to the learned judge's findings that the project stopped in December 2008 or the appellant stopped working on the project because of a lack of funds, the Court was of the view that the judge's finding that the appellant was in breach of contract cannot be sustained with "a lack of funds" being identified as the reason why the appellant had stopped working. In the court's view, he had stopped working because of the inability of the respondent to perform her obligations under the contract agreed upon to provide funds for the completion of the building.

The Court was also of the view that it was inadequate to state that the appellant did not provide a figure for the variations which he carried out. That failure to provide a figure did not put the respondent in a position where she could not have monies to complete the building. There was no reasonable explanation, therefore, for the learned judge's findings that the appellant was under a legal obligation to complete the building, notwithstanding the lack of funds. Such obligation was not imposed on him under the contract that he entered into and the Court was not provided with any law to assist it in making such a finding.

Accordingly, the Court found that the appellant was not in breach of contract in December 2008 when he left the worksite (or on a subsequent date alleged by the contractor being January, 2009). He left the site because there were no monies available to continue the project. The respondent gave evidence to that effect and the judge noted this

evidence at paragraphs 62 and 63 of the judgment:

“I return to the key issue. Did the defendant breach the contract when he left the site when only 60.23% of works were completed and he having collected the entire contract price less the 5% retention money?”

“The defendant answered this question in the negative. He alleged that it was the claimant’s inability to continue to fund the project in the future coupled with her refusal to meet with him to determine the best way forward that gave rise to the impossibility of performance of the contract. I agree that, on cross-examination, the claimant deposed that she had no more money to give to the defendant and that the bank would not re-finance the project.”

The Court noted that this was a clear finding by the trial judge of an admission by the respondent that she had no more money to proceed with the project and the bank had declined to refinance the project. Moreover, the trial judge, in her judgment, quoted from a letter which the respondent wrote to the appellant on 14th January 2009. The Court underscored the judge’s observations and noted that the real reason for the stoppage of the work in December 2008 was not a breach by the appellant but the respondent’s inability to fund the continuation of the construction because of the substantial variations that had been carried out. The words quoted by the learned judge from the letter of 14th January 2009 at paragraph 63 of her judgment are as follows:

“When I communicated your request for additional funds to finish the building to the Bank’s Management, they quickly pointed me to the existing contract between you and myself. Thus, any request for further sums cannot be addressed before you complete your obligations under the contract.”

In the Court’s view, this was a clear declaration by the respondent that even if the appellant had submitted a request for further sums (which it appeared to the Court that he did from the above excerpt), the respondent would not have complied with the request.

The Court held, therefore, that the learned judge erred in

finding that the appellant had breached the contract and the award of damages which the trial judge made to the respondent for breach of contract was accordingly set aside.

The Court found that the appellant's ground of appeal that the judge failed to carry out a proper assessment by way of a set off of the variations failed because the appellant did not make a counter claim for variations at the trial. The Court was not provided with the costs for these variations and the trial judge was correct in this respect, and was not in a position to ascertain an amount to which she could have effected a set off.

Case Name:	Petra Cooper (nee Klvacova) V Peter Cooper [BVIHCVAP2012/0010]
Date:	Thursday, 14th January 2016
Coram:	The Hon. Mr. Davidson Kelvin Baptise, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Ms. Marie-Lou Creque
Respondent:	In person
Issues:	Whether learned judge erred in holding that sum of £50,000.00 amounted to money loaned to appellant by the respondent which ought to be repaid
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order:	1. The appeal stands dismissed. 2. Costs to the respondent in the sum of \$2,000.00.

Reason:

The appellant appealed against a court order of £50,000.00 which sum the trial judge had found was loaned to the appellant and ought to be repaid. Paragraphs 38 to 40 of the trial judge's judgment provided the bases for that conclusion.

At paragraphs 38 and 39 the learned judge states that the respondent testified that:

"... during the marriage he gave 50,000 pounds sterling to the Mother [the appellant] to use towards purchasing a home together in Slovakia, and when those plans fell through ... he agreed that she could use the money towards reducing the mortgage on her house. ... He said he expected her to repay this money as it was not a gift and he had obtained it himself on loan facility from his bank.

"The Mother, although not claiming it was a gift denied that this money was a loan or was given to her for a particular purpose as alleged and she stated that she used it for their joint benefit and for A. This the Father [the respondent] denied."

The Court noted that the trial judge accepted the father's evidence.

The learned judge further stated in the judgment at paragraph 40:

"I note that she produced no documentary evidence which ought to have been readily available to her of how those funds were spent. They were entrusted to her for a particular purpose. If she was allowed to use the funds in the interim to pay off her mortgage on her separate property then the only reasonable inference to be drawn in all the circumstances, especially having regard to how the monies were raised, is that she should repay the sums to the Father when required to do so."

In the Court's view, the trial judge's statement, "No doubt had the marriage survived it is hardly likely that the Father would have sought repayment" was obiter. Nevertheless, the Court did not view that this released her from her

obligation to repay as intended. The Court noted that the trial judge made critical factual findings and drew inferences from facts she found. The law is well settled with respect to how an appellate court can interfere with factual findings made by a trial judge and a trial judge's evaluation of the evidence and inferences that were drawn therefrom.

The correct approach of an appellate court with respect to interfering with a trial judge's factual findings is that the appellate court should not interfere with a trial judge's conclusions on primary facts unless it is satisfied that the judge was plainly wrong. The restraints against an appellate court interfering with findings of fact apply not only to findings of primary fact, but also to the trial judge's evaluation of these facts and the inferences drawn from them. This being the law on the matter the Court could therefore find no basis to interfere with the judge's factual findings and the inferences which she drew from them. It was clearly open to the trial judge to draw such inferences on the facts which she found.

Case Name: **SFC Swiss Forfailing Company Ltd.**
v
Swiss Forfailing Ltd.

[BVIHCMAP2015/0012]

Date: **Thursday, 14th January 2016**

Coram: **The Hon. Mde. Louise Esther Blenman, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal

Appearances:
Appellant: **Mr. James Collins, QC, with him, Mr. Jonathan Addo**
Respondent: **Mr. Charles Samek, QC**

Issues: **Appeal against oral judgment refusing stay**

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

N/A

Result / Order:

The decision is reserved and will be rendered on notice to the parties.

Case Name:

**Glen Henley
(Trading as Cane Garden Bay Pleasure and Water
Sports Equipment)**

v

**Poco Loco Enterprises Incorporated
(A Delaware Corporation)**

[BVIHCVAP2015/0007]

Date:

Friday, 15th January 2016

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal**

Appearances:

**Appellant /
Applicant:**

Ms. Dancia Penn, QC

Respondent:

Mr. William Hare

Issues:

Application for extension of time to appeal and relief from sanctions – Application for stay of execution – Appeal against assessment and award of damages and pre-judgment interest – Default judgment – Negligence

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

Oral Judgment or Decision

Result:

1. The time for appealing against the Master's decision is extended to 15th January 2016 to appeal against the award of interest only.
2. The hearing of application for extension of time is treated as the hearing of the appeal;
3. We allow the appeal to the extent that the order of the master is varied to delete the award of interest on the damages;
4. We award interest on the award of damages from the date of the judgment on 5th May 2015 until payment at the rate of 5% per annum;
5. No order for costs of the application and the appeal
6. Application for stay of the judgment is dismissed;
7. Application for relief from sanctions is also dismissed.

Reason:

This was an application for extension of time to appeal against a decision of the learned master on assessment of damages. The applicant operates a business at Cane Garden Bay which includes the mooring of boats. The respondent entrusted its boat to the applicant. During the night of 14th March 2007 the boat became loose, drifted onto the rocks at Ballast Bay and was badly damaged. The respondent filed a claim for the damage to its boat.

Default judgment was entered for damages to be assessed. They were assessed by the learned master on 28th October 2014 and the decision was delivered via Skype on 28th May 2015. However, there were problems with the transmission. The learned master had also issued a written judgment dated 5th May 2015. On 21st May 2015 the applicant applied for leave to appeal against the learned master's decision. On 28th September 2015, however, the application was dismissed by the Court of Appeal because the applicant did not need permission to appeal a final judgment.

On 23rd October 2015 the applicant applied for an extension of time to appeal. In order to succeed, he had to satisfy four elements: (1) that the length of the delay was not inordinate; (2) that there was good reason for the delay; (3) that the delay had not prejudiced the respondent; and (4) that he had good prospects of succeeding.

Concerning the issue of delay in bringing the appeal, the applicant took early steps to challenge the learned master's decision by applying for leave to appeal it. It turned out that

leave was not required and the leave application was dismissed. There was a further delay of three weeks between the dismissal and the filing of the application for an extension of time to appeal. However, the Court found that the overall delay was not inordinate and the applicant had demonstrated an interest in prosecuting his appeal.

With regard to the issue of prejudice to the respondent, the Court stated that based on the way it intended to deal with the matter, there would be no prejudice to the respondent.

The Court found that there was no good prospect of success against the master's award of damages. It stated that while causation is a legitimate issue on an assessment of damages, on the facts of this case, the issues raised appear to relate to liability and not to causation: *Lunnun v Singh and Others* [1999] CPLR 587 applied.

The learned master's acceptance of the highest valuation of the boat was entirely within her discretion and there is no prospect of success in appealing against this aspect of the the decision, nor is there any good prospect of success on the complaint against the way that the master treated the evidence and handled the witnesses in this matter.

The Court stated that it was of the clear view that the learned master erred, however, in awarding interest from the date of the accident and the applicant had excellent prospects of success against the award of interest. The BVI court does not have jurisdiction to award pre-judgment interest except in limited cases, none of which apply to this situation. This was confirmed by Bannister J in the case *Ocean Conversion (BVI) Limited v The Attorney General of the Virgin Islands* BVIHCV2008/0192 (delivered 1st December 2009, unreported). The Court further held that where an applicant has very strong grounds of appeal the merits will play a significant role when it comes to balancing the various factors that have to be considered in coming to a decision on whether to extend time: *The Queen on the application of Dinjan Hysaj v Secretary of State for the Home Department* [2014] EWCA 1633.

The Court ultimately held that, having regard to all the circumstances, the proper disposal was to grant an extension of time to appeal against the award of interest. Since both parties had some measure of success, no order

was made as to costs.

Case Name: **Hualon Corporation (M) SDN BHD (in receivership)**
Acting by its Receiver and Manager
Mr. Duar Tuan Kait
V
Marty Limited
[BVIHCMAP2015/0017]

Date: **Friday, 15th January 2016**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: **Mr. John Carrington, QC**

Respondent: **Mr. Paul Dennis, QC, with him, Ms. Nadine Whyte and Dr. Alecia Johns**

Issues: **Interim injunction pending determination of claim – Whether learned judge failed to properly apply applicable legal test for grant of interim injunction for preservation of relevant property – Whether judge failed to consider properly or at all applicable law on limitation – Whether judge failed to apply properly or at all provisions of rule 17.4(4) of the Civil Procedure Rules 2000 to facts and circumstances of case – Whether learned judge erred in law or in principle and misdirected himself – Whether judge misunderstood appellant’s case and the evidence – Whether judge took into account irrelevant factors and/or reached conclusion that was plainly wrong, which no judge properly directed would have reached**

Type of Oral **N/A**

**Result/Order
Delivered:**

Result / Order: Judgment reserved.

Case Name:

[1] Ralph James

[2] Adrian Arthur

V

The Commissioner of Police

[BVIMCRAP2013/0008]

[BVIMCRAP2013/0009]

Date: Friday, 15th January 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Ralph James, in person
Mr. Michael Maduro (for Adrian Arthur)

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel

Issues: Appeals against sentence – Possession of controlled drug
with intent to supply – Possession of controlled drug –
Importation of controlled drug – Offering to supply
controlled drug – Whether sentences imposed by learned
magistrate were unduly severe

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

Directions

Result / Order: 1. The appellants shall file and serve legal submissions by
Friday, 12th February 2016.

2. The respondent shall file and serve submissions in response on Monday, 14th March, 2016.
3. 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 4th April 2016.

Case Name:

Jerome Allen
v
The Commissioner of Police

[BVIMCRAP2014/0001]

Date:

Friday, 15th January 2016

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: **Ms. Ayodeji Bernard, with her, Ms. Stacy L. Abel and Ms. Ruth-Ann Richards**

Respondent: **Ms. Tiffany Scatliffe, Principal Crown Counsel**

Issues:

Appeal against sentence – Whether sentence imposed was excessive having regard to sentences imposed for similar offences in courts of equal jurisdiction – Application for bail pending appeal

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

Oral Judgment or Decision

Result / Order:

1. The application is refused.
2. The appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 4th April 2016.

Reason: The Court was of the view that the circumstances put forward with regard to the behaviour of the applicant did not meet the required threshold for it to consider granting the application for bail pending appeal. The Court explained that in order for an applicant to meet the threshold (which is high) he or she must show that there are special or exceptional circumstances.

Case Name: The Commissioner of Police
v
[1] Lester Terrence DeCastro
[2] Isaac Bellony Caena
[BVIMCRAP2013/0016]

Date: Friday, 15th January 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions holding papers for Mr. Valston Graham

Respondents: Mr. Lester DeCastro, in person

Issues: Appeal against decision of learned senior magistrate to uphold no case submission in favour of respondents – 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: Directions

Result / Order:

1. The appellant is to file and serve legal submissions by Friday, 26th February 2016.
2. The first respondent is to file and serve legal submissions by Friday, 27th May 2016.
3. 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 18th July 2016.

Case Name:

**The Commissioner of Police
v
Neal Dabreo**

[BVIMCRAP2015/0001]

Date: Friday, 15th January 2016

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions

Respondent: Ms. Charmaine Rosan-Bunbury

Issues: Application to strike out appeal

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

Result / Order:

1. The application to strike out the appeal filed 14th January 2016 is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 4th April 2016
2. It is directed that the applicant files and serves written

submissions on or before 26th February 2016

3. The respondent without prejudice to the application shall file and serve legal submissions by 18th March 2016.
4. The appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 4th April 2016.

Case Name:

[1] Wendell Anthony

[2] Marvin Robinson

V

Commissioner of Police

[BVIMCRAP2014/0016]

Date:

Friday, 15th January 2016

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Paul Webster, QC, Justice of Appeal

Appearances:

Appellant: Mr. Hugh Wildman

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. Garcia Kirt Kelly, Crown Counsel, for the Director of Public Prosecutions

Issues:

Appeal against conviction – Assault causing actual bodily harm – Whether learned magistrate erred in relying on hearsay

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

N/A

Result / Order:

It is hereby Ordered:

- 1. The decision is reserved.**

Case Name:

**Ivan Gumbs
V
Tara Ladonna Matthias
[BVIMCVAP2015/0001]**

Date:

Friday, 15th January 2015

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal**

Appearances:

Appellant: Ms. Marie-Lou Creque (the appellant was also present)

Respondent: Mr. Richard Rowe

Issues:

Child maintenance – Whether decision of learned magistrate unreasonable – Whether learned magistrate erred in law in failing to hear basis for application for variation of order dated 21st July 2011 pursuant to s. 119 of the Magistrate’s Code of Procedure, Cap. 44 (Revised Laws of the Virgin Islands 1991) – Whether decision of learned magistrate unreasonable on basis that she failed to make enquiries of appellant as to whether his means had been altered or about his expenses, including other child maintenance payments, loans, etc. but instead just queried his income – Whether magistrate’s decision unreasonable on basis that she determined that appellant ought to increase his maintenance payments by \$140.00 per month

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

Oral Judgment or Decision

Result / Order:

- 1. By consent it is ordered that the order of magistrate Ayanna Baptiste-Dabreo dated 5th May 2015 is set aside.**
- 2. The matter is remitted to the Magistrates’ Court for full and substantive hearing of the application for variation of**

**the order of Senior Magistrate Valerie Stephens of 21st
July 2011.**