

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
18th – 22nd May 2015

JUDGMENTS

Case Name:

**[1] Patrick Facey
[2] Michael Facey
v
The Queen**

[BVIHCRA2013/0009]

Date:

Monday, 18th May 2015

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellants:

Ms. Natalie Sandiford, Senior Crown Counsel, Attorney General's Chambers, holding papers for Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions

Respondent:

Mr. Robert Nader holding papers for Mr. Patrick Thompson

Issues:

Criminal appeal – Appeal against conviction – Wounding with intent contrary to section 163 of the Criminal Code of the Virgin Islands – Whether trial judge ought to have left alternative verdict of unlawful wounding to the jury – Whether trial judge ought to have given a good character direction in relation to appellant who exercised the right to remain silent at trial – Whether remarks by trial judge to the jury on majority verdict inappropriate – Appeal against sentence of 10 years' imprisonment – Whether sentences imposed by trial judge excessive

**Result and
Reason:**

Held: dismissing the appeal and affirming the convictions and sentences of the appellants, that:

1. The question whether or not to leave an alternative verdict for a lesser offence to the jury in a particular case involves an examination by the trial judge of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise. In considering this matter, the judge is obliged to take into account the question of fairness to the defendant, on the one hand, and the question of proportionality, on the other. That is to say, whether the alternative verdict would do justice to the facts of the case. The decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case, and the manner of the judge's exercise of this discretion will not lightly be interfered with on appeal. Ultimately, the question on appeal is whether the judge's failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction.

Regina v Maxwell [1990] 1 WLR 401 applied; *Regina v Coutts* [2006] 1 WLR 2154 applied; *R v Foster and other appeals* [2008] 2 All ER 597 applied; *The State v Singh (Clement)* (1995) 51 WIR 128 applied; *R v Foster and other appeals* [2008] 2 All ER 597 applied.

2. In the instant case, there was considerable evidence from which the jury could have concluded that Mr. Springer's injuries were inflicted by the appellants unlawfully, maliciously and with the intention to do him grievous bodily harm. On the evidence and in the light of the perfectly fair direction to the jury on the possible effect of the appellants' case, it was entirely open to the learned trial judge to take the view that a direction to the jury on the alternative verdict of unlawful wounding was apt to divert their attention from the essential issue in the case, that is, whether Mr. Springer's injuries were inflicted by the appellants, with the intention of causing grievous bodily harm, or

whether the injuries came about accidentally. In these circumstances, a direction on unlawful wounding might only have served to offer the jury a compromise which, on the Crown's case, simply did not arise and on the appellants' case, would have done a serious injustice to their defence. There was simply no evidence tending to establish that the appellants might have inflicted wounds to Mr. Springer unintentionally.

3. A defendant who has no previous convictions of any significance is entitled to the benefit of a good character direction from the judge. Generally speaking, the defendant's good character must be distinctly raised, either by direct evidence given by and/or on his behalf, and/or by eliciting it in cross-examination of prosecution witnesses. However, in an appropriate case, the failure of counsel to put the defendant's good character in issue may itself, particularly if unexplained, make a guilty verdict unsafe. But, the omission of a good character direction is not inevitably fatal to the fairness of the trial or to the safety of a conviction, as much may turn on the nature of and issues in a case and on the other available evidence. In this case, the good character direction to the jury in relation to the first appellant was necessitated by the fact that the first appellant, who gave sworn evidence, explicitly put his character in issue. However, not only did the second appellant opt to remain silent, but he neither put any suggestions to the prosecution witnesses nor called any witnesses with a view to establishing his good character. Accordingly, the second appellant not having given evidence, the force of any argument that the absence of the credibility limb of the good character direction rendered the conviction unsafe would be greatly diminished. Further, it was impossible to see how, in the light of the cogent evidence which the jury clearly accepted of the second appellant's participation in the attack on Mr. Springer, a propensity direction would have benefitted him. In the circumstances, this was a case in which any potential assistance to the second appellant from a good character direction was wholly outweighed by the nature and coherence of the evidence against

him.

Teeluck v State of Trinidad and Tobago [2005] 1 WLR 2421 applied; *Jagdeo Singh v State of Trinidad and Tobago* [2006] 1 WLR 146 applied; *Nigel Brown v State* [2012] UKPC 2 referred; *Mark France and Rupert Vassell v The Queen* [2012] UKPC 28 applied; *Balson v The State* (2005) 65 WIR 128 applied.

4. When directing a jury on a unanimous or majority verdict, the overriding principle is that no pressure must be exerted on a jury to return a verdict and they should be free to deliberate uninfluenced by any promise or threat. Where the judge issues an ultimatum or stipulates a deadline, the conviction is liable to be set aside. The jury must not be made to feel that it is incumbent on them to concur with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so. Despite the fact that the trial judge in the instant case, quite unnecessarily at that stage of the proceedings, did give some indication to the jury of the proportions in which they would need to be divided before a majority verdict would be acceptable, he did not go further to suggest any consequences of a failure to reach agreement. Having told the jury of what the law required for a majority verdict, the judge was content to leave the matter with the comment that “the time for a majority verdict has not yet arrived”. No hint of prejudice caused to the appellants by the judge’s remarks was suggested. Further, the jury returned a unanimous verdict after the expiration of the relevant two hour period for a majority verdict. In all the circumstances, it cannot be said that, by these remarks, the judge imposed undue pressure on the jury to arrive at the verdict which they did.

Flavia Richardson v The Queen SVGHCRA2009/0019 (delivered 3rd June 2010, reissued with corrections 1st September 2010, unreported) distinguished; *R v Shields and another* [1997] Crim LR 758 referred.

5. An appellate court will not usually interfere with a trial judge's sentencing decision unless that decision is shown to be manifestly excessive or wrong in principle. In the instant appeal, the learned trial judge acknowledged that the appellants were persons of good character and explicitly took into account the favourable evidence given in mitigation on their behalf. However, as an aggravating factor, the judge was particularly struck by the fact that the appellants' attack on Mr. Springer was premeditated and emphasised that the appellants had armed themselves with machetes. Finally, the judge pointed out that the maximum penalty to which the appellants were liable was life imprisonment. In all the circumstances, taking into account the material which was placed before the judge and bearing in mind all the relevant factors, including the nature of the appellants' attack on Mr. Springer, the extent of his injuries and the appellants' good character, it could not be said that the sentences imposed by the learned trial judge were either manifestly excessive or wrong in principle.

Vincent Olalekan Fadairo v The Queen [2012] EWCA Crim 1292 referred.

APPLICATIONS AND APPEALS

Case Name:

Margaret V. Greene (Nee Jones)

v

Lorn C. Greene

[BVIHCVAP2014/0006]

Date:

Monday, 18th May 2015

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Anthony Gonsalves, QC, Justice of

Appeal [Ag.]

Appearances:

Appellant: Ms. Jennifer Jarvis
Respondent: Ms. Marie-Lou Creque

Issues: Application for extension of time to file notice of appeal – Costs

Result / Order: [Oral delivery]
The application is dismissed with costs to the respondent agreed in the sum of \$500.00.

Reason: The Court held that the application for extension of time in this matter was misconceived. The applicant required the leave of the court to bring this appeal pursuant to section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap. 80, Revised Laws of the Virgin Islands 1991) as the order of Byer J was an interlocutory order. The leave of the court was not sought, notwithstanding the order of a single judge of this Court dated 18th December 2014 stating same.

Case Name: The Attorney General of the Virgin Islands
v
Daphne Alves

[BVIHCVAP2011/0065]

Date: Monday, 18th May 2015

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

Appearances:

Appellant: Ms. Natalie Sandiford, Senior Crown Counsel,
Attorney General's Chambers

Respondent: Mr. John Carrington, QC, with him, Ms. Dian Fahie-
deCastro

Issues: Application for final leave to appeal to Her Majesty in
Council

**Result / Order
& Reason:** [Oral delivery]
The application is adjourned to enable counsel to
settle the record of appeal and to obtain the
Registrar's certificate of compliance.

Case Name: [1] Halliwell Assets Inc
[2] Panikos Symeou
[3] Marigold Trust Company Limited
Appellants / Defendants

v

Hornbeam Corporation
Claimant

v

Vadim Shulman
Respondent

[BVIHCMAP2015/0001]

Date: Monday, 18th May 2015

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

Appearances:

**Appellants /
Applicants:
(ex parte)**

Mr. Vernon Flynn, QC, with him, Mr. Robert Nader

Issues:

Costs orders obtained by appellants in court below – Appellants’ application to have Mr. Shulman joined as party to proceedings giving rise to costs orders against Hornbeam Corporation and for Mr. Shulman to be made jointly liable for payment of costs pursuant to rule 64.10 of Civil Procedure Rules 2000 refused by learned judge – Whether learned judge erred in holding that CPR 7.3 does not provide gateway for service out of third party costs applications – Whether CPR 2000 allows service out of jurisdiction of applications for non-party costs

Result:

[Oral delivery]

- 1. Decision reserved.**
- 2. Notice will be given of the date of delivery.**

Case Name:

Danny Benjamin

v

The Queen

[BVIHCRAP2013/0001]

Date:

Monday, 18th May 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

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

Issues:

Appeal against conviction and sentence – Wounding with intent to do grievous bodily harm – Whether learned trial judge erred in failing to give jury good character direction in respect of appellant – Whether appellant’s conviction rendered unsafe and unsatisfactory as a result – Whether learned trial judge erred in failing to advise jury of statutory and lesser alternative of “inflicting grievous bodily harm” – Whether learned trial judge materially misdirected jury on issue of self defence – Whether count 1 of indictment was defective thus rendering his conviction on this count unsafe and unsatisfactory – Whether learned trial judge erred in advising jurors that majority verdict could be delivered by them before time for doing so had properly arisen – Whether sentence imposed was excessive having regard to circumstances of case – Application for leave to amend notice of appeal

Result / Order:

[Oral delivery]

1. The notice of appeal is deemed to have been properly filed and served.
2. The respondent is to file and serve skeleton submissions on or before 31st May 2015.
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 28th September 2015.

Case Name:

E. M. Watts Development Company Ltd

v

The Government of the Virgin Islands

[BVIHCVAP2015/0003]

Date:

Monday, 18th May 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

**Appellant /
Respondent:**

**Mr. Guy Roots, QC, with him, Mr. Gerard St. C. Farara,
QC**

**Respondent /
Applicant:**

**Mr. Baba Aziz, Attorney General, with him, Ms. Maya
Barry, Crown Counsel, Attorney General's Chambers**

Issues:

**Compulsory acquisition of land – Appeal against
award of Board of Assessment (exercising jurisdiction
provided by section 11 of Land Acquisition Act) –
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**

Result / Order:

[Oral delivery]

- 1. Leave is granted to the Attorney General to file and
serve written submissions on behalf of the
respondent on or before 19th May 2015.**
- 2. Costs thrown away are assessed in the sum of
\$20,748.00, to be paid by the respondent to the
appellant, on or before 1st August 2015.**
- 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 28th
September 2015.**
- 4. Appellants are granted 14 days leave if necessary
to file and serve skeleton submissions in reply.**

Case Name:

Petra Cooper (nee Klvacova)

v

Peter Cooper

[BVIHCVAP2012/0010]

Date:

Monday, 18th May 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Jamal Smith holding papers for Ms. Marie-Lou Creque
Respondent: No appearance

Issues: Adjournment of matter

Result / Order: [Oral delivery]
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 28th September 2015.

Reason: The respondent, who was unrepresented, wrote to the court explaining why he was unable to be present at the day's hearing.

Case Name: Wakima Lettsome
v
The Queen
[BVIHCRA2012/0010]

Date: Monday, 18th May 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Patrick Thompson

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

Issues: Appeal against conviction – Attempted murder – Wounding with intent – Whether learned trial judge failed to properly direct jury on special need for caution before convicting appellant upon uncorroborated evidence of virtual complainant – Application for leave to file submissions

Result / Order: [Oral delivery]
1. The appellant is to file skeleton submissions on or before 17th June 2015.
2. The respondent is to file and serve skeleton submissions on or before 17th July 2015.
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 28th September 2015.

Case Name: Leonard Sprauve
v
The Queen
[BVIHC RAP2012/0006]

Jason Stevens
v
The Queen
[BVIHC RAP2014/0001]

Date: Monday, 18th May 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of

Appeal [Ag.]

Appearances:

Appellants: Mr. Patrick Thompson

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

Issues:

Appeal against sentence – Robbery – Possession of firearm with intent to endanger life

Result / Order:

[Oral delivery]

- 1. The appeal against sentence in relation to robbery is allowed and a sentence of 12 years is substituted for that of 15 years.**
- 2. The appeal against sentence in relation to the offence possession of a firearm with intent to endanger life is allowed in so far as the sentence of 10 years is varied to 7 years.**
- 3. The sentences in respect of both appellants are to run concurrently.**
- 4. The sentence in respect of Jason Stevens will begin to run from 21st January 2015 and Leonard Sprauve's sentence will begin to run from 1st July 2015.**

Reasons:

Counsel for the appellants complained that the learned judge erred in the exercise of his discretion in imposing on the appellants the sentences of 15 years and 10 years imprisonment for the two offences. Learned counsel helpfully pointed out to the Court authorities on the sentencing guidelines from the United Kingdom in support of his contention that the learned trial judge could not have utilised the appropriate benchmark in determining the sentences that should have been imposed on the appellants.

Learned counsel pointed to number of authorities from this jurisdiction in relation to the offences of robbery in which a firearm was used, and showed the Court that there was not any consistency in relation to the sort of sentences that have been imposed in this jurisdiction for the offence of robbery. The sentences

seemed to range from 6 to 20 years imprisonment. Therefore, it was open to the Court to determine, looking at all the circumstances of the case and taking into consideration the circumstances of the offence, the offenders, and importantly, the maximum sentence for the offence in the British Virgin Islands (20 years), whether the learned trial judge did err in sentencing the appellants. Principal Crown Counsel conceded that an examination of the learned trial judge's sentencing remarks did not indicate whether or not the learned judge took into account a relevant factor – the fact that the appellants had pleaded guilty before the trial commenced, once the voir dire was held and the ruling had been given. Furthermore, there was no indication from the sentencing remarks of the learned judge as to whether or not the appellants received credit for having pleaded guilty. In those circumstances, Principal Crown Counsel correctly indicated that it was open to the Court to review the entire matter and determine an appropriate sentence.

The principles of sentencing are well known; they include: deterrence, rehabilitation and punishment. In the case before the Court where the appellants had no previous convictions, there was no need for the sentence to reflect specific deterrence. However, the Court held that sentence ought to have reflected general deterrence on the basis of what appeared to be the level of crimes of that nature in the jurisdiction. With regard to rehabilitation, this, like specific deterrence, was not a material consideration for the Court, since the appellants had no previous convictions. Therefore the sentence ought not to have reflected an aspect of rehabilitation. Concerning punishment, the Court held that the appellants must be dealt with condignly for what the Court considered to be a very serious offence. The Court accepted Principal Crown Counsel's starting point for the offence of robbery of 10 years. It then looked at the mitigating and aggravating factors, and took the view that the mitigating factors were slightly outweighed by the aggravating factors. The Court noted that the judge had taken into consideration that the appellants were young men, had pleaded guilty, were remorseful, and had no previous convictions. However, although, the learned trial judge referred to the appellants' guilty

pleas, there was no indication that they were given any credit for this. Accordingly, the Court was of the unanimous view that the appropriate sentence for the offence of robbery was 12 years imprisonment. With regard to the offence of possession of a firearm with intent to endanger life, the Court held that the appropriate sentence for this offence was 7 years imprisonment, utilising a notional starting point of 7 years, and taking into consideration the fact that the appellants had pleaded guilty thereby saving Court resources and time, and had thrown themselves at the mercy of the Court.

STATUS HEARING

Case Name:

Alcedo Tyson

v

The Queen

[BVIHCRA2013/0008]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Patrick Thompson

Respondents:

Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions holding papers for the Director of Public Prosecutions

Issues:

Status of matter – Appeal against conviction and sentence – Murder

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED:

1. The record of appeal having been collected on

behalf of the Crown, the record is to be paid for and collected on behalf of the appellant within one month of today's date.

2. The appellant shall file skeleton arguments on or before 25th September 2015.
3. The respondent shall file skeleton arguments in reply on or before 25th October 2015.
4. Hearing of the appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 11th January 2016.

Case Name:

Allen Baptiste

v

The Queen

[BVIHCRAP2013/0003]

CONSOLIDATED WITH

Yan Edwards

v

The Queen

[BVIHCRAP2013/0004]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellants:

Mr. Patrick Thompson

Respondents:

Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions, holding papers for the Director of Public Prosecutions

Issues:

Status of matter – Appeals against conviction and sentence – Murder

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The record of appeal having been collected by counsel on behalf of the second appellant and on behalf of the Crown, the record is to be collected on behalf of the first appellant within one month of today's date.
2. The appellants are to file skeleton arguments on or before 25th September 2015.
3. The respondent shall file skeleton arguments in reply on or before 25th October 2015.
4. Hearing of the appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 11th January 2016.

Case Name:

Keno Allen

v

The Queen

[BVIHCRA2013/0005]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

In person

Respondent:

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

Issues:

Status of matter – Appeal against conviction – Robbery – Attempting to choke – Indecent assault

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. It is hereby directed that the Registrar shall cause

to be completed within one month of today's date the record of appeal and shall notify the parties accordingly.

2. The appellant shall pay the necessary fee and obtain a copy of the record of appeal within one month of being notified of its availability.
3. The appellant shall file and serve skeleton arguments on or before 18th August 2015.
4. The respondent shall file and serve skeleton arguments in reply on or before 18th September 2015
5. The matter is adjourned for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Case Name:

Samuel James

v

The Queen

[BVIHC RAP2012/0002]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

**Ms. Charmaine Rosan-Bunbury
(the appellant was also present)**

Respondent:

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

Issues:

**Status of matter – Appeal against sentence –
Wounding with intent – Whether sentence of 12 years
imposed by learned trial judge was excessive in all
circumstances of the case**

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The Registrar of the High Court is directed to cause the record to be completed and the parties to be notified of its availability.
2. Upon receipt by the parties of notification of availability of the record the parties shall pay the requisite fee so as to obtain copies of same.
3. The appellant shall file skeleton arguments in support of his appeal within 28 days of receiving a copy of the record from the court office.
4. The respondent shall file skeleton arguments in reply within 28 days of being served with the appellant's skeleton arguments.
5. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Case Name:

Farnum Place, LLC

v

**[1] Joanna Lau and Kenneth Kryz
(as joint liquidators of Fairfield Sentry Limited
(In Liquidation))**

[2] Fairfield Sentry Limited (In Liquidation)

[BVIHCVAP2012/0006]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Richard Evans

Respondents:

(Mr. Robert Nader was within the Court's precincts but attending to another matter)

Issues:

Status of matter – Discontinuance of appeal – Costs

Result / Order:

[Oral delivery]

It is hereby ordered, in view of the imminent discontinuance of the substantive appeal and of the agreement as to costs, that the status hearing of the matter is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015, by which date the parties shall report to the Court on the issue of the discontinuance of the appeal and costs in the matter.

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:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury

Respondents: Mr. Lewis Hunte, QC

Issues:

Status of matter – Record of appeal prepared after date ordered by Court (no actual dates given) and notice of its availability given to appellant's previous counsel – Request for further directions

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

- 1. The appellant to file additional grounds of appeal on or before 30th June 2015.**
- 2. The appellant is to file and serve skeleton arguments in support of the appeal on or before 21st July 2015.**
- 3. The respondent is to file and serve skeleton arguments in reply on or before 11th August 2015.**
- 4. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.**

Case Name:

**In the Matter the Guardianship of Infants Cap
270**

CFD

v

ZBC

[BVIHCVAP2014/0003]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Ms. Charmaine Rosan-Bunbury

Respondent:

Ms. Kamika Forbes

Issues:

Status of matter – Custody of minor children – Whether learned trial judge erred in dismissing appellant’s application to strike out respondent’s claim in court below for sole legal custody / parental responsibility of minor children – Whether learned trial judge erred in not giving reasons for dismissing appellant’s application – Whether learned trial judge erred in holding that legal custody / parental

responsibility can be lost and/or taken away from the mother and transferred to an unmarried father – Weight given to fact that respondent is unmarried father – Whether mother is sole legal custodian as a result of father being unmarried – Whether there is arguable basis for granting sole legal custody to respondent – Whether learned trial judge erred in law in using court's inherent jurisdiction to make minor children wards of the court in application for legal custody / parental responsibility – Limits of court's jurisdiction to appoint guardian – Whether such jurisdiction limited to cases where child has no parent with legal custody / parental responsibility

**Result / Order
& Reason:**

[Oral delivery]

IT IS HEREBY ORDERED:

1. With agreement by both counsel, and with a view to facilitate settlement of the matter, the matter is adjourned for further status hearing during the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.
2. At that date, if there is no settlement, directions for trial will be given.

Case Name:

**Nolan Davis
dba
AN Davis Plumbing and Electrical Service
v
McArthur Engineering Co. Ltd.**

[BVIHCVAP2012/0032]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Dave Marshall

Respondent: Ms. Kamika Forbes

Issues: Status of matter – Contract – Whether learned judge erred in ordering appellant to pay respondent sum of \$15,000.00 plus prescribed costs – Whether there was reliable basis established on evidence by respondent justifying entitlement to said sum – Notice of withdrawal of appeal filed on 15th May 2015

Result / Order & Reason: [Oral delivery]
IT IS HEREBY ORDERED:
1. At the request of the appellant with no objection by the respondent, the appeal is withdrawn.
2. Costs to the respondent agreed in the amount of \$1,500.00.

Case Name: Sheila Callwood-Schulterbrandt
v
[1] Lucien Callwood
[2] Urman Callwood
[3] Gertrude Callwood-Coakley
[4] Wendell Callwood
[BVIHCVAP2012/0009]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Dave Marshall

Respondents: Ms. Patricia Archibald-Bowers

Issues: Status of matter – Land ownership – Whether respondents were entitled to be registered as proprietors of land by prescription – Exclusive possession of land – Equivocal acts of user

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

- 1. The appellant to file and serve the record of appeal in this matter on or before 1st June 2015.**
- 2. The appellant to file skeleton arguments in support of the appeal on or before 1st July 2015.**
- 3. The respondent to file and serve skeleton arguments in reply on or before 31st July 2015.**
- 4. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.**

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, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellants: Ms. Patricia Archibald-Bowers (for the 1st appellant)

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

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The respondent is to be served with a copy of today's order along with a copy of the Certificate of Result of the last status hearing of this matter on 12th January 2015.
2. The matter is adjourned for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Reasons:

There was no appearance of or on behalf of any of the respondents and no evidence that the respondents had been served with notice of the day's hearing.

Case Name:

[1] Sylvia Maduro-Dale

[2] Lucia Chalwell

v

The Registrar of Lands

[BVIHCVAP2010/0022]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellants: Ms. Patricia Archibald-Bowers

Respondent: Ms. Jo-Ann Williams-Roberts

Issues:

Status of matter – Ownership of land – Prescriptive title – Notice of appeal filed in July 2010 – Registry unable to produce transcript to move matter forward – Rule 62.12(3) of Civil Procedure Rules 2000 requires that record be produced within 42 days of filing of notice of appeal

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The Registry of the High Court shall cause to be prepared on or before 30th June 2015 any notes available to the Registry for the transcripts and to notify the parties whenever such notes are available.
2. In the event that any notes made available by the Registry are incomplete for the purpose of the transcripts, the parties and/or counsel on their behalf shall meet on or before 31st July 2015 to finalise the record on the available notes.
3. Further status hearing of this matter is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Case Name: **Titan Oil Storage Investment Limited**
v
[1] Saturn Storage Limited
[2] Titan Group Investment Limited
[BVIHCVAP2012/0022]

Date: **Monday, 18th May 2015**

Before: **The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: **Mr. Richard Evans**

Respondents: **Mr. Grant Carroll (for the 1st respondent)**
Ms. Arabella di Iorio (for the joint liquidators of the 2nd respondent)

Issues: **Status of matter – Joint liquidators appointed over 2nd respondent by order of learned judge in court below – Whether learned judge erred in appointing liquidators – Whether Originating Application seeking appointment of liquidators was abuse of process on basis of it having been made by 1st respondent to obtain collateral advantage rather than for benefit of class of**

creditors – Whether 1st respondent had locus standi to bring Originating Application – Procedural unfairness
– Whether learned judge erred in refusing to grant adjournment

**Result / Order
& Reason:**

[Oral delivery]

In view of the eminent settlement of this matter the matter is set for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015 by which time the parties shall advise the Court as to the status of the settlement.

Case Name:

Clearlie Todman-Brown

V

The National Bank of the Virgin Islands

[BVIHCVAP2013/0004]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Jamal Smith

Respondent: Ms. Akilah Anderson

Issues:

Status of matter – Appeal against decision of learned judge granting respondent summary judgment in court below – Whether learned judge erred in finding that appellant's claim had no reasonable prospect of success

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

- 1. The Registrar of the High Court shall cause to be prepared a copy of the transcript of the proceedings in the High Court and to notify the**

parties of the availability of the transcript on or before 18th June 2015.

2. The record of appeal shall be prepared by the appellant within one (1) month of being notified of the availability of the transcript.
3. The appellant shall file skeleton arguments on or before 31st July 2015.
4. The respondent shall file and serve skeleton arguments on or before 31st August 2015.
5. The appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Case Name:

The Attorney General

v

Maureen Peters

[BVIHCVAP2010/0038]

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Ms. Jo-Ann Williams-Roberts

Respondent:

Mr. Robert Nader, holding papers for Mr. William Hare

Issues:

Status of matter – Construction to be given to rule 7(1) of the Prison Rules, 1999 (S.I. No. 25 of 1999) – Whether purposive interpretation of Rules wrong in law – Recommendation for remission to be granted to respondent not made to Governor by Superintendent of Prisons – Whether rule 7(1) ought to be construed to mean that Superintendent of Prisons obliged to make recommendation for remission to Governor provided that prisoner of good conduct – s. 43 of Virgin Islands Constitution Order 2007 – Whether s. 43 ought to be construed to mean that Governor unable to properly refuse to grant full one-third remission to

prisoner who was of good conduct while in prison – Full remission not granted to respondent by Governor after consultation with Advisory Committee on the Prerogative of Mercy – Whether learned judge erred in finding that Governor’s discretion was invalidly exercised and that respondent’s continued detention at Her Majesty’s Prison was unlawful – No explanation given as to why full remission not granted to respondent – Whether decision of Superintendent of Prisons to refuse to make recommendation for remission reviewable by the Court – Whether Governor’s exercise of discretion reviewable by the Court – Legitimate expectation

**Result / Order
& Reason:**

[Oral delivery]
Having been withdrawn by the appellant, the appeal is dismissed.

Case Name:

**Alfa Telecom Turkey Limited
v
[1] Cukurova Finance International Limited
[2] Cukurova Holdings AS
[BVIHCVAP2010/0036]**

Date:

Monday, 18th May 2015

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Oliver Clifton

Respondents: Ms. Arabella di Iorio

Issues:

Status of matter

**Result / Order
& Reason:**

[Oral delivery]
IT IS HEREBY ORDERED:
1. The appeal is withdrawn, notice to this effect

having been filed by the appellant this morning.
2. No order as to costs.

Case Name: Irvine Fletcher Scatliffe
v
[1] Dancia Penn & Co.
[2] Dancia Penn QC
[3] Astra D. Penn
[BVIHCVAP2015/0006]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: In person

Respondents: Ms. Dian Fahie-deCastro

Issues: Status of matter

**Result / Order
& Reason:** [Oral delivery]
IT IS HEREBY ORDERED:
1. Dismissing the appeal on the basis that the appeal is struck out, notice of appeal filed having been filed out of time and without the leave of the Court on an appeal against an interlocutory order.
2. Costs to the respondent in an amount to be agreed between the parties.

Case Name: Ciban Management Corporation
Appellant
v

[1] Citco (BVI) Limited
[2] Tortola Corporation Company Limited
Respondents

Alberto Jackson Byington Neto
Additional Respondent

[BVIHCVAP2013/0001]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Ben Mays

Respondents: Mr. Jeremy Child

Issues: Status of matter

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

- 1. The Registrar is directed to cause the transcript to be prepared and to notify the parties of its availability on or before 30 June, 2015.**
- 2. The Appellant shall cause to be prepared, filed and served, the record of appeal within six weeks of notification of the availability of the transcript.**
- 3. The matter to be proceeded with thereafter in accordance with Part 62 of the CPR.**

Reasons:

Notwithstanding that the appeal was filed on 7th January 2013, the transcript had not been prepared as yet; the parties had not received the notice from the Court under Rule 62.9.

Case Name:

Jerome Allen

v

The Commissioner of Police

[BVIMCRAP2014/0001]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

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

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

Issues: Status of matter – Appeal against sentence – Whether sentence imposed was excessive having regard to sentences imposed for similar offences in courts of equal jurisdiction

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED:

1. The Senior Magistrate is directed to cause the record to be prepared and the parties notified of its availability on or before 30th June 2015.
2. The appellant shall file skeleton arguments in support of the appeal on or before 14th August 2015.
3. The respondent shall file skeleton arguments in reply on or before 14th September 2015.
4. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in the British Virgin Islands during the week commencing 28th September 2015.

Reason: The transcript had not been prepared as yet.

Case Name: The Commissioner of Police
v
[1] Lester Terrence DeCastro

[2] Isaac Bellony Caena

[BVIMCRAP2013/0016]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel, holding papers for Mr. Valston Graham, Senior Crown Counsel

Respondents: The 1st respondent, Mr. Lester Terrence DeCastro, in person
No appearance of the 2nd respondent

Issues: Status of matter – Appeal against the 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 – Unclear whether 2nd respondent was present in the Territory for service purposes

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The Senior Magistrate is directed to cause the record to be prepared and the parties notified of its availability on or before 30th June 2015.
2. The appellant shall file skeleton arguments in support of the appeal on or before 31st July 2015.
3. The respondent shall file skeleton arguments in reply on or before 31st August 2015.
4. The hearing of the appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 28th September 2015.

Case Name:

Commissioner of Police

v
Carlton Herbert

[BVIMCRAP2014/0011]

Date: Monday, 18th May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

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

Respondent: No appearance of or on behalf of the respondent (counsel on record was Ms. Marie-Lou Creque)

Issues: Status of matter – Appeal against decision of learned senior magistrate to acquit respondent – Procuring acts of indecency – Wrongful confinement

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to Friday, 22nd May 2015, at 9:00 a.m.

APPLICATIONS AND APPEALS

[1] Andrey Adamovsky
[2] Stockman Interhold SA

v

[1] Andriy Malitskiy
[2] Igor Filipenko

[BVIHCMAP2014/0031]

Date: Tuesday, 19th May 2015

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

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

Appearances:

Appellants: Mr. Justin Fenwick, QC, with him, Mr. George Spalton and Mr. Dan Wise

Respondents: Mr. Peter McMaster, QC, with him, Mr. Andrew Willins and Mr. Sebastian Said

Issues:

Interlocutory appeal – Restraint on prosecution of foreign claim – Enforcement of foreign judgment – Res judicata – Estoppel – Abuse of process – Whether learned trial judge was entitled on anti-suit injunction to summarily determine matter which was before another court overseas or to act as appellate court

Result / Order:

- 1. The decision is reserved.**
- 2. Notice will be given of the date of delivery.**

Case Name:

**Basab Inc.
v
[1] Accufit Investment Inc.
[2] Double Key International Limited
[BVIHCMAP2014/0020]**

Date:

Tuesday, 19th May 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. David Fisher, with him, Ms. Monique Peters

Respondents: Mr. Timothy Harry and Mr. David Welford (for 1st

respondent)
No appearance of 2nd respondent

Issues:

Derivative proceedings – Appeal against learned trial judge’s refusal of appellant’s application to bring proceedings on behalf of and in the name of 1st respondent against directors of 1st respondent and also against 2nd respondent and company Superb Glory Holdings Limited – Whether shares sold at an undervalue – Interpretation of s. 184C(2)(c) of BVI Business Companies Act, 2004 (as amended) – Whether learned trial judge erred in holding that intention and effect of s. 184C(2)(c) is that for claim to be “likely to succeed” it must be obvious, without any substantial consideration of or debate on the merits that it is likely to succeed – Whether learned trial judge erred in holding that intention and effect of s. 184C(2)(c) is that proposed claim must appear to court to be self-evidently strong without conducting an inquiry – Whether learned trial judge erred in holding that application for leave under s. 184C was not occasion for painstaking analysis of valuation or other evidence – Appeal against findings of fact made by learned judge

Result / Order:

It is hereby ordered that judgment is reserved.

[1] Andrey Adamovsky
[2] Stockman Interhold SA
v
[1] Andriy Malitskiy
[2] Igor Filipenko

[BVIHCMAP2014/0022]

Date:

Wednesday, 20th May 2015

Coram:

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

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

Appearances:

Appellants: Mr. Justin Fenwick, QC, with him, Mr. George Spalton and Mr. Dan Wise

Respondents: Mr. Peter McMaster QC, with him, Mr. Andrew Willins and Mr. Sebastian Said

Issues:

Stay of execution of judgment and stay of enforcement of judgment debt – Whether appellants or respondents conducted single business – Whether learned judge wrongly dismissed as irrelevant admissions by respondents in statements of case in court below that parties had entered into agreement to carry on single business – Whether various businesses carried on by parties were carried on together in partnership – Distribution of proceeds of sales of shares – Winding up – Whether learned judge erred in holding that first appellant’s counterclaim did not disclose ingredients of cause of action for account in respect of secret profits from Railway Project – Fiduciary duties of parties under partnership/business agreements – Damages – Section 184I of the BVI Business Companies Act, 2004 – Costs

Result / Order:

- 1. The decision is reserved.**
- 2. Notice will be given of the date of delivery.**

Case Name:

**Alexander Pleshakov
Claimant / Respondent**

v

[1] Sky Stream Corporation

First Defendant

**[2] Sergey Linkov
Second Defendant / Appellant**

**[3] Irina Kazantseva
Third Defendant / Appellant**

[BVIHCMAP2014/0027]

Date: **Wednesday, 20th May 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellants: **Ms. Barbara Dohmann, QC, with her, Mr. Brian Lacy
(for the 3rd defendant / appellant)
Mr. Clive Freedman, QC, with him, Mr. Brian Lacy for
(the 2nd defendant / appellant)**

Respondent: **Mr. Terence Mowschenson, QC, with him, Mr. Grant
Carroll for the respondent / claimant**

Issues: **Ownership of shares – Beneficial ownership of
defendant company Sky Stream Corporation –
Purpose of incorporation of Sky Stream Corporation –
Whether incorporated to disguise respondent's
beneficial ownership of shares in Russian airline
Transaero – Whether respondent had acquired
beneficial interest in shares in Transaero – Whether
learned trial judge erred in so finding – Whether
learned trial judge erred in finding that appellants held
their shares in Sky Stream Corporation on trust for
respondent – Alleged nominee agreement – Whether
there was any basis in fact or law on which alleged
nominee agreement could be established**

Result / Order: **Judgment in this matter is reserved.**

Case Name:

Comodo Holdings Limited
v
[1] Renaissance Ventures Limited
[2] Joseph Katz (as Executor for the estate of
the late Eric D. Emanuel, deceased)

[BVIHCMAP2014/0032]

Date:

Thursday, 21st May 2015

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of
Appeal [Ag.]

Appearances:

Appellant:

Mr. Vernon Flynn, QC

Respondents:

Mr. David Fisher, with him, Mr. Robert Christie

Issues:

Commercial appeal – Rule 20.1(1) of the Civil
Procedure Rules 2000 – Whether permission required
to amend reply and defence to counterclaim prior to
first case management hearing – CPR 24.3 and CPR
2.4 – Whether security for costs available against
external company

Result / Order:

The decision is reserved in this matter.

Case Name:

JSC VTB Bank
Claimant / Respondent
v

[1] Alexander Katunin
First Defendant / Appellant

[2] Sergey Taruta
Second Defendant

[BVIHCMAP2015/0004]
[BVIHCMAP2015/0007]

Date: Thursday, 21st May 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Stephen Rubin, QC, with him, Mr. Niki Olympitis and Ms. Sara-Jane Knock
Respondent:	Mr. Mark Forte and with him, Mr. Jerry Samuels

Issues: Interlocutory appeal – Submission to jurisdiction – Service out of jurisdiction – Whether learned trial judge erred in dismissing appellant’s application for order setting aside alternative service order and for declaration that he had not been served with claim form and statement of claim – Whether learned trial judge erred in concluding that there were proper grounds justifying alternative service order – Whether learned trial judge erred in holding that appellant’s service challenge application failed in limine because appellant had submitted to jurisdiction by filing affidavit of Lauren Peaty in response to respondent’s summary judgment application – Whether learned trial judge failed to apply correct legal test in coming to conclusion on whether appellant had submitted to jurisdiction – Whether learned trial judge erred in concluding that service within the jurisdiction of person outside the jurisdiction was permitted or appropriate under the rules – Whether learned trial judge erred in exercise of his discretion in refusing to stay proceedings pending final determination in Russia of ongoing appeals process against Russian judgment to decline to exercise jurisdiction

Result / Order:

Judgment reserved.

Case Name:

**C-Mobile Services Limited
v
Huawei Technologies Co. Limited**

**[BVIHCMAP2014/0006]
[BVIHCMAP2014/0017]**

Date:

Friday, 22nd May 2015

Coram:

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

Appearances:

Appellant: Mr. Jason Nickless, with him, Mr. Grant Carroll

Respondent: Mr. Mungo Lowe

Issues:

Insolvency – Appeal against learned judge’s refusal to set aside respondent’s statutory demand and grant stay of liquidation proceedings – Whether learned trial judge erred in determining that s. 6(2) of Arbitration Act 1976 did not apply to present case – Whether learned trial judge erred in failing to set aside statutory demand pursuant to s. 157(2) of Insolvency Act 2003 given that there was provision for arbitration – Whether learned trial judge erred in exercise of his discretion – Whether any or any sufficient weight or consideration given to fact that officers of appellant company believed that there had been compromise agreement in respect of the debt – Whether learned trial judge erred in finding that alleged debt was not time barred pursuant to New York Convention on Limitation Periods in the International Sale of Goods in not attaching sufficient weight to assertions of appellant that alleged debt not due and owing as a

result of relevant limitation period

Result / Order:

- 1. The decision is reserved. Notice will be given of the date of delivery.**
- 2. Costs to be assessed if not agreed within 28 days of the delivery of the decision.**

Case Name:

**C-Mobile Services Limited
v
Huawei Technologies Co. Limited**

[BVIHCMAP2014/0017]

Date:

Friday, 22nd May 2015

Coram:

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

Appearances:

Appellant: Mr. Jason Nickless, with him, Mr. Grant Carroll

Respondent: Mr. Mungo Lowe

Issues:

Liquidation proceedings – Arbitration Ordinance 1976 – Originating Application filed by respondent in court below for appointment of joint liquidators of appellant company – Appellant’s application to stay Originating Application pursuant to s. 6(2) of Arbitration Ordinance 1976 dismissed by learned judge – Whether liquidation proceedings fall under ambit of s. 6(2) of Arbitration Ordinance 1976 – Whether learned judge erred in finding that the Arbitration Ordinance 1976 was not applicable to this case – Whether learned judge erred in finding that appellant was attempting to bring liquidation proceedings within ambit of arbitration clause – Whether learned judge failed to give proper weight to fact that respondent had served statutory demand despite knowing that underlying

debt was disputed – Leave to add documents to record of appeal as fresh evidence – Whether application satisfies criteria set out in case of *Ladd v Marshall* [1954] 1 WLR 1489

Result / Order: [Oral delivery]
The application is granted.

Reason: The Court was satisfied that all the limbs of the test established in the case of *Ladd v Marshall* [1954] 1 WLR 1489 had been satisfied.

Case Name: Ng Man Sun
v
[1] Peckson Limited
[2] Chen Mei Huan
[BVIHCMAP2013/0026]

Date: Friday, 22nd May 2015

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

Appearances:
Appellant: Mr. Jonathan Addo
Respondents: Mr. John McDonnell, QC, with him, Ms. Rosalind Nicholson

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 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 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 – *Nilon Ltd and Another v Royal Westminster Investments SA and Others* [2015] UKPC 2 Privy Council decision dated 21st January 2015 – Whether dispute over ownership of shares can be decided on s. 43 claim for rectification of the register – Whether the claim/appeal in present proceedings rendered nugatory as a result of Privy Council decision – Whether Court of Appeal judgment *per incuriam* – Whether Court of Appeal judgment final – Whether Court *functus officio*

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

1. The judgment will not be finalised and perfected until the Court has had an opportunity to consider the effect of the decision of the Privy Council in *Nilon Ltd and Another v Royal Westminster Investments SA and Others* [2015] UKPC 2 by hearing further submissions on behalf of the parties as far as that decision impacts upon proceedings and orders sought under s. 43 of the BVI Business Companies Act.
2. The respondent shall file and serve submissions on the appellant by Friday, 3rd July 2015.
3. The appellant shall file and serve submissions in response by Friday, 14th August 2015.
4. Oral hearings on the point will be listed for hearing before the same panel of the Full Court at its sitting commencing the week commencing 28th September 2015.
5. The appellant shall be at liberty to raise the point whether this Court is *functus* to hear these arguments.
6. The respondent to have carriage of this Order.

Reason:

The appeal was heard by this Court on 2nd October 2014. The Privy Council delivered its judgment in the case of *Nilon Ltd and Another v Royal Westminster*

***Investments SA and Others* [2015] UKPC 2 on 21st January 2015. Counsel for the respondent, after the delivery of the decision in *Nilon Ltd*, raised the point that that decision impacts upon the judgment in the present appeal as far as it relates to proceedings and orders sought under s. 43 of the BVI Business Companies Act (Act No. 16 of 2004, Laws of the Virgin Islands).**

The Court of Appeal judgment had not been signed as yet and neither had the judgment order been sealed. Having been apprised of binding authority from the Privy Council, the Court indicated that it would take time to consider its effect.

Case Name:

Eddie Medina Thomas Baez

v

Commissioner of Police

[BVIMCRAP2012/0002]

Date:

Friday, 22nd May 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

**Appellant /
Applicant:**

Ms. Marie-Lou Creque

Respondent:

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

Issues:

**Appeal against conviction – Application (by appellant)
for adjournment**

Result / Order:

[Oral delivery]

The appellant's appeal is struck out for want of prosecution.

Reason:

The appellant was deported as a result of a deportation order and on the date of the hearing of the appeal, did not appear. No steps were taken to have him present for the matter, short of learned counsel for the appellant indicating to the Court that the last time she had had contact with him was January 2011. The Court, in the exercise of its discretion, was of the unanimous view that the appellant's appeal ought to be struck out for want of prosecution pursuant to rule 33 of the Court of Appeal Rules.

Case Name:

**Andres Bailey
v
Commissioner of Police
[BVIMCRAP2012/0008]**

Date:

Friday, 22nd May 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

Ms. Annjel Flax-Solomon, Crown Counsel, Office of the Director of Public Prosecutions

Issues:

Appeal against sentence – Unlawful possession of cannabis – Being concerned in the supply of cannabis – Whether sentence imposed by learned magistrate was unduly severe

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The fine of \$42,000.00 for the possession of 2.2906 grams of cannabis is varied by substituting the sum with a fine of \$12,000.00 to be paid by the appellant within 4 months and in default 6 months imprisonment.**

Reason:

Having reviewed the sentencing guidelines provided by *Desmond Baptiste v the Queen* (SVGHCRA2003/0008 (delivered 6th December 2004, unreported)) and *Leon McAllister v Commissioner of Police* (SVGMCRAP2003/0025 (delivered 6th December 2004, unreported)), the Court was of the view that a magistrate who departs from the sentencing guidelines provided by the Court of Appeal ought to provide very good reasons for doing so. The appellant in this matter pleaded guilty, although it was not at the earliest opportunity. He had no previous convictions, was of good character, a married father of one child and 31 years of age.

In the Court's view, the mitigating factors outweighed the aggravating factors, and in the circumstances where the appellant pleaded guilty, he ought to have been given some credit for doing so, that credit being short of a 1/3 credit.

The principles of sentencing are well known; they include: rehabilitation, punishment and deterrence. Deterrence has two aspects – specific deterrence and general deterrence. In the present case, the appellant was a virgin to the law; therefore, there was no need for the sentence to reflect specific deterrence. However, as it related to the prevalence of the offence in the Virgin Islands, the Court held that the sentence should reflect general deterrence. With regard to rehabilitation, this, like specific deterrence, was not a material consideration for the Court, since the appellant was a first time offender. Concerning punishment, the Court held that the sentence ought to reflect punishment as society frowns on offences such as the one in this matter.

Taking into account the characteristics of the offender

and the offence, the sentence of a fine of \$42,000.00 imposed by the learned Senior Magistrate was clearly excessive and she erred in the exercise of her discretion when she imposed that sentence.

Case Name: **The Commissioner of Police**
v
Sydney Watson
[BVIMCRAP2013/0012]

Date: **Friday, 22nd May 2015**

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

Appearances:

Appellant: **Mr. Herbert Potter, Senior Crown Counsel [Ag.], Office of the Director of Public Prosecutions**

Respondent: **In person**

Issues: **Appeal against decision of learned magistrate to acquit respondent – Assault occasioning actual bodily harm**

Result / Order: **[Oral delivery]**
The appeal is dismissed and the magistrate’s decision is affirmed.

Reason: **There were two versions of evidence presented in the court below. The virtual complainant’s version was that the respondent was the aggressor in the altercations between them. The respondent’s version of the evidence was that it was the virtual complainant who was the aggressor; the virtual complainant had approached the respondent menacingly, causing him**

to feel threatened as a result. The court below took the view that this appeared to be a clear case of self-defence.

The appeal required the Court to review the evidence and come to a determination on whether, based on the evidence, it was open to the court below to reach the decision that it did. On reviewing the evidence, the Court found that there was a clear case of self-defence and the magistrate was fully entitled to accept the version of the evidence given by the respondent. The Crown failed to negate the defence of self-defence put forward by the respondent. In the circumstances, the Court found no basis upon which it could interfere with the decision of the learned magistrate and reverse the respondent's acquittal.

Case Name:

**Selvin Chinnery
v
The Commissioner of Police
[BVIMCRAP2013/0015]**

Date:

Friday, 22nd May 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Marie-Lou Creque

Respondent:

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

Issues:

Appeal against sentence – Whether sentence of 6 months imprisonment imposed by learned Senior Magistrate appropriate in circumstances of case

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed and the sentence that was imposed by the learned Senior Magistrate is varied to a suspended sentence of 6 months imprisonment for a period of 2 years.
2. The appellant is to do community service for 1 year.

Reason:

The Court reviewed the matter in its totality and took into consideration the circumstances of the offence, the offender, the plea of guilty, the date of the appellant's conviction – 21st November 2013 – and the time the record took to be prepared. In relation to the circumstances of the offence, the Court had regard to the fact that it was a nail gun that was used and not a firearm, and also to the fact that the appellant was remorseful. The Court also gave consideration to learned Principal Crown Counsel's suggestion that the sentence be varied to a suspended sentence, and the Court took the view that learned counsel for the appellant had quite properly abandoned the prosecution of the appeal against the Newton decision.

Accordingly, the Court held that the sentence of 6 months imprisonment ought to be varied to a suspended sentence of 6 months imprisonment for a period of 2 years. The appellant was ordered to do community service for 1 year; this reflected the Court's view of the seriousness of the offence.

STATUS HEARING

Case Name:

**Commissioner of Police
v
Carlton Herbert**

[BVIMCRAP2014/0011]

Date: Friday, 22nd May 2015

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions
Respondent:	Ms. Marie-Lou Creque

Issues: Status of matter – Appeal against decision of learned senior magistrate to acquit respondent – Procuring acts of indecency – Wrongful confinement

Result / Order:

[Oral delivery]

1. The matter is adjourned for further status hearing during the next sitting of the Court of Appeal during the week of 28th September 2015.
2. The Registrar of the High Court is directed to liaise with the magistrate to cause the record to be prepared and the parties notified of its availability within 3 months.
3. The matter is adjourned for further status hearing during the next sitting of the Court of Appeal during the week of 28th September 2015.