

COURT OF APPEAL SITTING

SAINT CHRISTOPHER AND NEVIS

11th – 15th March 2013

JUDGMENTS

Case Name:

**[1] Somers Dublin Ltd. a/c KBCS
[2] Citco Global Custody NV – Ref 09974/ARM
[3] Fidulex Management Inc.
[4] Daiwa Securities Trust & Banking
v
Monarch Pointe Fund Limited**

**[BVIHCVAP2011/040]
(Territory of the Virgin Islands)**

Date:

Monday, 11th March 2013

Coram:

**The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellants: Ms. Dahlia Joseph holding papers for counsel for the appellants

Respondent: Ms. Dahlia Joseph holding papers for counsel for the respondent

Issues:

Civil appeal – BVI company – Mutual fund – Redeemed members of fund in liquidation claiming redemption proceeds in priority to claims of continuing members – Whether judge right to order liquidator to distribute pro rata between continuing members and redeemed members

Result and Reason:

Held: allowing the appeal, that:

1. A redeemed member is a creditor in respect of his

unpaid redemption payment.

Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al (Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported)) followed; *Kenneth M. Kryz et al v Stichting Shell Pensioenfond*s (Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011 (delivered 17th September 2012, unreported)) followed.

2. The purpose of section 197 of the Insolvency Act, 2003 is merely to subordinate the former members' claims (along with other claims arising out of membership) as creditor to that of ordinary unsecured (and usually external) creditors. When section 197 says that a past member "may not claim in the liquidation" it must be read as referring to and barring claims as an ordinary unsecured creditor, and not as barring claims as a deferred creditor as part of the "final adjustment of the rights of members and ... past members between themselves".

Section 197 of the Insolvency Act, 2003 applied.

3. It was therefore wrong for the learned trial judge to have held that the redeemed members in their character as such should rank equally with the continuing members claiming a return on their capital. It was wrong to have held that redeemed members were not deferred creditors and as such entitled to have their claims against the Company satisfied in priority to any claim by the continuing members. The redeemed members must be paid before any surplus is ascertained out of which the continuing members may be paid.

Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al (Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported)) followed; *Kenneth M. Kryz et al v Stichting Shell Pensioenfond*s (Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011 (delivered 17th September 2012, unreported)) followed.

4. Share capital is now an obsolete concept for BVI companies. The BVI Business Companies Act, 2004 removes the concept altogether, even with respect to par value shares. The mode of distribution of surplus among members on a liquidation depends ultimately on the Memorandum and Articles of a company, but section 34(1)(c) of the BVI Business Companies Act, 2004 provides a default position. It provides that in the absence of anything to the contrary, a share confers “the right to an equal share in the distribution of the surplus assets of the company”. There being nothing to the contrary in the Memorandum and Articles in the present case, each share carries an equal right to share in any surplus.

BVI Business Companies Act, 2004 applied.

Case Name:

**Ronald Green
v
Petter Saint Jean**

AND

**Maynard Joseph
v
Roosevelt Skerrit**

**[DOMHCVAP2012/0001]
(Commonwealth of Dominica)**

Date:

Monday, 11th March 2013

Coram:

**The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellants: Mr. Jonel Powell holding papers for counsel for the appellants

Respondents: Mr. Sylvester Anthony holding papers for counsel for the respondents

Issues: Election petition – Disqualification to be nominated and elected – Allegiance, obedience or adherence to a foreign state – Obtaining, renewing or travelling on a French passport

Respondents not filing any witness statements or defence, and declining to testify at trial – Only petitioners and their witnesses testify – Petitioners unable to produce any direct evidence of the allegations made in their petitions – Whether the petitioners could rely on inferences – Whether petitioners could compel the respondents by process of discovery to produce their passports – Whether the respondents could compel the respondents by subpoena the production of their passports – Whether the petitioners could compel the testimony of the respondents at the hearing of the petitions by subpoena

Foreign law – whether necessary to be pleaded and proved

Result and Reason: Held: dismissing the appeals, allowing the respondents' counter-notice in respect of only the foreign law issue (Pereira CJ and Michel JA a majority, Mitchell JA [Ag.] dissenting), and making no order as to costs, that:

1. The only rules governing election petitions in the Commonwealth of Dominica are those found in the Elections Act. There are no statutory provisions applying the Civil Procedure Rules 2000 to the hearing of election petitions nor has the court an inherent jurisdiction to introduce the interlocutory procedures found in the Civil Procedure Rules 2000 into election petitions.

Winston Peters v The Attorney General of Trinidad and Tobago et al & William Chaitan v The Attorney General of Trinidad and Tobago et al (Civil Appeal Nos. 21 and 22 of 2001, Republic of Trinidad and Tobago Court of Appeal (delivered 31st July 2001, unreported)) distinguished; ***Ezechiele Joseph v Alvina Reynolds and Lenard “Spider” Montoute v Emma Hippolyte*** (Saint Lucia High Court Civil Appeal No. 14 of 2012 (delivered 31st July 2012, unreported)) applied; Commonwealth of Dominica Constitution Order 1978, S.I. 1978 No. 1027 (U.K.) cited; House of Assembly (Elections) Act, Chap. 2:01 Revised Laws of the Commonwealth of Dominica 1990 cited; Evidence Ordinance, Cap. 64 Revised Laws of the Commonwealth of Dominica 1961 cited; Civil Procedure Rules 2000 cited.

2. Petitioners making specific allegations in their election petitions about the existence of a disqualification must bring the appropriate evidence to prove their allegations.

Quinn-Leandro v Jonas, Maginley v Fernandez, Spencer v St. Clair Simon (2010) 78 WIR 216 applied.

3. The judge having found that there was no direct evidence of the allegations of disqualification made in the petitions, she was entitled to dismiss the petitions.
4. Before a court hearing an election petition can draw an adverse inference from the absence or silence of a witness there must be a *prima facie* case to answer on the issues.
5. The burden was on the appellants to have brought the necessary evidence before the court to prove that under the law of France, the respondents being in possession of French passports was an act which amounted to an acknowledgment of

allegiance, obedience or adherence to the state of France. It was necessary to plead and produce evidence which would prove the principles of foreign law which would disqualify the respondents under section 32(1)(a) of the Constitution of the Commonwealth of Dominica. (Per Pereira CJ and Michel JA, Mitchell JA [Ag.] dissenting).

Joyce v Director of Public Prosecutions [1946] AC 347 considered; *Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub* (Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported)) applied.

6. It is unnecessary for a person challenging the nomination or election of a person who has obtained, renewed, or travelled on a foreign passport either to plead the foreign law in question or to prove that under that foreign law such action amounts to an acknowledgment of allegiance, obedience or adherence to the foreign state sufficient to establish a disqualification under the Constitution. (Per Mitchell JA [Ag.]).

Joyce v Director of Public Prosecutions [1946] AC 347 applied; *Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub* (Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported)) applied.

STATUS HEARING

Case Name:

Kristoff Pemberton (an Infant by his Mother &

Next Friend Renita Pemberton)

v

[1] Devi Singh

[2] Jairan Kellowan

[SKBHCVAP2007/0006]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: Mr. Perry Joseph

Respondents: Ms. Keisha Spence

Issues: Status of matter

Result / Order: [Oral delivery]
Appeal is dismissed with costs to the respondent in the sum of \$1,500.00.

Reason: Counsel notified the Court of the appellant's intention to have the appeal dismissed. Costs were agreed in the sum of \$1500.00.

Case Name:

Lynn Bass

v

St. Kitts-Nevis-Anguilla National Bank Limited

[SKBHCVAP2009/0004]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: Ms. Revi Warner

Respondent: Ms. Keisha Spence

Issues: Status of matter

Result / Order: [Oral delivery]

1. Counsel for the appellant to meet with counsel for the respondent on or before 11th April 2013 to agree on the transcript of proceedings to be prepared from judge's notes and notes of counsel for the respondent;
2. Following production of transcript, parties shall comply with rules 62.11 & 62.12 of CPR 2000;
3. Failure of counsel for the appellant to make themselves available to meet with counsel for the respondent by 11th April 2013 would result in the appeal being dismissed for want of prosecution;
4. Failure of parties on production of transcript the matter shall be set down for further status hearing at the next sitting of Court of Appeal in St. Christopher and Nevis in June 2013.

Reason: Counsel for the respondent had complied with a previous order of the Court in this matter (dated 26th November 2012) which required her to make available to counsel for the appellant her notes of hearing from the court below, but counsel for the appellant had not made herself available to meet with counsel for the respondent to agree on the transcript of proceedings.

Case Name: Hotel Equity Fund IV, LLC
v
Ernestine Celestine
[SKBHCVAP2010/0005]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: No appearance

Respondent: Ms. M. Angela Cozier

Issues:

Status of matter

Result / Order:

[Oral delivery]

- 1. Status hearing is adjourned to Monday, 10th June 2013 at the next sitting of the Court of Appeal in St. Kitts;**
- 2. Court Office is directed to notify the appellant by registered mail at address P. O. Box 50018, Saint Louis City, Saint Louis, Missouri, 63105, USA of the adjourned status hearing of this matter for 10th June 2013 and requiring the appellant to give notice of intention to proceed with appeal no later than 30th April 2013. Failing this the appeal stand dismissed.**

Reason:

There was no appearance of or on behalf of the appellant. The Court was informed that the firm of Myrna Walwyn & Associates (who previously acted for the appellant) had been removed from the record as acting for the appellant.

Case Name:

Caribbean Cable Communications Limited

V

[1] The Nevis Island Administration

**[2] The Nevis Island Public Utilities
Commission**

[SKBHCVAP2009/0008]

Date:

Monday, 11th March 2013

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: No appearance

Respondents: No appearance

Issues: Status of matter

Result / Order: [Oral delivery]
1. The Court Office is directed to notify the parties of this appeal so the appellant would notify if it would proceed with this appeal;
2. Status Hearing of this matter is adjourned to the next sitting of the Court of Appeal in St. Christopher and Nevis on 10th June 2013.

Reason: No one appeared on or on behalf of either party.

Case Name: Syonia Powell
v
Phillip Walters

[SKBHCVAP2007/0007]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: Mr. Perry Joseph
Respondent: Mr. Sylvester Anthony

Issues: Status of matter

Result / Order: [Oral delivery]
1. Further Status hearing of this matter is adjourned

- to October 2013 Court of Appeal sitting in St. Kitts;
2. If the record of appeal is not filed by the adjourned hearing date the appeal shall stand dismissed by 30th November 2013.

Reason: The transcripts were not available as yet.

Case Name: Eugene Hamilton
v
[1] Cedric Liburd
[2] Leroy Benjamin
[3] Wayland Vaughn

[SKBHCVAP2011/0025]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: Ms. Revi Warner
Respondents: Mr. Philmore Warner of Attorney General's Chambers
(for the 2nd and 3rd respondents)

Issues: Status of matter

Result / Order: [Oral delivery]
1. Counsel for the respondents shall make available to counsel for the appellant on or before 11th April 2013 notes of hearing of counsel for the respondents; Counsel for the parties shall meet on or before 11th May 2013 to agree on a transcript of proceedings to be prepared from the notes of counsel;
2. Following production of transcript the parties shall comply with rules 62.11 & 62.12 of CPR 2000;
3. Failing agreement by the parties on production of

the transcript the matter shall be set down for status hearing at the next sitting of the Court of Appeal in St. Christopher and Nevis in June 2013.

Reason: The transcript of proceedings had not been prepared as yet.

Case Name: Leslie Farrell
v
The Director of Public Prosecutions

[SKBHCRAP2011/0003]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: In person
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against sentence – Robbery – Unlawful wounding

Result / Order: [Oral delivery]
1. The Court Office is directed to prepare a transcript of judge's notes on sentencing by 11th April 2013 and give immediate notice to the parties that the transcript is available;
2. The parties are to comply with rules 62.11 and 62.12 of CPR 2000;
3. The appeal is fixed for hearing at the next sitting of the Court of Appeal in St. Kitts in June 2013.

Reason: The record of appeal had not been prepared as yet.

Case Name: Emmanuel Mills
v
The Director of Public Prosecutions
[SKBHCRAP2011/0007]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: In person
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Status of matter – Appeal against conviction and sentence – Rape – Attempted Robbery – Burglary

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: Jermul Jules
v
The Director of Public Prosecutions
[SKBHCRAP2011/0008]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence for Robbery

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: Craig Bradshaw
v
The Director of Public Prosecutions
[SKBHCRAP2011/0009]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Unlawful carnal knowledge

Result / Order: [Oral delivery]

1. The Court Office is to prepare the transcript of proceedings;
2. Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: Keithley Griffin
v
The Director of Public Prosecutions

[SKBHCRA2011/0010]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: Dr. Henry L. Browne, QC
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Unlawful carnal knowledge

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: **David Morton**
v
The Director of Public Prosecutions

[SKBHCRAP2011/0011]

Date: **Monday, 11th March 2013**

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

Appearances:

Appellant: **In person**

Respondent: **Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon**

Issues: **Status of matter – Appeal against conviction and sentence – Rape**

Result / Order: **[Oral delivery]**
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: **The record of appeal had not been prepared as yet.**

Case Name: **Samuel Tyson**
v
The Director of Public Prosecutions

[SKBHCRAP2011/0012]

Date: **Monday, 11th March 2013**

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

Appearances:

Appellant: **In person**

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Indecent assault

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: Joseph Gardener
v
The Director of Public Prosecutions
[SKBHCRA2011/0018]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: In person
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Wounding with intent

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal had not been prepared as yet.

Case Name: **Glenville Maynard**
v
The Director of Public Prosecutions
[SKBHCRAP2010/0023]

Date: **Monday, 11th March 2013**

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

Appearances:
Appellant: **In person**
Respondent: **Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon**

Issues: **Status of matter – Appeal against conviction and sentence – Robbery**

Result / Order: **[Oral delivery]**
1. The Court Office is directed to make available to the appellant and the Office of the Director of Public Prosecutions the record of proceedings within three (3) weeks;
2. Hearing of appeal is set for 10th – 14th June 2013.

Reason: **The record of appeal was partially complete.**

Case Name: **Rawle Benjamin**
v
The Director of Public Prosecutions
[HCRAP2010/0024]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Robbery

Result / Order: [Oral delivery]

1. The Court Office is directed to make available to the appellant and the Office of the Director of Public Prosecutions the record of proceedings within three (3) weeks;

2. Hearing of appeal is set for 10th – 14th June 2013.

Reason: The record of appeal was partially complete.

Case Name: Jamie Wilkinson
v
The Director of Public Prosecutions
[SKBHCRAP2011/0013]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: Mr. John Cato

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Wounding with intent to do grievous bodily harm

Result / Order: [Oral delivery]
The hearing of this appeal is fixed for next sitting of Court of Appeal in St. Christopher and Nevis from 10th – 14th June 2013.

Reason: The record of appeal had been completed.

Case Name: Joseph Herbert
v
The Director of Public Prosecutions
[SKBHCRAP2011/0014]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: In person
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Buggery

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal was not prepared.

Case Name:

**Gibson Blake
v
The Director of Public Prosecutions
[SKBHCRAP2011/0015]**

Date:

Monday, 11th March 2013

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

In person

Respondent:

Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues:

**Status of matter – Appeal against sentence –
Housebreaking and larceny**

Result / Order:

**[Oral delivery]
Status hearing of this matter is adjourned to 10th June
2013 at the next sitting of Court of Appeal in St. Kitts.**

Reason:

The record of appeal was not prepared.

Case Name:

**Mario Harvey
v
The Director of Public Prosecutions
[SKBHCRAP2011/0016]**

Date:

Monday, 11th March 2013

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	In person
Respondent:	Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Buggery

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal was not prepared.

Case Name:

Neil Harvey
v
The Director of Public Prosecutions
[SKBHCRAP2011/0019]

Date: Monday, 11th March 2013

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

Appearances:

Appellant:	In person
Respondent:	Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Wounding with Intent

Result / Order: [Oral delivery]
Status hearing of this matter is adjourned to 10th June

2013 at the next sitting of Court of Appeal in St. Kitts.

Reason: The record of appeal was not prepared.

Case Name: Carl Warner
v
The Director of Public Prosecutions
[SKBHCRAP2011/0020]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: Dr. Henry Browne, QC
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Assault

Result / Order: [Oral delivery]
1. Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts;
2. Leave is granted to amend the notice of appeal to include the grounds of appeal.

Reason: The record of appeal was not prepared and the notice of appeal contained no grounds of appeal.

Case Name:

**Razba Matthew
v
The Director of Public Prosecutions**

[SKBHCRAP2011/0021]

Date:

Monday, 11th March 2013

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

In person

Respondent:

Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues:

Status of matter – Appeal against conviction and sentence – Manslaughter

Result / Order:

[Oral delivery]

- 1. Status hearing of this matter is adjourned to 10th June 2013 at the next sitting of Court of Appeal in St. Kitts;**
- 2. The appellant shall make an application to amend the notice of appeal to include the grounds of appeal.**

Reason:

The record of appeal had not been prepared as yet and the notice of appeal contained no grounds of appeal.

Case Name:

**Newrish Nital
v
The Director of Public Prosecutions**

[SKBHCRAP2011/0022]

Date:

Monday, 11th March 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Fraud and false pretence

Result / Order: [Oral delivery]

1. The record of appeal is to be transmitted to the appellant and the Office of Director of Public Prosecutions within three (3) weeks;
2. Hearing of this appeal is set for next sitting of the Court of Appeal in St. Kitts in June 2013;
3. Viva voce application for bail made by the appellant pending hearing of this appeal is adjourned to Tuesday, 12th March 2013 at 8:30 a.m.

Reason: The record of appeal was partially complete.

Case Name: Jason Liddie
v
The Director of Public Prosecutions
[SKBHCRAP2011/0023]

Date: Monday, 11th March 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Receiving

Result / Order: [Oral delivery]
1. The Court Office is directed to make available to the appellant and the Office of the Director of Public Prosecutions the record of appeal within one (1) month (11th April 2013);
2. The appeal is set for hearing at the next sitting of Court of Appeal in St. Kitts in June 2013.

Reason: The record of appeal was not prepared.

Case Name: James Ham
v
The Director of Public Prosecutions
[SKBHCRAP2010/0007]

Date: Monday, 11th March 2013

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

Appearances:
Appellant: Mr. John Cato
Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues: Status of matter – Appeal against conviction and sentence – Rape

Result / Order: [Oral delivery]
1. The Court Office is directed to make available to the appellant and the Office of the Director of Public Prosecutions the record of appeal within

- six (6) weeks;
2. The appeal is set for hearing at the next sitting in St. Kitts in June 2013.

Reason: The record of appeal was not prepared.

APPLICATIONS AND APPEALS

Case Name:

Joseph Parry

v

Mark Brantley

[SKBHCVAP2012/0003]

[1] Leroy Benjamin

[2] Bernadette Lawrence

v

Mark Brantley

[SKBHCVAP2012/0004]

Hensley Daniel

v

Mark Brantley

[SKBHCVAP2012/0005]

Date: Monday, 11th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Applicants: Dr. Henry Browne, QC for Joseph Parry and also

holding papers for Mr. Oral Martin (representing Hensley Daniel)

**Respondents /
Appellants:**

Mr. Sylvester Anthony, with him, Ms. Angelina Gracy Sookoo for Mr. Leroy Benjamin and Ms. Bernadette Lawrence

Respondent:

Ms. Dahlia Joseph for Mr. Mark Brantley

Issues:

Application to review costs order

Result / Order:

1. a) The applicants Joseph Parry and Hensley Daniel by their legal practitioners shall serve personally upon Bernadette Lawrence and Leroy Benjamin the application together with the affidavit in support, written submissions and record of appeal and the supplement record of appeal filed in respect of the application to the Court made on 10th December 2012 to review the costs order of 27th August 2012 no later than Friday 15th March 2013.

b) The legal practitioners shall file with the Court an affidavit of service of the said documents on the appellants Bernadette Lawrence and Leroy Benjamin no later than Wednesday, 20th March 2013.
2. The appellants Bernadette Lawrence and Leroy Benjamin may file and serve a notice of Intention to be heard on the application no later than Friday 29th March 2013.
3. The matter is adjourned pending compliance with the directions.

Reason:

There was no compliance with the directions order made by the Court on 18th February 2013.

Case Name: [1] Trans-Americainvest (St. Kitts) Ltd.
[2] Natalia Bitton
[3] John Zuliani
v
[1] Susan Dodge
[2] Anthony Zapparoli
[SKBHCVAP2013/0001]

Date: Monday, 11th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Applicants: Ms. M. Angela Cozier
Respondents: Ms. Camilla Cato

Issues: Application for stay of execution and proceedings

Result / Order: [Oral delivery]
By consent it is ordered that a stay of execution and all proceedings under the order of Master Actie [Ag.] contained in her judgment of 16th January 2013 is hereby granted pending the hearing and determination of the appeal herein.

Reason: The respondent withdrew her opposition to the application.

Case Name: Kareem Vinton né Glasford
v
[1] First Caribbean International Bank
(Barbados) Limited
[2] Bronwen Glasford

[SKBHCVAP2012/0024]

Date: Monday, 11th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Jonel Powell holding papers for counsel for the applicant

Respondent: Mr. Damian Kelsick

Issues: Application for an adjournment

Result / Order: [Oral delivery]
Hearing of the application for leave to appeal is adjourned to the next sitting of the Court in June 2013.

Reason: The applicant was away at the Hugh Wooding Law School in Trinidad. The application for the adjournment was not opposed.

Case Name:

[1] Vernon S. Veira
[2] Vernon S. Veira & Associates
v
[1] Guy Mitchell
[2] Amy Mitchell

[SKBHCVAP2010/0021]

Date: Monday, 11th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. Camilla Cato holding papers for Mr. Gerhard Wallbank of Webster Dyrud and Mitchell (now Webster)

Appellants: Dr. Henry Browne, QC

Respondents: Mr. Jonel Powell

Issues: Application to be removed from the record –
Directions for hearing of substantive appeal

Result / Order: [Oral delivery]
1. Hearing of the substantive appeal is adjourned to the next sitting of the Court in St. Kitts-Nevis scheduled for June 2013.
2. The matter is to be placed on the next Chamber hearing list for giving any necessary directions.

Reason: There was an order made on 8th March 2013 removing Webster as the solicitors for the respondents. The adjournment of the substantive appeal allowed the respondents some time to instruct new counsel, if they wished to do so.

Case Name: Naomi Darren also known as Naomi Darabaner
v
[1] Intrust Trustees (Nevis) Limited
[2] In-Trust Limited
[3] Steven Slom

[SKBHCVAP2012/0002
& SKBHCVAP2012/0012]

Date: Monday, 11th March 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. M. Angela Cozier

Respondent: Mr. Frank Walwyn, with him, Ms. Kalisia Isaacs (for the 3rd respondent)

Issues: Application for leave to appeal judgment of Hon. Albert Redhead J dated 14th February 2012 – Application for leave to appeal judgment of Hon. John Benjamin J [Ag.] dated 22nd May 2012 – Application for stay of execution under the order of Benjamin J [Ag.] – Application for review of paragraph 2 of the Order dated 29th March 2012 of Justice of Appeal Janice M. Pereira by full Court

Result / Order: [Oral delivery]
The application for leave to appeal is dismissed. The Court can find no basis to review the order of Justice of Appeal Janice Pereira and the orders of Benjamin JA [Ag.]. The Applicant is ordered to pay costs in the sum of \$10,000.00 to the 3rd respondent.

Reason: The applicant had filed four applications (an application for leave to appeal the decision of Redhead J [Ag.]; an application for review of the order of Pereira JA; an application for leave to appeal the decision of Benjamin J [Ag.]; and an application for stay of execution of the order of Benjamin J [Ag.]). The Court was of the opinion that these applications related to the applicant's failure to comply with the order of Redhead J [Ag.] that she pay security for costs failing which the matter should stand dismissed.

It was accepted by both parties that if the Court of Appeal refused to grant leave to appeal the order of Redhead J [Ag.], then the substantive underlying claim would be moot.

The application for security for costs was filed on 10th September 2011. Redhead J [Ag.] ordered, inter alia, that “in my discretion it is hereby ordered that the Claimant pay into Court \$150,000.00 as security for cost[s] within 21 days of the Order. Failing to comply with this order for security for cost[s] the matter stands dismissed.” The applicant failed to comply with this order, which made it clear that the applicant had 21 days until the 7th of March 2012 to pay into court \$150,000.00 as security for the respondent’s costs and that failure to comply would result in the matter being dismissed. The applicant was aware of the order and the consequence of failing to comply. The applicant waited until 9th March 2012 to file an application for stay of proceedings, two days after the expiration of time specified by the order of Redhead J [Ag.]. The application was out of time and no relief from sanctions was sought.

The Court opined that it is trite law that for leave to be granted to appeal, the appeal must have a realistic prospect of success. The Court further stated that the burden lies on the applicant to demonstrate a reasonable prospect of success.

Before one can get the appellate court to interfere with the exercise of a judge’s discretion, one must show that this discretion exceeded the generous ambit within which reasonable disagreement is possible. The Court’s powers in the context of the application for leave to appeal is expressed by Rawlins JA in *Enzo Addari v Edy Gay Addari* (Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2005/0021 (delivered 23rd September 2005, unreported)) when he said the “Court will only entertain an appeal from a matter, which is within the plenitude of the discretion of a Judge, in certain circumstances. The applicant must satisfy this Court that in the exercise of the discretion, the Judge made a mistake of law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise the discretion. The applicant may also convince this court that the conclusion which the Judge reached, was ‘outside

the generous ambit within which reasonable disagreement is possible.” Having considered this matter, the Court was also of the opinion that the applicant in this case had failed to establish that the proposed appeal had a realistic prospect of success.

The applicant had appealed the order of Redhead J [Ag.] on grounds which included that His Lordship had erred in exercising his discretion as stated in paragraph 2 of the application for security for costs, rendering the decision unsafe and unreasonable and liable to be set aside. The Court opined that the judgment was clearly not consistent and that it seemed like there was a typographical error. The Court held however, that this would not prejudice the applicant, as the information contained was not material to the judgment.

The applicant alleged that Redhead J [Ag.] erred by finding it would be unjust to order security for costs if it would shut out the applicant but then failed to consider the strength of their case. The Court opined that the factors to be considered in exercising a discretion for determining security for costs must include investigating the merit of the claim, holding a mini trial, and the impact on the respondent (to the application for security for costs). Redhead J [Ag.] considered the strength of the applicant’s case albeit without embarking on a mini trial. The Court was therefore of the view that there was no error made by Redhead J [Ag.] in this regard.

It was also contended that the judge erred in not considering the applicant’s opinion that she was not impecunious. The Court found that there was no basis for this ground of appeal, having regard to the learned judge’s reasoning which was based on the evidence which had been presented to him by the applicant.

The Court also held that the judge did not err in appointing Mr. George Rosenberg as an expert witness at the trial. Expert evidence would have been required in relation to the legal fees from a foreign court, hence the reason why judge deemed it necessary for Mr. Rosenberg to give evidence in

respect of this issue.

The applicant in this case was essentially seeking to challenge the exercise of the judge's discretion. However, the material filed in support of the application for leave to appeal did not meet the high threshold set out in the case of *Enzo Addari v Edy Gay Addari*. In the circumstances, the Court held that the application for leave to appeal should be dismissed. It was further held that there was no need to make formal orders in relation to the other applications which were before the Court. There was no basis to review the orders of Pereira JA and Benjamin J [Ag.].

Case Name:

**Newrish Nital
v
The Director of Public Prosecutions**

[SKBHCRAP2011/0022]

Date:

Tuesday, 12th March 2013

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

**Appellant /
Applicant:**

In person

Respondent:

Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess Gordon

Issues:

**Application for bail pending hearing of appeal –
Appeal against conviction and sentence – Fraud and
false pretence**

Result / Order:

[Oral delivery]

- 1. Bail is set in the sum of forty thousand dollars Eastern Caribbean currency (\$40,000.00) with two (2) sureties in the sum of twenty thousand dollars**

- Eastern Caribbean currency (\$20,000.00) each;
2. That the appellant/applicant shall surrender to the Registrar of the High Court his driver's license and any other travel documents that he is in possession of;
 3. That the appellant/applicant shall report to the Basseterre Police Station every Monday, Wednesday, Friday and Saturday sometime between the hours of 7:00 a.m. and 7:00 p.m.;
 4. That the appellant/applicant shall attend Court of Appeal during the period from 10th – 14th June 2013 for the hearing of his appeal.
 5. Failure on the part of the appellant/applicant to comply with any of the above conditions shall result in the forfeiture of his bail and his continued imprisonment until conclusion of appeal or expiration of his term of imprisonment (whichever comes first).

Reason:

The appellant/applicant made a viva voce application for bail pending hearing of his appeal and the Office of the Director of Public Prosecutions had no objections. The record of appeal had not been completed in accordance with order made by the Court on 26th November 2012.

Case Name:

Louis Richards

v

The Director of Public Prosecutions

[SKBHCRAP2008/0030]

Date:

Tuesday, 12th March 2013

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

In person

Respondent: Ms. Rhonda Nisbett-Browne

Issues: Appeal against conviction – Murder –Application for an adjournment

Result / Order: [Oral delivery]
Hearing of the appeal is adjourned to the next sitting of the Court of Appeal in the Federation of Saint Christopher and Nevis during the week of 10th – 14th June 2013.

Reason: To allow the appellant to retain counsel to prosecute his appeal.

Case Name: John Harvey
v
The Director of Public Prosecutions
[SKBHCRAP 2010/0016]

Date: Tuesday, 12th March 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: In person
Respondent: Ms. Greatess Gordon, with her, Mr. Garth Wilkin, Ms. Rhonda Nisbett-Browne and Dr. Dennis Merchant

Issues: Appeal against sentence – Unlawful carnal knowledge – Whether sentence of 12 years is too severe in the circumstances

Result / Order: [Oral delivery]

The appeal is dismissed. The sentence is affirmed.

Reason: The Court could find no reason to disturb the sentence of the lower court. The sentence of 12 years was appropriate.

Case Name: Talbert Warner
V
The Director of Public Prosecutions
[SKBHCRAP2010/0020]

Date: Tuesday, 12th March 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: In person
Respondent: Mr. Garth Wilkin, with him, Ms. Greatess Gordon, Ms. Rhonda Nisbett-Browne and Dr. Dennis Merchant

Issues: Appeal against sentence – Embezzlement – Whether sentence of 5 years is too severe in the circumstances

Result / Order: [Oral delivery]
Appeal against sentence is allowed to the extent that the sentence is varied to reflect four (4) years.

Reason: There was no evidence that the notional sentencing factors were taken into account. The Court opined that it is only where the aggravating factors outweigh the mitigating factors that the court should go above a notional sentence.

Case Name:

**Junior Gordon
V
The Director of Public Prosecutions
[SKBHCRA 2009/0007]**

Date:

Tuesday, 12th March 2013

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Mr. Anthony Johnson

Respondent:

Ms. Rhonda Nisbett-Browne, with her, Mr. Garth Wilkin, Ms. Greatess Gordon and Dr. Dennis Merchant

Issues:

Appeal against conviction – Indecent assault – Whether the section under which the appellant was charged is a penal section (i.e. a section which only prescribes a penalty for the offence) and the appellant should have instead been charged with the offence contrary to the common law – Whether this rendered the charge nugatory and the conviction unsafe – Whether the way the way the identification of the appellant was conducted was unsafe – Whether the inconsistencies in the case were sufficient to render the conviction of the appellant unsafe – Whether the learned trial judge’s direction on corroboration was fatal to the case – Whether the learned trial judge ought properly to have directed the jury on good character

Result / Order:

**[Oral delivery]
Appeal allowed. Conviction and sentence are set aside and a retrial is ordered.
(Per Baptiste JA and Blenman JA, Michel JA dissenting).**

Reason:

The Court held that while it was true that section 47(1) is penal in nature, no injustice had been occasioned to the appellant by the indictment as laid. It focused the mind of the appellant on the offence for which he had being indicted and the penalty provided by the section. There was no merit in this ground of appeal.

With regard to the issue of the identification of the appellant by the virtual complainant not being voluntary, but rather, assisted and brought about by prompting from the virtual complainant's father and the police officer Errol Wattley, the Court opined that it was clear on the evidence that the virtual complainant had complained to her mother in clear terms as to the assault which she experienced in the store. Although she did not call the appellant by name, she gave sufficient information which caused the mother to report the matter to the police who then went to the home of the appellant, where the confrontation took place. Even before the confrontation, there was no doubt in the virtual complainant's mind as to who indecently assaulted her in the store. Furthermore, the appellant was the person who was known to the virtual complainant. In his statement, the appellant did say that he was in the store at the same time as the virtual complainant, although he denied committing any offence. In the circumstances, this ground of appeal was found to be without merit.

In relation to whether the trial judge failed properly to direct the jury on the issue of identification, the Court held that this was a case of recognition and upon reviewing the trial judge's directions, the learned judge did not inadequately or improperly direct the jury on the issue. Accordingly, this ground of appeal also fails.

The appellant had also contended that there were inconsistencies and contradictions in the evidence of the virtual complainant. The Court held that the learned trial judge dealt adequately with these matters and that they were not of such importance so as to affect the safety of the conviction.

With regard to the issue of corroboration, the Court was of the view that the learned trial judge dealt adequately with this issue and could not be faulted for the directions he gave on the matter.

The Court did however raise the issue of whether the learned judge adequately directed the jury on the appellant's good character. Although this was not one of the appellant's grounds of appeal, this issue would have been caught by the ground of appeal that the conviction was unsafe. The Court was of the view that there was clear evidence of the appellant's good character, which had been raised during the trial. However, the trial judge omitted to direct jury on the issue. While the Court was of opinion that omitting to give this direction was not necessarily fatal to the fairness of a trial or the safety of the conviction (see *Theresa Anne Marie Justin v The Queen* (Saint Lucia High Court Criminal Appeal SLUHCRA2008/0005 (delivered 26th June 2012, unreported)), it was held that the question here was whether the jury would inevitably have convicted the appellant even if a good character direction had been given. The Court could not be certain that this would have been the case, and so on this basis, the appeal was allowed.

Case Name: **The Director of Public Prosecutions
v
Kenrick Hendrickson**

[SKBHCRAP2011/0002]

Date: **Tuesday, 12th March 2013**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances: **Appellant: Ms. Rhonda Nisbett-Browne, with her, Mr. Garth Wilkin, Ms. Greatess Gordon and Dr. Dennis Merchant**

Respondent:	In person
Issues:	Appeal against sentence – Indecent Assault – Whether sentence imposed was extremely lenient
Result / Order:	[Oral delivery] The matter is adjourned to the next sitting of the Court of Appeal in St Kitts & Nevis from 10th – 14th June 2013.
Reason:	To allow the respondent to instruct counsel to prosecute the appeal.
Case Name:	Che Gregory Spencer v The Director of Public Prosecutions [SKBHCRAP2009/013A]
Date:	Tuesday, 12th March 2013
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	Dr. Henry Browne, QC, with him, Mr. Hesketh Benjamin
Respondent:	Dr. Dennis Merchant, with him, Ms. Rhonda Nisbett-Browne, Mr. Garth Wilkin and Ms. Greatess Gordon
Issues:	Criminal appeal against conviction – Murder – Whether there was a miscarriage of justice – Whether learned trial judge erred in law in failing to properly direct the jury on of self-defence and provocation – Whether appellant failed to adequately and accurately sum up the law on accident to the jury

Result / Order: Decision reserved.

Case Name: Kevin Jones
V
The Director of Public Prosecutions
[SKBHCRAP2010/0005]

Date: Wednesday, 13th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: Dr. Dennis Merchant, with him, Ms. Rhonda Nisbett-Browne, Mr. Garth Wilkin and Ms. Greatess Gordon
Respondent: Mr. Chesley Hamilton

Issues: Criminal appeal against conviction – Rape

Result / Order: [Oral delivery]
1. Leave is granted to the appellant to file and serve proper grounds of appeal with full particulars no later than Wednesday, 27th March 2013.
2. The appellant shall also file and serve skeleton submissions in response no later than Friday, 12th April 2013.
3. The hearing of the appeal is accordingly adjourned to the next sitting of the Court in St. Kitts & Nevis in June 2013.

Reason: The grounds of appeal were vague and un-particularised leading to uncertainty as to the appellant's complaint.

Case Name:

[1] Alexter Amory

[2] Leon Phillip

v

The Director of Public Prosecutions

[SKBHCRA2010/0013]

[SKBHCRA2010/0015]

Date:

Wednesday, 13th March 2013

Coram:

The Hon. Mde. Janice M. Pereira, Chief Justice

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

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellants:

In person

Respondent:

Ms. Rhonda Nisbett-Browne

Issues:

**Criminal appeal against conviction – Armed Robbery
– Application for leave to amend grounds of appeal –
Alibi – Identification – Joint enterprise – Whether
learned trial judge misdirected jury on evidence of
alibi, identification and joint enterprise – Whether
learned trial judge failed to give sufficient direction to
jury on evidence of alibi, identification and joint
enterprise – Whether evidence showed two separate
incidents or two separate versions of a single
incident – Application for adjournment**

Result / Order:

[Oral delivery]

**The hearing of the appeal is adjourned to the next
sitting of the Court in St. Kitts & Nevis in June 2013.**

Reason:

**To allow the appellant some time to seek legal
representation.**

Case Name:

**Tamboei Huggins
v
The Director of Public Prosecutions
[SKBHCRAP2010/0018]**

Date:

Wednesday, 13th March 2013

Coram:

**The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Chesley Hamilton

Respondent:

Mr. Garth Wilkin

Issues:

**Criminal appeal against conviction and sentence –
Burglary – Whether learned trial judge misdirected
jury on issue of voice identification**

Result / Order:

**[Oral delivery]
Appeal is dismissed and conviction is affirmed. The
sentence of seven (7) years is also affirmed.**

Reason:

**The Court was of the view that there was no merit in
the ground of appeal advanced that the learned trial
judge had misdirected the jury on voice identification.
As has been indicated in the case of *Donald Phipps v
The Director of Public Prosecutions and Another*
[2012] UKPC 24 the learned judge need not use any
precise form of words in giving the jury the *Turnbull*
directions on identification, so long as the essential
elements of the warning are given.**

**The Court was satisfied that the learned trial judge
did all that was required and more to bring home to
the jury the danger of convicting on voice
identification alone. Based on the totality of the
evidence before the jury on this issue (the main parts**

of which were captured succinctly in paragraph 28 of the respondent's written submissions), the Court is satisfied that there was no miscarriage of justice.

In respect of sentence, though the Court considered that it was somewhat lenient in all the circumstances of this case, it held that the sentence would not be disturbed.

Case Name: **Eldean Phipps**
v
The Director of Public Prosecutions

[SKBHCRAP2010/0025]

Date: **Wednesday, 13th March 2013**

Coram: **The Hon. Mde. Janice M. Pereira, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: **In person**
Respondent: **Ms. Rhonda Nisbett-Browne**

Issues: **Appeal against conviction and sentence – Shooting with intent to do grievous bodily harm – Whether learned trial judge misdirected jury on circumstantial evidence**

Result / Order: **[Oral delivery]**
Appeal is dismissed. Sentence is affirmed.

Reason: **The Court was of the view that the appeal had no merit. The learned trial judge gave a balanced and fair summation concerning the issues raised. In particular, he explained to the jury how to treat with circumstantial evidence and how to treat with**

discrepancies. The Court also held that there was no basis warranting interfering with the sentence imposed by the learned judge.

Case Name: **Hesketh Trevor Chapman**
V
Nevis Cooperative Banking Company Limited
(now called RBTT Bank (SKN) Limited)
[SKBHCVAP2003/0032]

Date: **Wednesday, 13th March 2013**

Coram: **The Hon. Mde. Janice M. Pereira, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: **Ms. Joan Slack**
Respondent: **Ms. Deidre Williams**

Issues: **Application for adjournment**

Result / Order: **[Oral delivery]**
1. The Registrar in St. Kitts and Nevis shall furnish the legal practitioners for the parties with a copy of the judge's notes taken in the proceedings no later than Monday, March 18th 2013.
2. The legal practitioners shall collaborate and use their best endeavors to transcribe the notes of evidence and shall report their progress to the Court of Appeal's headquarters by fax or email no later than Friday, May 17th 2013.
3. The appeal is to be taken off the hearing list and will be relisted only at such time when the appeal is ready for hearing in accordance with the rules of Court.

Reason: The parties had not yet received the judge's notes of evidence.

Case Name: Leonora L. Walwyn
v
[1] Eustace Archibald
[2] RBTT Bank (SKN) Limited
[SKBHCVAP2010/0012]

Date: Wednesday, 13th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Terence Byron
Respondents: Ms. M. Angela Cozier for Eustace Archibald
Ms. Deidre Williams for RBTT Bank(SKN) Limited

Issues: Whether appellant equitable mortgagee by subrogation – Whether first respondent entitled to damages

Result / Order: [Oral delivery]
1. Time is extended to the appellant to file and serve skeleton submissions in accordance with rule 62.11 of the Civil Procedure Rules 2000 no later than Wednesday, 3rd April 2013 failing which the appellant's appeal shall stand dismissed.
2. The first named respondent/counter appellant, shall file and serve skeleton arguments in support of the counter notice and in response to the skeleton argument of the appellant no later than Friday, 26th April 2013 failing which the first respondent's counter notice shall be struck out.

3. The second named respondent shall file and serve skeleton submissions no later than Friday, 26th April 2013.
4. The hearing of this appeal is adjourned and will be listed for further case management.

Reason: The parties had failed to comply with the Rules of Court.

Case Name: Dwight C. Cozier
v
[1] Pauline Waruguru Ngungiri
[2] E Bizz Business Solutions Inc (dba sknvibes.com)

[SKBHCVAP2012/0021]

Date: Wednesday, 13th March 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: Ms. M. Angela Cozier
Respondents: Ms. Cindy Herbert (for the 2nd respondent)

Issues: Appeal against order of learned master refusing application for specific disclosure – Disclosure of articles posted on sknvibes.com – Articles containing passages of and concerning appellant

Result / Order: [Oral delivery]
Appeal is dismissed with costs to the respondent in the sum of \$1,500.00.

Reason:

The Court held that the appeal had no merit. Even though the learned master's conclusion was arrived at by a different route (to that which the Court would have taken), the Court was of the view that her conclusion was correct. Furthermore, the application placed before the learned master was misconceived, as articles sought to be 'disclosed' were already 'disclosed' within the meaning of rule 28.1(3) of the Civil Procedure Rules 2000. What the appellant sought was more in the nature of an inspection or requesting a copy, but the appellant would have been unable to surmount the hurdle in CPR 28.11 given the master's specific findings as to the existence of the articles. The Court was of the view that the learned master correctly exercised her discretion.

Case Name:

Steven G. Hites

v

[1] Anguilla Business Services Ltd

[2] St. Kitts Scenic Railway Limited

[3] Jeffery D. Hamilton

[SKBHCVAP2012/0007]

St. Kitts Scenic Railway Limited

v

[1] Anguilla Business Services Ltd

[2] Steven G. Hites

[3] Jeffery D. Hamilton

[SKBHCVAP2012/0008]

Date:

Thursday, 14th March 2013

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Terence Byron

Respondents: Mr. Damian Kelsick, with him, Mr. Garth Wilkin for the 1st respondent

Issues: Application for wasted costs for failure to comply with Court's direction given in November 2012

Result / Order: [Oral delivery]

1. Today's hearing date is vacated.
2. Leave is granted to the appellant to file a supplemental record of appeal in 21 days.
3. Leave is granted to the respondent to file submissions within 21 days of the filing of the supplemental record of appeal.
4. The solicitors for the parties are to agree on the content of the supplemental record of appeal.
5. The consolidated appeals are adjourned to the next sitting of the Court in the week of June 10th – 14th 2013.
6. By consent costs awarded in the sum of \$1,500.00.

Reason: Counsel for the appellant did not comply with directions of the Court given at the November 2012 sitting.

Case Name:

SM Life Ventures LLC
V
[1] Susan Morrice
[2] Tony Quinn
[3] International Natural Energy LLC
[4] Belize Natural Energy Limited

[SKBHCVAP2012/0018]

International Natural Energy LLC

V
SM Life Ventures LLC

[SKBHCVAP2013/0002]

Date: Thursday, 14th March 2013

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

Appearances:

Appellant / Respondent:	Mr. Jeffrey Nisbett (for International Natural Energy LLC)
Respondent / Appellant:	Mr. Frank Walwyn, with him, Ms. Kalisia Isaacs (for SM Life Ventures LLC)

Issues: Whether learned judge erred in holding that there was not a sufficient nexus between claim brought by respondent and costs awarded in previous proceedings between respondent and appellant to permit appellant's costs in those proceedings to be set off against respondent's dividend – Consent order filed

Result / Order: In relation to SKBHCVAP2012/0018:

BY CONSENT IT IS HEREBY ORDERED THAT:

1. The 3rd respondent International Natural Energy LLC ("INE") shall pay the sum of US 14,500,000 to SM Life Life Ventures LLC ("SM Life").
2. SM Life shall forthwith execute instruments of transfer in respect of its Membership interest to INE, which for greater certainty consists of 64,000 CLASS A membership interest units described as numbers 117071–157070 and 524621–548620, reflected by Certificates 83 and 163 ("SM Life Membership Interest").
3. The appeal herein be, and is allowed only to the extent that there shall be no costs awarded to any party from the trial below.
4. Save for the Orders made above the appeal and cross appeal are dismissed with prejudice and

without cost.

5. All further proceedings in this action be stayed upon the terms which provide for the timing of the payment of the sum of US 14,500,000 pursuant to paragraph 1 above and the transfer of the SM Life Membership Interest pursuant to paragraph 2.
6. Each and every party shall have permission to apply to the Court to enforce the terms without the need to bring a new claim.

In relation to SKBHCVAP2013/0002:

BY CONSENT IT IS HEREBY ORDERED THAT:

1. The appeal hearing be, and is hereby dismissed with prejudice and without costs.
2. The action below commenced as claim No. NEVHCV2012/0149 be, and the same is hereby dismissed with prejudice and without costs.
3. The judgment sum of US 1.28 million ordered paid into Court is to be paid out to the appellant, International Natural Energy LLC.

Reason:

Consent orders were filed in both matters.

Case Name:

Sylvester Edwards

v

Shirley Burnham

[SKBMCVAP2011/0009]

Date:

Thursday, 14th March 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Dr. Henry Browne, QC, with him, Mr. Hesketh Benjamin

Respondent:

Mr. Karlweis Liburd

Issues: Application for leave to withdraw appeal

Result / Order: [Oral delivery]
Leave to withdraw and discontinue the appeal is granted. The appeal therefore stands dismissed. No order as to costs.

Reason: Counsel for the appellant indicated to the Court that the matter had been settled out of court and the appellant wished to withdraw the appeal.

Case Name: Phillip Lloyd
v
The Chief of Police
[SKBMCRAP2012/0006]

Date: Thursday, 14th March 2013

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

Appearances:

Appellant:	Dr. Henry Browne, QC, with him, Mr. Hesketh Benjamin
Respondent:	Ms. Rhonda Nisbett-Browne, with her, Dr. Dennis Merchant, Mr. Garth Wilkin and Ms. Greatess Gordon

Issues: Criminal appeal against conviction and sentence – Possession of controlled drug with intent to supply – Whether judgment of learned judge was based on wrong principles – Whether viewing the circumstances the learned magistrate could not properly have so decided – Whether the judgment was unreasonable and cannot be supported having

regard to the evidence – Whether sentence imposed was unduly severe

Result / Order:

[Oral delivery]

The appeal is allowed in relation to the count of possession of 7 rounds of .25 ammunition, also in relation to the 1 round of 12 gauge ammunition and also in relation to the offences of cultivation of cannabis and possession with intent to supply.

In relation to the offence of possession of cannabis, the appeal against conviction is dismissed, the appeal against sentence is allowed and the sentence of the magistrate is varied to time already served (the appellant having already served 1 year and 7 days, in addition to 5 months on remand).

Reason:

The evidence which was before the learned magistrate in relation to the charge of cultivation of cannabis and the charge of possession of cannabis with intent to supply was tenuous at best. The Court was of the view that the learned magistrate was equally capable of drawing the inference that the appellant was not guilty of these offences as she was capable of reaching the conclusion that he was. The learned magistrate was duty bound to reach a conclusion which was more favourable to the appellant in those circumstances, but she did not. She therefore erred in finding him guilty of these two offences.

In relation to the charge of possession of cannabis however, the Court was of the opinion that there was sufficient evidence on which the magistrate could have come to the conclusion that the appellant was guilty of this offence. Dr. Browne, QC conceded that there was no basis to challenge the magistrate's finding in relation to this offence. Therefore, the only issue left for the Court of Appeal to consider was the issue of sentencing. The Court opined that while the learned magistrate referred to the case of *Desmond Baptiste v the Queen* (Saint Vincent and the Grenadines High Court Criminal Appeal SVGHCRA2003/0008 (delivered 6th December 2004,

unreported)) in her ruling, she failed to apply the principles laid down in that case. In the circumstances, the Court of Appeal must therefore question whether the appellant was properly sentenced. The learned magistrate ought properly to have taken into account the mitigating factors as well as the aggravating factors in the case. Given that the appellant was a mature man with no previous convictions, the fact that he admitted that the cannabis belonged to him and also that the cannabis in the other bedroom belonged to him, the aggravating factors did not outweigh the mitigating factors.

The Court was of the opinion that the learned magistrate ought properly to have taken into consideration all of the sentencing factors – deterrence, rehabilitation and punishment. Deterrence is general as well as specific in nature. The Court was of the view that specific deterrence was not applicable to this case. There was nothing before the Court to suggest that the appellant was in need of rehabilitation. When the Court looked at the totality of the evidence in the matter, it held that the learned magistrate should have started at a notional sentence of 2 years. There were no aggravating factors in this case and therefore, there was no justification for the learned magistrate giving 3 years as a notional sentence, having regard to the appellant's admission that the cannabis belonged to him, and also considering the quantity of cannabis. The notional sentence ought properly to have been 2 years.

Case Name:

**Tonya Powell
v
The Chief of Police**

[SKBMCRAP2011/0009]

Date:

Thursday, 14th March 2013

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

Appearances:

Appellant: Dr. Henry Browne, QC

Respondent: Ms. Greatess Gordon, with her, Ms. Rhonda Nisbett-Browne, Dr. Dennis Merchant and Mr. Garth Wilkin

Issues: Criminal appeal against conviction and sentence – Whether the finding of the learned magistrate was against the weight of the evidence – Whether the sentence imposed was unduly severe

Result / Order: [Oral delivery]
Leave to withdraw the appeal is granted.
Accordingly, the appeal stands dismissed.

Reason: Counsel for the appellant informed the Court that the appellant wished to withdraw the appeal. The prosecution had no objections.

Case Name: Daurren Williams
v
Chief of Police

[SKBMCRAP2013/0002]

Date: Thursday, 14th March 2013

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

Appearances:

Appellant: Dr. Henry Browne, QC

Respondent: Ms. Rhonda Nisbett-Browne, with her, Ms. Greatess

Gordon, Dr. Dennis Merchant and Mr. Garth Wilkin

Issues: Criminal appeal against conviction and sentence – Possession of ammunition – Application to withdraw appeal

Result / Order: [Oral delivery]
Leave to withdraw the appeal is granted. Accordingly, the appeal is dismissed.

Reason: The Court was informed by counsel for the appellant that the record of appeal was not yet ready, and the sentence would have been served within one month. The appellant therefore wished to withdraw the appeal.

Case Name: Neil Duporte
v
The Chief of Police

[SKBMCRAP2012/0003]

Date: Thursday, 14th March 2013

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

Appearances:
Appellant: Mr. Chesley Hamilton
Respondent: Ms. Rhonda Nisbett-Browne, with her, Mr. Garth Wilkin, Ms. Greatess Gordon, and Dr. Dennis Merchant

Issues: Whether learned magistrate erred in law and misdirected herself in finding that appellant had knowledge of cannabis when there was no evidence

to contradict witness's evidence that he had sole possession, care, control and knowledge of the cannabis

Result / Order: [Oral delivery]
The appeal is dismissed and the sentence is affirmed.

Reason: The Court could find no reason to conclude that the learned magistrate had erred in reaching her decision.

Case Name: The Commissioner of Police
V
Rayheam Forbes
[SKBMCRAP2012/0004]

Date: Thursday, 14th March 2013

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

Appearances:
Appellant: In person
Respondent: Ms. Rhonda Nisbett-Browne, with her, Mr. Garth Wilkin, Ms. Greatess Gordon, and Dr. Dennis Merchant

Issues: Appeal against decision of learned magistrate for not imposing a custodial sentence for offence of possession of firearm and ammunition – Application for adjournment

Result / Order: [Oral delivery]
The appeal is adjourned to the next sitting of the Court of Appeal in Federation of St. Kitts & Nevis

from 10th to 14th June 2013.

Reason:

To allow the respondent an opportunity to retain counsel.