BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

Criminal Case No. 1A of 2007

THE QUEEN

V

[1] MORRISON WATTLEY
[2] ALLAN PARKER

Appearances:

Mr. Paul Dennis and Mr. Malcolm Arthurs of O'Neal Webster for the Applicant, Allan Parker
Dr. Henry Browne Morrison Wattley, amicus curiae in this application
Mr. Terrence F. Williams, Director of Public Prosecution for the Crown.

2007: 17 May
18 September

JUDGMENT

[1] HARIPRASHAD-CHARLES J: At the conclusion of the Preliminary Inquiry ("PI"), Mr. Morrison Wattley and Mr. Allan Parker ("the Defendants") were committed by the Learned Magistrate to stand trial at the High Court in its Criminal Jurisdiction. The Defendants were subsequently indicted by the Attorney General on behalf of the Crown for various offences under the Criminal Code (No. 1 of 1997) and the Proceeds of Criminal Conduct Act, 1997 (No. 5 of 1997) of the Laws of the Virgin Islands. Their matter has been traversed to the October 2007 Criminal Assizes. The allegations which educed those charges are not germane to the present application.

The present application

[2] At the PI, the Prosecution tendered into evidence the affidavit together with supporting documents of Mr. Ian Smith, Manager of Banco Popular as well as the affidavit with supporting documents of Mr. Donald Thompson, Senior Manager of the St. Kitts and Nevis

Anguilla National Bank Ltd. These documents were tendered into evidence by Detective Constable 109 Brian Penn. The Defendants did not object to the tendering of these documents by the Prosecution. Had they done so, they would have had an insurmountable task by virtue of the Banker's Books (Evidence) Act ("the Act"). As I understand it, the Defendants do not intend to challenge the admission of these exhibits into evidence when the matter comes up before a Judge and Jury at the October Assizes. However, one of the Defendants namely Mr. Parker ("the Applicant") is seeking an Order for these two bank officials to be made available for cross-examination. The Prosecution opposes the application on the ground that the Applicant has not shown any "special cause" as is required by section 6 of the Act.

Banker's Books (Evidence) Act

[3] It is convenient to start by setting out the relevant provisions of the Act. Section 2 defines banker's books to include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank. Section 3 provides as follows:

> "Subject to the provisions of this Act, a copy of any entry in a banker's book shall, in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

[4] By section 3, in all legal proceedings, a copy of any entry in a banker's book shall be received as prima facie evidence of the existence of such entry and of all matters, transactions and accounts therein recorded.

[5] Sections 4 reads:

> "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is the custody or control of the banker."

[6] It goes on to say that "such proof may be given by a partner or officer of the bank, and may be given orally, or by affidavit sworn before any Commissioner or person authorized to take affidavits."

[7] Section 5 provides that:

> "A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be further proved that the copy has been examined with the original entry and is correct.
>
> Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally, or by affidavit sworn before any Commissioner or person authorized to take affidavits."

[8] Section 6 reads:

> "A banker or officer of a bank, shall not, in any legal proceeding to which the banker is not a party, be compellable to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge made for special cause."

[9] The purpose of sections 3 to 6 was to enable attested copies of entries in a banker's books to be made available in evidence without the necessity of the books themselves being produced in court together with an officer of the bank to speak to them. In relation to the Bankers' Books (Evidence) Act 1879 (England & Wales), which is in substantially identical terms to the BVI Act, Lindley M.R commented in Pollock v Garle[1]:

> "The Bankers' Book Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers' books. If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a *subpoena duces tecum*, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from the inconvenience. This is accompanied by the first six sections of the Act of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books."[2]

[10] It is plain that the main object of the Act is to avoid the inconveniences to bankers of their being compellable to produce their books in legal proceedings to which they are not party.[3] The previous practice was vexatious, because in theory, the books could be utilized only

[1] [1898] 1 Ch. 1, 4.
[2] See also Lord Keith of Kinkel in *Douglas and Others v The Right Honourable Sir Lynden Oscar Pindling (Bahamas) 1996 UKPC 8 (13 May 1996).*
[3] Parnell v Wood [1892] P. 137.

for refreshing the memory of the clerk or the officer who made the entries and was summoned as a witness; and the real object of compelling their production was that they were in practice invariably but regularly put forward and treated as substantive evidence in themselves.[4]

[11] In Wheatley & Anor v The Commissioner of Police of the British Virgin Islands[5], Lord Bingham of Cornhill indicated that the purposes of the Act were threefold namely:

> "to enable a banker's books to be inspected and copied despite the duty of confidentiality owed by banker to customer; to relieve the banker of the need to produce his books in court; and to provide that duly authenticated entries in such books should be received as prima facie evidence not only of the entries but of the transactions recorded."

Section 6 of the Act: its applicability

[12] The critical issue is whether the application is made pursuant to section 6 of the Act.

[13] Mr. Paul Dennis appearing as Learned Counsel for the Applicant forcefully argued that the application is not made pursuant to section 6 and as such, the Applicant does not have to show "special cause". According to him, section 6 envisages a situation of seeking to adduce evidence. He submitted that the Applicant is simply seeking to cross-examine the two bank officials on evidence which the Prosecution has already produced at the PI and as such, section 6 has no applicability to such a case.

[14] In his succinct submissions, the Learned Director of Public Prosecutions, Mr. Terrence Williams asserted that a prosecutor cannot order a banker to come to court; it must be a Judge and special cause must be shown for a Judge to allow the banker to attend Court to prove the matters, transactions and accounts. He submitted that the Act is applicable to all proceedings and that the witness is not compellable to attend to give evidence.

[4] See Bowen LJ in *Arnott v Hayes* (1887) 36 Ch D 731 at 738.
[5] [2006] UKPC 24, Judgment delivered on 4 May 2006

[15] The Learned Authors of Banking Litigation stated that "….the order of a judge to compel a banker to produce records or to explain them under the Act must be made 'for special cause'." [6]

[16] The Act provides that, once copies of the relevant entries have been appropriately verified, they shall, in legal proceedings, be received as prima facie evidence of such entries and of all matters, transactions and accounts therein recorded[7] (these are the provisions designed to protect bankers – as commented to by Lindley M.R. in Pollock v Garle). So, since attested copies of entries in the books were capable of being given in evidence, it would be in exceptional cases that the books themselves could be required to be produced in court, together with an officer of the bank to speak to them. This is the significance of the reference to "special cause" in section 6.[8]

[17] It is plain that the Applicant has to surmount the hurdle of showing "special cause." This he must seek to do by affidavit evidence in support of such an application. The Applicant has not even file an application much less swear to an affidavit setting out any "special cause." Unquestionably, the Act was enacted for specific reasons; one being to prevent the inconvenience which was caused to bankers and their customers when bankers and banker's books are away from the bank for long periods. The Legislature must have contemplated and sanctioned the fact that in cases where a party has complied with the statutory requirements, the evidence will be admitted on affidavit without the need for the banker to be present at the trial to be cross-examined.

[18] In Steven Grant v R, it was submitted by Counsel for the Appellant that the evidence against the accused at a criminal trial should be given by witnesses who attend court to give evidence on oath and who can be cross-examined. Lord Bingham of Cornhill accepted that the evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation

[6] See Banking Litigation by David Warne and Nicholas Elliott, Q.C. 1999, page 294 at para.8-28.
[7] See sections 3, 4 and 5 of the Act.
[8] See Lord Keith of Kinkel in Douglas and Others v The Right Honourable Sir Lynden Pindling (Bahamas) at paragraph 14 of the judgment.

evaluated by the tribunal of fact, has always been regarded as the best evidence and any departure from that practice must be justified. He then stated that exceptions to the common-law rule against the admission of hearsay evidence has been recognized for centuries and he gave one statutory exception as entries in bankers' books under section 33 of the Evidence Act, as amended, Jamaica (which is similar to the BVI Act).

[19] It is clear from Steven Grant that entries in bankers' books are exception to the general common-law rule against the admission of hearsay evidence which cannot be tested by cross-examination and that the departure from the rule is justified. The fact that these entries can be admitted in evidence without the banker being available for cross-examination must have been contemplated and accepted by the Legislature when it gave statutory sanction to the admission of such evidence.

[20] The Act however provides an avenue for the parties to request that the banker or his books be present at trial by virtue of section 6. This is the only avenue by which the Court could order a banker or his books to be in court. The party must show special cause when requesting an order of this nature. For a Court to order a banker to attend Court for cross-examination on application by Defence Counsel without the need to show special cause is going against the purpose and reason for the enactment of this Legislation. If this is done, it would undoubtedly open the floodgates for lawyers to ask for the presence of bankers solely for the purpose of cross-examination without the need to show "special cause." The ultimate result would be a step in retrograde of reverting to the inconveniences and hardships suffered by bankers prior to the enactment of the Act.

[21] It follows, therefore, that if a party is seeking the attendance of a banker in court, he has to show special cause whether he is trying to adduce evidence or simply to cross-examine the banker on his affidavit evidence.

[22] For completeness, I need to consider whether the Applicant has shown any "special cause" as is required by the Act?

[23] As I iterated at paragraph 17 of the judgment, the Applicant has not even file an application much less swear to an affidavit setting out "any special cause." However, to be fair to the Applicant, Mr. Dennis in his submissions gave some reasons why the two bank officials should be cross-examined. Firstly, he argued that the Applicant does not have the burden of showing "special cause". Such burden, he says, rests on the shoulders of the Prosecution. Secondly, he argued that even if the Applicant has such a burden, the fact that the documents will be put into evidence is potentially incriminating to the Applicant who would be deprived of the right to cross-examine these witnesses. He submitted that this in itself is more than "special cause."

[24] He further submitted that the affidavit of Mr. Ian Smith, tendered as part of the proof of the Prosecution's case against the Applicant, contains two schedules with a list of documents numbering no less than 21 bank records which directly impact on the Applicant and the Prosecution will be asking the Jury to draw certain inferences about the transactions in which the Applicant was allegedly involved on the basis of which they will be asked to find that the Applicant received stolen property, namely a bank draft which represents the proceeds of the monies which were the subject of the theft and that he knowingly facilitated or had in his possession the proceeds of crime. Mr. Dennis also submitted that the affidavit of Mr. Thompson exhibited a large number of documents specifically a copy of the bank draft purchased by an alleged accomplice of the other defendant on 22 December 2004 in the sum of $75,000 with which the Applicant is charged with having received and which the Prosecution is alleging, constitutes the proceeds of a crime and which he knows or knew at the material time to have constituted the proceeds of a crime.

[25] It is the law that only in exceptional cases would the Court make an order requiring the presence of a banker to be in court to give evidence in cases where the bank is not a party. The Learned Authors of the Law of Banking alluded to one such instance where they stated:

> "This means that it is no longer necessary to the clerk who is responsible for keeping the account to attend the court, except in the unusual event of the accuracy of the figures being challenged."

[26] As I understand it, the reasons advanced by the Applicant to cross-examine these bank officials are two-fold in nature namely (i) the documents which they have tendered are potentially incriminating and (ii) the Applicant has an absolute right to cross-examine. Certainly, there are no allegations that the figures are incorrect and/or the documents are unauthentic. In my judgment, these reasons, whether taken singly or jointly, do not amount to "special cause" and I so find. It is not far-fetched to say that in criminal cases, Defence Counsel will invariably find documents which are in the Prosecution's possession are potentially incriminating to their clients and they may wish their exclusion but that cannot amount to "special cause" as contemplated by the Act.

Is the right to cross-examine an absolute right?

[27] Mr. Dennis submitted that the Court should order the cross-examination of the bank officials because all that section 6 is saying is that there is no need for a Prosecutor to require the banker to come to Court if it is not a party and therefore, is facilitating the Prosecution to tender copies of banker's books as evidence without the necessity of producing the original themselves and the witnesses. He argued that this ability of the Prosecution to put prima facie evidence in such a manner before the Court does not deprive the opposing party, be it in a civil or a criminal case of the right to cross-examine and to test the evidence which the Act allows them to present in that manner.

[28] Learned Counsel argued that it is a staggering proposition to assert that a defendant does not have a right to cross-examine because the effect of such a proposition is tantamount to a denial of a basic and fundamental right in any trial. He quizzically inquired: "how can a defendant test any aspect of it unless he can test the authenticity of the documents?"

[29] Mr. Williams asserted that this right to cross-examine is a "so-called right" and not an absolute one. He relied on the cases of Steven Grant v R[9], Barnes Desquottes and Johnson v R Scott and Walters v R[10] and Wheatlley and another v The Commissioner of Police of the British Virgin Islands.

[9] (2006) 68 WIR 354
[10] (1989) 37 WIR 330

[30] In Stephen Grant, the Court held that there is no statutory discretion to refuse admissible evidence and that the fact that the deponent cannot be cross-examined, or that the deposition contains the only evidence against the accused or that it relates to identification evidence is not of itself sufficient to justify the exercise of the discretion to exclude the evidence. It is plain that when Parliament passed the Act, they knew that the banker could not be cross-examined.

[31] In Scott and Walters, Lord Griffiths said at page 340:

> "In light of these authorities, their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence….This much however can be said: that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion."

[32] In Stephen Grant, Lord Bingham of Cornhill had this to say at paragraph 16:

> "While it is true, secondly, that a general common-law rule against the admission of hearsay evidence has been recognized for some centuries, it is not a rule to which there were no exceptions, either in England or in Jamaica before it became independent and adopted its Constitution in 1962. Common-law exceptions were recognized in both jurisdictions in the cases of, for instance, dying declarations and statements forming part of the *res gestae.* Statutory exceptions were established in relation, for example, to entries in bankers' books (s 33 of the Evidence Act, as amended). Under Part 11 of the Justices of the Peace Jurisdiction Act it was permissible for a deposition sworn before a magistrate, in certain specified circumstances and subject to procedural conditions designed to protect the interests of the defendant, to be given in evidence at a trial despite the absence of a deponent. It would, in the opinion of the Board, be wrong to construe ss 13 and 20 (6) (d) of the Constitution as guaranteeing that there would not (without a constitutional amendment) be further statutory exception to the hearsay rule applicable in criminal proceedings, but it is of course clear that any new exception must not compromise the fairness of the proceedings which s 20 is designed to protect."

[33] I do not think that it can be disputed that Stephen Grant was concerned with the admissibility of evidence. Of importance, it dealt with whether the inability to cross-examine a deponent was unconstitutional. The Privy Council opined that the admission of hearsay evidence which cannot be tested by cross-examination is not unconstitutional. It logically follows that the denial of the opportunity of a party to cross-examine a witness is not a breach of that party's basic and fundamental right to a fair trial or contrary to natural justice. The absence of the banker from the trial and hence the inability of a party to cross-examine him must have been contemplated, considered and accepted by the Legislature as being justifiable in light of the mischief that the Act was intended to remedy.

Conclusion

[34] For the reasons stated above, I will dismiss the application. Given the nature of the application, I will make no Order as to Costs.

[35] Lastly, I am grateful to both Mr. Dennis and Mr. Williams for their patience in awaiting the delivery of this protracted judgment. This was due to circumstances beyond my control. The official transcript of evidence was received this morning.

Indra Hariprashad-Charles
High Court Judge