BRITISH VIRGIN ISLANDS

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

BVIHCR 2009/0031

BETWEEN

THE QUEEN

-V-

ANDRE PENN

Appearances:

Mr. Wayne Rajbhansie, The Director of Public Prosecutions, Mr. Valston Graham, Senior Crown Counsel, Ms. Leslie-Ann Faulkner, Senior Crown Counsel for the Crown
Mr. Jerome Lynch Q.C. for Mr. Andre Penn *(only appearing and presenting submissions in relation to three issues dealt with in this decision)*

2014: November 3, 4, 11, 24
2015: February 18

The defendant, Mr. Andre Penn, was charged on an indictment containing twelve counts of various sexual offences including unlawful sexual intercourse and buggery allegedly committed against a minor between the years 2006 and 2008. On a trial of the charges on this indictment, he was convicted on the 12th of March 2011. He appealed his conviction and on the 17th January 2012, the Court of Appeal overturned his conviction and ordered a retrial. The retrial was then fixed to commence on a number of occasions before the BVI High Court. Since the Court of Appeal hearing, however, the defendant has raised a number of jurisdictional arguments that he contended went to the core of whether he should ever be retried. On the basis of these arguments he filed a number of applications and proceedings, one of which involved even an excursion to the Court of Appeal to permanently stay the retrial. He was only successful in securing a number of adjournments even though some of the court proceedings were still pending and yet to be determined. This case was case managed on the 11th September 2014 and on the 7th October 2014. He did not raise any other issues at this stage and the court then fixed the matter for trial on Monday the 3rd November 2014.

On the afternoon of Friday the 31st October 2014, the defendant filed two applications and on the morning of the trial, acting on his own behalf, asked the court to consider both applications. The

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court acceded to his request and sent away the entire array comprising 105 persons who had been summoned to attend pending the outcome of the applications.

The first application was for a stay of the trial on the basis that several proceedings were pending before the high court including a constitutional claim and that he was likely to succeed in these other proceedings rendering a trial unnecessary; it would not be appropriate he contended for the trial to proceed in these circumstances. Among the arguments raised in those proceedings, was an argument that he had unsuccessfully taken before one high court judge and the Court of Appeal, that the procedural conscription of section 8 of the Criminal Appeal 1968 Act (UK) applied to the BVI and that the procedure adopted following the order of retrial of the Court of Appeal was in breach of section 8 and this meant that the court had no jurisdiction to proceed with the trial. Another point raised in those proceedings was that section 27 of the Jury Act CAP 36 which gave the Crown an unfettered right to standby any number of jurors selected to be part of the jury was unconstitutional as being contrary to the fair trial provision of the BVI Constitution. He also requested that the Crown should provide disclosure of the social security records of a school-teacher who is a witness in this trial to prove that the complainant was not being truthful about being taught certain topics in class during a certain period.

On the second application, he sought the recusal of Senior Crown Counsel Mr. Valston Graham. On this application he contended that Mr. Graham was familiar, on a personal level, with the family members of the virtual complainant and this presented a conflict of interest as Mr. Valston could use this to the Crown's advantage and to his disadvantage. He also contended on this application having regard to this particular allegation, there would be at the very least a perception that there could not be a fair trial of the charges on the indictment.

During the considerations of these applications, the defendant sought to stay the trial on an issue that was totally unconnected to his applications. Some time during the morning of the 3rd November 2014, he informed the court that three of the potential jurors attending the court as part of the array on various days were connected to his first trial. It was confirmed that two of these persons had actually been members of the jury on the first trial and the third person was the sister of someone who was also a juror on the first trial. The defendant asked the court to discharge the entire array. Immediately on this discovery, the court removed these three persons from the array and conducted an enquiry to discover whether any had spoken to any of the other members in the array of the first trial.

The court dismissed both applications, and having already discharged the three jurors following the enquiry, ordered that the trial proceed on the 24th November 2014. The court advised the defendant to use this time to ensure that his attorney, Learned Queen's Counsel Mr. Jerome Lynch be present at the trial if he intended to be represented.

On the 24th November 2014, the day fixed for the trial, Learned Queen's Counsel did attend but he too sought a stay of the trial and asked the court to reconsider its ruling on several of the matters. He first asked the court to reconsider the court's ruling on Crown's right of unlimited standby, urging the court to grant a temporary stay to allow the constitutional court to consider that matter. He also requested that having regard to the three jurors in the array who were connected to the first trial and were excused after the enquiry, the trial should be adjourned to January 2015 when a new array would be summoned.

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Held:

1. In considering to permanently stay a criminal trial, 'it is well established that a court has power to stay proceedings in two categories of cases, namely (i) where it will be impossible to give the accused a fair trial and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category, if the court concludes that the accused cannot receive a fair trial, it will stay the proceedings without more. No question of balancing competing interests arises. The law in relation to the second category is well settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed.' On an application for temporary stays, generally the court has to consider whether there is any substantial reason to adjourn the trial. Where the temporary stay is being sought on the basis that certain events would cause prejudice to the impending trial, the test that a court should employ is whether there would be a substantial risk that the trial would be seriously prejudiced. If the application for a temporary stay is premised on the outcome of other proceedings pending before the court, which may result on the permanent stay of the trial, the court is entitled to consider whether there is any merit in those applications and whether those applications have real chances of success. In deciding whether to grant temporary stays, the conduct of the defendant as well as the effective use of the court's time and resources are among those matters which a court should have regard to. Where a temporary stay is granted it will only be for such minimum period as would be sufficient to abate the prejudice or to allow for the resolution of that event which grounded the stay.

   Applied: **Andre Penn v The Director of Public Prosecutions** Criminal Appeal No. 7 of 2007 approving of **R v Maxwell** [2010] UKSC 48 and **R v Latiff** [1996] 1 WLR 104 – Per Baptiste J.A. at paragraph 3. Considered: **Attorney General v Birmingham Post and Mail Ltd** [1999] E.M.L.R. 39 Divisional Court

2. Section 48 of the Criminal Procedure Code cannot be construed to incorporate sections 7 and 8 of the Criminal Appeal Act 1968 of the UK, as that would an overly wide and absurd interpretation of that section. Therefore, an argument that the prosecution had breached section 8 of the 1968 Act, and should not be allowed to proceed with the trial unless they secured the leave of the Court of Appeal was an argument without merit. An argument that the defendant's arraignment in the presence of the array meant he could not be tried by a jury selected from that array was equally without merit, as such an event cannot have the effect that he can no longer be tried by anyone from that array. Therefore, with the exception of the constitutional motion filed raising the constitutionality of section 27 of the Jury Act, none of the proceedings filed or contemplated nor the points raised had any likelihood of succeeding.

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3. 'At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.' There is also a duty imposed on the prosecution to disclose to the defence all relevant material in the possession of the prosecution if such material is likely to assist the defendant at his trial. If the defendant requests material which he considers to be relevant to his defence and which is held by the prosecution as part of the case which has not been disclosed, then the prosecution is required to disclose such material unless they seek and obtain the permission of the court to withhold the material. There is no general duty imposed on the prosecution to carry out an investigation on behalf of the defendant to source and secure material which the defendant believes is relevant to his defence. If such material is in the custody and control of the civil departments of the Crown, the defendant is entitled to make an application to the court and upon satisfying the court on a balance of probabilities that the material is relevant he will be entitled to an order directing that such information be produced. This of course does not preclude the Crown from assisting a defendant who makes reasonable and timely requests for information that might aid his defence that can be obtained without taxing the resources of the Crown.

   Considered: **R. v Keane** [1994] 1 W.L.R. 747 **R. v Davis, Johnson and Rowe** (1993) 97 Cr. App. R. 110

4. In this case the material that the defendant has requested is not material which is in the possession of the prosecution as part of its investigation and case against the defendant. It is material or information that may be held by the Crown in its civil departments. The prosecution has complied with its duty of disclosure. The defendant is now attempting make them do work and provide information on matters which lie outside their obligation. This court considers that this defendant is on a fishing expedition. The defendant himself admits that he is trying to confirm when this teacher was not present at school during a certain period, in an attempt to prove that the complainant was lying about being taught certain classes by this teacher. He has been given school records to show when this teacher was at work. Now he wants records from the Social Security office to determine whether she was being paid for a period when she **<u>might</u>** have been absent from work, and he is trying to confirm when she was not present at work. This application for disclosure is without merit. The resources of the Crown are not to be employed simply on the whim of any criminal defendant to source information and documents.

5. The fact that a prosecutor enjoys some level of familiarity with one or more of the Crown's witnesses is not by itself a good reason why that prosecutor should not prosecute the matter. The fact that a prosecutor may use such familiarity to his advantage is also not a good reason to direct that he withdraw from the matter. There may be situations when the prosecutor himself may, out of such familiarity, lose sight of his role as a prosecutor and as a Minister of Justice. That, however, is a matter for Crown unless this possibility manifests itself in court by the conduct of the prosecutor. The defendant has not pointed to even one occasion when Mr. Graham's has acted

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inconsistent with his role as a prosecutor. In this case the Director himself is leading the prosecution's team. There is therefore no reason to direct that Mr. Graham withdraw from this trial.

6. The fair trial guarantee enshrined in the Constitution is one that is made up of several components. It is now accepted that for a criminal trial to be fair, the tribunal must be independent and impartial tribunal, the trial must be a public one, and there must be an 'equality of arms'. This latter principle aims to give due respect to equity, fairness and balance in the adversarial criminal process. It requires that each side be allowed a reasonable opportunity to present its case in conditions that does not place it at a substantial disadvantage vis-à-vis its opponent. The principle extends to due process safeguards that are in place to ensure a fair trial. It does not require a standard of strict mathematical equality but one of basic and reasonable proportionality, as it has been recognized that there can never be that complete balance between the opposing sides.

   Considered: **Steel and Morris v United Kingdom** (2005) 41 EHRR 22; **Szwabowicz versus Sweden** European Court of Human Rights, decision from 30th of June, 1959; **Dombo Beheer BV v Netherlands** (1993) 18 EHRR 213; **De Haes and Gijsels v Belgium** (1997) 25 EHRR 1; **Edwards and Lewis** v **United Kingdom** (2005) 40 EHRR 24; **Kaufman v Belgium** (1986) 50 DR 98 115; **Delacourt v Belgium** (1970) 11 ECHR;

7. Section 27 of the Jury Act which gives the Crown a right of unlimited standbys in the jury selection process whilst giving the defendant a right to preemptory challenge only three jurors, both sides also having the right to challenge for cause, has the effect of putting the defendant at a substantial disadvantage vis-à-vis the Crown. The Crown's right of standby is for all effect and purposes tantamount to preemptory challenge of the majority of any array as in most circumstances it is hardly likely that the Crown will exhaust the entire array thereby allowing the standbys to be recalled. This in effect gives the Crown a real opportunity to unreasonably influence the composition of the jury. There is also no real justification that may render it reasonably proportional in the balance for the prosecution to have such an unlimited right of standby, having regards to the obligations imposed on the Crown in prosecuting a criminal trial. There is also no adequate counterbalance to this right of standby given to the defendant. Therefore, insofar as it provides for this unlimited right of standby, section 27 of the Jury Act offends against equality of arms principle enshrined in the fair trial provision of the Constitution.

   Considered: **Dowsett v United Kingdom** (2004) 38 E.H.R.R. 41

8. A selection process as the one created by section 27 of the Jury Act, which would reasonably lead the fair minded and informed observer to conclude that the system of selection impairs impartiality, and gives rise to a reasonable apprehension of partiality, is one which offends the independent and impartial components of section 16 of the Constitution. Any selection process which allows for a jury not indifferently chosen strikes at the heart of section 16 of the Constitution which requires not only that there

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must be an independent and impartial tribunal but such a tribunal must also be perceived to be independent and impartial.

Considered **Bain v The Queen and the Attorney General** [1992] 1 R.C.S. 91; **Porter v Magill** [2002] 2 A.C. 357

9. The trial court is obligated to ensure that the trial is fair. When the issue is raised that some aspect of the proceedings are in breach of the constitutional right to a fair trial, the trial court is entitled and duty bound to consider whether steps may be taken at the trial to determine the issue. The court has jurisdiction given by section 115 of the British Virgin Islands Constitution to construe laws existing prior to the Constitution with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution. In acting under this section, the court is able to construe the existing law with substantial modification to bring it into conformity with the Constitution, once it does not extend to introducing new, unrelated and contradictory provisions into the law.

   Considered: **Gibson v The Attorney General of Barbados** [2010] CCJ 3; **R v Maharaj and Others** 71 WIR 303; **San Jose Farmers' Co-operative v The Attorney General** (1991) 43 WIR 63; **Attorney General of St. Christopher, Nevis and Anguilla v Reynolds** (1979) 43 WIR 108

10. The Jury Act, CAP 36, in the British Virgin Island has created a statutory jury selection scheme providing inter alia for preemptory challenges given to the defendant, challenges for cause given to both sides and the right of unlimited standby given to the Crown. In recognizing that the Jury Act was an 'existing law' when the Constitution came into force, and that particular aspects of the jury selection scheme, offend the fair trial provisions, the court is entitled for the purposes of this trial by virtue of section 115 of the Constitution, to consider whether in construing section 27 of the Jury Act, there could be such modifications which do not amount to introducing new, unrelated and contradictory provisions in the law, but which are consistent with the scheme and which are consistent with the fair trial provision of the Constitution. It is within the scheme and consistent with the Constitution that the Crown's right of unlimited standby should be whittled down, so that the equality of arms principle is not offended. Such a narrowing of the right of standby requires a counterbalance as a defendant has a right to preemptory challenge three persons. An appropriate counterbalance would be to construe section 27 with that modification which also gives the Crown the right to preemptory challenge three jurors for each defendant on trial. For the purposes of this trial therefore, section 27 of the Jury Act would be construed with such modifications to read as follows: For the purpose of this trial therefore, section 27 of the Jury Act is to be construed as follows:

    "When a common jury is being impanelled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanour –

    (a) the person charged, or each of the person charged, and the Crown in relation to each defendant, may preemptory and without assigning cause challenge any number of jurors not exceeding three;

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(b) The Crown shall have the right to ask that jurors stand by only with the consent of the defendant or defendants as the case may be, or in exceptional cases."

11. Exceptional cases would include cases involving treason, terrorism and national security. This is not a case of treason, terrorism or national security. It is not otherwise an exceptional case. Therefore, the effect would be, that in this trial the Director may exercise the right to make three preemptory challenges, any amount of challenges for cause, but may not exercise the right of standby unless the defendant consents

DECISION

[1] **RAMDHANI J. (Ag.)** I delivered an oral decision on the 4th November 2014 on two applications filed in this matter by the defendant, Mr. Andre Penn acting personally seeking a temporary stay of this trial and various other orders. On the 24th November 2014, I was asked to reconsider some of the issues raised on those applications by Mr. Jerome Lynch Q.C. who then appeared for the defendant. I dismissed both applications and refused to stay the trial. On the reconsideration, I reaffirmed my earlier rulings. I did provide oral reasons for my rulings on both occasions indicating at the time they were not exhaustive. I promised to reduce my rulings and set out my detailed reasons into writing. For convenience and for practical purposes I have decided to set out my findings on these two separate days in one written decision. This is that decision.

[2] The defendant, Mr. Andre Penn was convicted on the 12th of March 2011, on a twelve-count indictment relating to various sexual offences committed against a minor. He appealed his conviction and on the 17th January 2012, the Court of Appeal overturned his conviction and ordered a retrial.

[3] A number of applications and proceedings, one involving an excursion to the Court of Appeal, have since been initiated by the defendant raising a number of issues including jurisdictional matters which he contended went to the core of whether he should ever be retried. On various occasions he has sought to have his criminal trial stayed. Some of those proceedings have been concluded. Some are still pending. On the 11th September 2014, the matter was case managed. Then again on the 7th October 2014. The defendant

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was present and informed the court that he yet to confirm his legal representation. The court advised he put all his arrangements in place for the trial. There were no other issues raised by the defendant at this stage. The matter was fixed to take place before a new trial judge, this Court on the 3rd November 2014.

[4] At 3.17 p.m. on the 31st October 2014, the defendant filed two applications, one requesting a stay of the trial on a number of grounds and for disclosure of certain social security records, and an on order that Mr. Valston Graham, Senior Crown Counsel in the Office of the Director of Public Prosecutions be removed from the matter. The second application essentially overlapped over the first having regard to the relief sought. These applications were communicated to this Court that very afternoon.

[5] On the morning of the 3rd November 2014, an array, comprising of 108 jurors was present in court when this matter was called on for the trial. At this stage, the defendant was not represented by counsel (Learned Queen's Counsel Mr. Lynch joined the matter on the 24th November 2014). On being told that the court was about to empanel a jury, he asked that the court consider the two applications he had filed on the previous Friday afternoon. In support of each of his application, the defendant also asked the court to consider the two affidavits which he personally swore to and had filed in support of his applications. The Director of Public Prosecutions did not file any affidavits in response, but relied on matters that the learned Director essentially stated that the court could take judicial notice of. The learned director also relied on oral submissions made.

[6] The first application is an application for a stay of the proceedings to await the outcome of a number of court related proceedings (one of which he said is an appeal to the Privy Council and is yet to be filed) which defendant argues will demonstrate that this trial was unnecessary and would in any event be shown to have been oppressive, burdensome and incurring unnecessary costs, as any resulting convictions would have to be set aside.

[7] In considering to permanently stay a criminal trial, 'it is well established that a court has power to stay proceedings in two categories of cases, namely (i) where it will be

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impossible to give the accused a fair trial and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category, if the court concludes that the accused cannot receive a fair trial, it will stay the proceedings without more. No question of balancing competing interests arises. The law in relation to the second category is well settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed.'[1]

[8] On an application for temporary stays, generally the court has to consider whether there is any substantial reason to adjourn the trial. Where the temporary stay is being sought on the basis that certain events would cause prejudice to the impending trial, the test that a court should employ is whether there would be a substantial risk that the trial would be seriously prejudiced.[2] If the application for a temporary stay is premised on the outcome of other proceedings pending before the court, which may result on the permanent stay of the trial, the court is entitled to consider whether there is any merit in those applications and whether those applications have real chances of success. In deciding whether to grant temporary stays, the conduct of the defendant as well as the effective use of the court's time and resources are among those matters which a court should have regard to. Where a temporary stay is granted it will only be for such minimum period as would be sufficient to abate the prejudice or to allow for the resolution of that event which grounded the stay.[3] With these principles in mind I now turn to each of the points raised.

[9] As his first ground supporting this application, he points this court to the recently delivered judgment of the Court of Appeal on the 29th September 2014, in which that Court dismissed an application filed by defendant in which he sought to have the Court of Appeal retrial order set aside and a verdict of acquittal entered on his behalf as the Crown had failed to indict and arraign him within two months of the order of retrial by the Court of

[1] Andre Penn v The Director of Public Prosecutions Criminal Appeal No. 7 of 2007 approving of R v Maxwell [2010] UKSC 48 and R v Latiff [1996] 1 WLR 104 – Per Baptiste J.A. at paragraph 3.
[2] See generally Attorney General v Birmingham Post and Mail Ltd [1999] E.M.L.R. 39 Divisional Court
[3] See R v Glennon 173 CLR 592

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Appeal on his appeal against conviction. He had relied on section 8 of the Criminal Appeal 1968 Act (UK) that he argued was applicable to the BVI by virtue of section 48 of the Criminal Procedure Act. He stated that he given instruction to have an appeal brought before Her Majesty's Privy Council.

[10] I have not seen an application for leave to appeal to the Privy Council. I have not seen any document containing the draft grounds of the appeal which is being proposed. The defendant has stated that he has given instructions for one to be filed. It is true that he has 56 days from the date of the order to make his application for leave to apply to the PC. Whilst he is right about that, I would have thought that he should have at least presented this court with a draft of the grounds of his proposed appeal. That has not been done. What he is effectively then saying is that I should simply grant the stay on the basis that there is this jurisdictional point being raised and even though he has failed at the Court of Appeal level, he is proceeding the Privy Council; I should therefore grant the stay to await the outcome of that proposed application.

[11] It seems to me that the simple filing of this application is not enough for me to exercise this discretion to grant a stay. I must say that I do not agree with the Learned Director that I need simply look to the Court of Appeal decision to realize that I have no jurisdiction to consider whether the defendant's proposed appeal has any merit. In deciding this matter, the Court of Appeal was not deciding the issue by way of an appeal from the high court, but was being asked to exercise an originating jurisdiction.

[12] As stated above, my task on this application for a stay of this criminal trial is to consider whether there is good reason having regard to the justice of the case and really whether the proposed appeal has any merit; whether there is any likelihood that it may succeed and therefore render the criminal trial as having been unnecessary in those circumstances. Even though I have not had the benefit of seeing the application for leave or any draft grounds, it is clear to me that this defendant is arguing that the judges of the Court of Appeal were wrong when they dismissed his application. I am of the view that I should consider that the Court of Appeal analysis on the issue on whether the English rules apply

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in deciding whether there is any merit in the proposed appeal. For myself, I am also of the view that I can hardly see how those English Rules being called in aid by the defendant apply to the present matter. Section 48 cannot be as wide as the defendant is hoping it is and to incorporate even procedural rules relating to retrial. I cannot see how defendant could possess any real chance at success on appeal which he hopes to file. I agree with Justice Persad when he said that:[4]

> *"Section 48 in the court's view would allow for the reception of English law on matters of procedure that arise in relation to the provisions dealt with under Sections 34 to 51 of the Criminal Procedure Act. It cannot be a basis to allow the general reception of "all other matters of procedure" much less provisions that deal with the Court of Appeal's jurisdiction to deal with retrial."*

[13] I have noted that the Court of Appeal was not sitting as a Court of Appeal when it decided these issues, but I admit that I can hardly add to that court's analysis of the issues. That being the case, I will refuse the stay being sought on this ground.

[14] Ground No. 2 – The defendant has also grounded his application for a stay on the basis that there is also an appeal of Ellis J's judgment which was delivered on the 25th July 2013. As I understand his argument, he must be saying that this court should not proceed with this trial as he is likely to succeed on that matter, that this trial would have been unnecessary, that he would have been prejudiced, and the justice of the case requires a stay of this trial

[15] The Learned Director has urged this court that this ground is without merit, as the civil appeal traverses the same issues as those raised in Criminal Appeal Number 6 of 2013. At the High Court level in that matter, Ellis J had ruled that the English Procedure Rules did not apply the BVI. I have already dealt with this above.

[16] The defendant did point out that that appeal (which again I must say was not before me in any of the papers filed by defendant) raises a number of other issues on which Ellis J made rulings against him.

[4] The Queen v Andre Penn Criminal Case No 31 of 2009, decision of Justice Persad, delivered on the 23 November 2013.

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[17] I have examined the judgment of Ellis J and have noted that defendant in that matter raised a number of issues. For what it is worth, I have considered each and every one raised, and will treat with them as they were raised on the motion.

[18] First, he had raised the issue that the prosecution had failed to provide him a with a copy of the indictment. Well there is not much to be said on this matter, as he has since 21st June 2013, been served with a copy of this indictment. This complaint is now dated and does not affect his fair trial.

[19] Second, he had argued in that motion that he had not been provided with a copy of the transcripts of the proceedings before the Court of Appeal on the 17 January 2012. Like Ellis J, I am of the view that there is no duty on the prosecution to have provided him with this transcript. Secondly the Court of Appeal at that hearing quashed his conviction and ordered a retrial. In any event I do not see how this transcript would in any way assist the defendant in this trial.

[20] Third, he had raised on that motion, pretrial publicity acting to affect his right to a fair trial. The defendant did not make much of this issue in this hearing, and I have noted the Learned Director's statement that the Press has since desisted from publishing anything on this matter. the defendant would have been entitled to raise it at this trial, that the pre-trial publicity has affected his right to have a fair trial. He has not really done so. I therefore have no material on which I can act to assess this aspect of his complaint, if he is fact even relying on it.

[21] Ground No. 3 - The defendant has also grounded his application for a stay on the fact that he has been arraigned twice on this matter, and he has in fact been arraigned in the presence of the array on one occasion. He argues that this trial should not continue until the legal position concerning the validity and consequences of second arraignment which took place in the presence of the jury is determined.

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[22] To my mind, this ground is equally without any merit. For me the question is whether this has affected the defendant's right to a fair trial. I can hardly see how a second arraignment should have the result that no fair trial is thereafter possible and all future proceedings should be stayed. That's a startling conclusion and unwarranted. The defendant has failed to satisfy this court how that affects his fair trial; jurors must be accorded some respect for their ability to appreciate that a man charged with a criminal offence is required to put in a plea at some point. I do not see that the defendant being made to plea in their presence should have the effect of causing any prejudice to the trial that is to follow. Before leaving this point, I should point to the fact that it is a usual event for amendments to be granted to indictments during a trial and as a matter of law when this happens, the indictment would have to be read again to the defendant who would have to be given an opportunity to plead again the charges as now amended. All of this happens in the presence of the jury. What is the prejudice? In this case, the very charges that this defendant face, were the ones that were read out in the presence of the jury. A jury has to try this defendant on these charges. I confess, I do not see what prejudice could be caused if charges were read out in the presence of the entire array. Again, whilst I have not seen any papers relating to the appeal, I am of the view that an appeal on this matter, if its purpose is to quash the indictment and permanently stay the trial, or even to have the defendant re-arraigned in the absence of the array, has little chances of success.

The Disclosure Point

[23] The defendant has stated that the prosecution has failed to provide disclosure to him pursuant to a request made by him to the Director by way of a letter dated the 21st October 2014. In that letter he requested the Office of the Director provide him with the social security records relating to one of the prosecution's witnesses, a school teacher, so that he might be able to show that this teacher, Ms. Bell was absent from school for a particular period.

[24] The defendant argues that these document are relevant to his defence as he states that from the disclosed witness statement of Ms. Bell, she is to speak to two matters. One, that

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she has taught a particular topic as part of the school curriculum during the last term of 2008, and two, that in February 2009, she spoke to the VC and noted her demeanour and made a report to the Principal.

[25] The defendant had earlier requested disclosure of the Prosecution of records showing when this teacher had attended school and had been supplied with the attendance records from the Principal showing Ms. Bell signing an attendance on a number of days during the latter part of 2008 to signify her attendance at the school. He had also been supplied with the teaching curriculum supplied by Ms. Bell.

[26] The defendant is not satisfied and required the prosecution to source the Social Security records showing the school's contribution to the fund on Ms. Bell's behalf. He also wishes to have that organization's records as he contends it will show that this teacher was absent from school from about September 2008 until about December 2008. He at first contended that he was aware that this teacher was absent for this period, but he later told this court that he was not aware when exactly this teacher was not absent. He stated: 'I am not sure what dates she was not at school. I am looking for records to know when she was not.'

[27] He submitted that this record was crucial as it would assist him in preparing his defence, as it was the prosecution's case that it was when the complainant was informed by classes taught by Ms. Bell about methods of the link between transmission of venereal diseases and vaginal sex that she told the defendant this and he then proceeded to have anal sex with her. He stated that these records would show that this teacher was not in class to have even taught these topics.

[28] The Director on the other hand submitted that they had complied with all reasonable requests made for disclosure and that the defendant was now fishing for information and simply abusing the system.

Analysis and Findings on the Disclosure Point

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[29] 'At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.'[5] There is also a duty imposed on the prosecution to disclose to the defence all relevant material in the possession of the prosecution if such material is likely to assist the defendant at his trial. If the defendant requests material held by the prosecution as part of the case which has not been disclosed, then the prosecution is required to disclose such material unless they seek and obtain the permission of the court to withhold the material.[6] There is no general duty imposed on the prosecution to carry out an investigation on behalf of the defendant to source and secure material which the defendant believes is relevant to his defence. If such material is in the custody and control of the civil departments of the Crown, the defendant is entitled to make an application to the court and upon satisfying the court on a balance of probabilities he will be entitled to an order directing that such information be produced. This of course does not preclude the Crown from assisting a defendant who makes reasonable and timely requests for information that might aid his defence that can be obtained without taxing the resources of the Crown.

[30] In this case the material or information which the defendant has requested is not material which is held by the prosecution as part of its investigation and case against the defendant. It is material or information that may be held by the Crown in its civil departments. The office of the DPP has complied with its duty of disclosure. The defendant is now attempting make them do work and provide information on matters which lie outside their obligation. The prosecution has refused to assist the defendant in sourcing this material. I therefore have to consider whether he has satisfied this court on a balance of probabilities that this material exists and that it is likely to be of relevance to his case.

[31] However the defendant's own evidential foundation betrays him. This court agrees that this defendant is on a fishing expedition.[7] The defendant himself admits that he is trying to

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[5] Dowsett v United Kingdom (39482/98) (2004) 38 E.H.R.R. 41 at para. 27
[6] R. v Keane [1994] 1 W.L.R. 747 R. v Davis, Johnson and Rowe (1993) 97 Cr.App.R. 110
[7] See Nepia v R. [2000] NZCA 226; Cant v R. [2013] NZCA 321; R. (on the application of Nunn) v Chief Constable of

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confirm when this teacher was not present. He has been given school records to show when she attended. Now he wants records from the Social Security office to determine whether she was being paid for a period when she **might** have been absent, and he is trying to confirm when she was not present. This application for disclosure is without merit. The resources of the Crown are not to be employed simply on the whim of any criminal defendant to source information and documents. There must be shown some relevance to the trial. Where there is some relevance, and these records or documents lie within the bosom of the Crown, then the defendant will be entitled to an order directing that the Crown deliver up this material. In this case, I have not seen any reason to make an order or to give any directions that any material be sourced or produced.

The Request to have Mr. Graham, Senior Crown Counsel withdraw from the Proceeding

[32] The defendant requested that Mr. Graham be directed to withdraw from the proceedings. He grounds this application on contentions that Mr. Graham is familiar and has been familiar for decades with the complainant's family and that the Crown could use the familiarity to their advantage.

[33] To my mind, this bare contention really goes nowhere. It would perhaps be useful to the Crown that they are knowledgeable of their witnesses that they hope to lead in trial. It is always a beneficial to the Crown's case if witnesses are comfortable with the Crown as this is an essential element of the Crown's ability to treat with their witnesses. There may be situations when the prosecutor himself may, out of such familiarity, lose sight of his role as a prosecutor and as a Minister of Justice. That, however, is a matter for Crown unless this possibility manifests itself in court by the conduct of the prosecutor. The defendant has not pointed to even one occasion when Mr. Graham's has acted in a manner inconsistent with his role as a prosecutor. In this case the Director himself is leading the prosecution's team. I see no reason to direct that Mr. Graham step out of the matter.

Suffolk [2014] 2 Cr. App. R. 22. Whilst these cases dealt with the duty of disclosure after conviction, to my mind they are relevant where a defendant hardly seems aware what he is looking for.

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Other Points Raised

[34] The defendant also raised two other points. One was that section 72 of the Jury Act CAP 36, was unconstitutional as being in breach of the equality of arms principles. He argued that he had filed a constitutional motion for a declaration of the unconstitutionality of this provision and that this court should await the outcome of that matter.

[35] The Director submitted at this stage, that the court should not make any ruling on this matter, and consider that the constitutional motion filed by the defendant for a declaration that section 27 of the **Jury Act CAP 36** was unconstitutional, should not present a hurdle for this court to proceed with the trial. As I understood his argument, the Director was asking this court to disregard this submission of the defendant, and proceed to trial.

[36] The court considered that having regard to the history of this matter, and the many attempts by numerous applications to stay this trial, that the court could not take a laissez faire approach and disregard these arguments which were being raised. The defendant had clearly given an indication that if I did not rule on this matter now he would again raise it when the jury was being selected. In an effort to case manage this trial, I felt that this was a matter I should address as a substantive issue.

[37] In addressing this point, I ruled that this court was quite entitled to consider whether the section itself was unconstitutional. I did find that in fact the section offended the fair trial provision of the **Constitution** and I called in aid section 115 of the BVI **Constitution** to modify the section to reflect the intent of the provision and to bring it into conformity with the **Constitution** for the purposes of this trial.

[38] I have chosen to set out my reasoning on this point below as it was again raised by Mr. Lynch Q.C. when he appeared on the day set for the trial and asked me to reconsider my earlier ruling on this point.

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[39] The other substantive point raised by the defendant fell outside his applications. Late in the afternoon on the 3rd November 2014, the defendant informed the court that he had recognized two jurors in the array who had been jurors on his first trial. He stated that these jurors, having sat on the last trial and now sitting in the array for selection in this trial had tainted the entire array by their mere presence and that they all should be discharged. The matter was adjourned that day, but early the next morning the court gave instructions that these two named jurors should be separated from the array upon their arrival in court. This in fact happened. In fact a third juror, who the defendant on the 4th identified as being a sister of another juror who sat in the first trial was also separated from the array. They were all seated together in the office of the Judge's secretary awaiting further instructions.

[40] The court then advised both sides that it would conduct an enquiry with each of these jurors individually with a view to ascertaining whether they had in fact spoken to the array about the first trial at all. Each of these jurors was then called into the Judge's Chambers. The Prosecution and the defendant were present. The court posed a number of questions to this juror. The first asked was: "Were you a juror in the first trial involving this gentleman, Mr. Penn, sometime in the past?" The juror responded in the affirmative saying that she was not sure which year it was but that it was 'either three or four years ago'. She was then asked: 'Since you were called as part of the present array, have you spoken to anyone in the array about the matter that you sat in before?" At this stage, I gave an indication that I meant the jurors sitting in the courtroom. The juror then stated that she had not. She was then excused and told to return to the secretary's office to await further instructions.

[41] The second juror was then called in and she also stated that she had sat in the first trial. She was then asked: "Have you spoken to anyone in the array sitting out there about this matter?" She too said that she had not. She was also instructed to return to the secretary's office.

[42] The last juror was then called. In response to questions from the court she stated that she had a sister who had sat on the first trial and said that she had only found out recently

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about it. She was then asked: "Have you spoken to anyone out there about this matter?" she said that she had not and she was asked: "Those are the other jurors I'm talking about, those people sitting there?" Whenever each juror was questioned, the court gave an indication that the questions were being asked about the array in the courtroom. She then responded, "No. Only just now with the two jurors that was called before, in terms that they were on the case before." She was also excused.

[43] I then considered that I had no reason to doubt any of these three jurors and was satisfied that none of them had spoken to any of the other jurors in the array. In any event, I also considered that this jurisdiction was a relatively small one, and that the fact this was a retrial would be well in the public domain as well as the fact that the defendant had been earlier convicted. I considered that the appropriate course would be to excuse the three other jurors from taking any further part in the proceedings. They were then excused and were asked to depart the court precincts.

[44] I directed that the trial would proceed with the array as comprised, and having regard to indications from the defendant that his attorney, Mr. Jerome Lynch Q.C. could be available on the 24th November 2014, the trial was fixed to commence on that day.

[45] On the 24 November 2014, when the matter was called on for trial, the defendant was indeed represented in court by Mr. Jerome Lynch Q.C. who was assisted by Ms. Salder-Best of Counsel.

[46] At an early administrative formal session in the absence of the jury, Mr. Lynch, being consistent with the approach of the defendant so far in this matter raised several points in the absence of the jury. He stated that he had earlier given the Director notice of his intention to raise these points and eventually asked the court to send away the jury to be returned 10 a.m. the next day. He informed the court that two of these matters related to new applications for a stay of the criminal trial and the third was in the nature of sanitizing the jury further by the intervention of the court.

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[47] The Learned Director advised the court that he had no objection to Mr. Lynch's request the jury be asked to return the following day and this course was agreed to by this court. The jury was sent away and I heard the application and submissions from both sides.

[48] The lesser of the points raised by Mr. Lynch Q.C. related to the earlier removal of the three jurors from the array. He asked this court to reconsider this matter and suggested that the entire trial be adjourned to the January session so that a jury could be selected from an entirely new array. On a reconsideration I was satisfied that having regard to the steps taken by the court on this issue, there could be no prejudice caused the defendant if the trial were to continue with the present array. This being the case, I affirmed my earlier ruling on this point and refused the application for a stay on this ground.

The Main Point – The Constitutionality of Section 7 of the Jury Act CAP 36

[49] Mr. Lynch's main point was this court had erred in its earlier ruling on the preliminary ruling given on the 4th November 2014, when it decided that it had the jurisdiction to first decide on the constitutionality of section 27 of the **Jury Act** and further when it decided to construe, as it did, the said section with such adaptations and modifications to bring it into conformity with section 16 of the **Constitution** of the BVI.

[50] He argued that by virtue of section 31(1) of the BVI **Constitution**[8], that it apparent that constitutional questions should only be determined by the constitutional court and not this criminal court. He stated that the application was required to be made pursuant the rules of court in the civil jurisdiction sitting as a constitutional court. In short he stated that this court, being a court trying a criminal case had no power to consider the constitutionality of any legislation much less go on to make declarations on its constitutionality. Learned Queen's Counsel did not present this court with any authority and relied on the logic and

[8] Section 31(1) provides: If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress. ...."

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his own analysis of section 31. He did point out that in making this submission, he was not at all treating with the merits of the constitutionality of section 27 of the **Jury Act** and stated effectively and firmly that this was clearly something which could only be traversed on the basis of careful submissions from both sides, and that the Attorney General was a necessary party to these types of matters.

[51] This Court tasked Mr. Lynch Q.C. to provide an alternative route to the court in the event that it did not agree with his first argument. The question posed was what would be the test for the criminal court where a defendant in a criminal trial was raising arguments that the provisions of the **Jury Act** offended against his right to a fair trial? Was the court entitled or even more obligated to consider the merits of such an argument, or was a court acting properly to simply accept that such an argument had merit and leave it to another court? The court also asked Learned Queen's Counsel Mr. Lynch, whether if the test involved a consideration of the merits of the constitutional argument being raised, the court was then permitted, if it considered that the provision did in fact offend the **Constitution**, construe the provision in question in keeping with section 115 of the **Constitution** to bring it into conformity with the **Constitution**.

[52] Whilst maintaining that he really was prepared to stand by his earlier submission that this court had no power to determine the constitutionality of legislative provisions, Mr. Lynch Q.C. further submitted that if the court were to disagree with his first point, the court would obviously be bound to consider the merit of the arguments being raised, in other words, whether the provision was unconstitutional, and that the court would soon realize that the provision was overly wide and offended the fair trial provisions, but that no amount of judicial intervention could save it under the 'Existing Law Clause'. This was a power that the court did not posses. This would be judicial law making, he cautioned.

[53] He was then asked if he was right, whether this would mean that if a court were to rule that section 27 of the Jury Act was unconstitutional, the right of unlimited standby offending against the fair trial provisions, and then further accept that the court was unable to construe it to bring it into conformity with the **Constitution**, whether this would not mean

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that all criminal trials would have to be stopped pending parliamentary intervention as the pendulum would have swung completely the other way. Mr. Lynch accepted that it was a matter for parliament and again maintained that it could be dealt with expeditiously by the constitutional court and eventually by Parliament.

[54] The Learned Director relied on his earlier arguments on the matter. He accepted that the court had a power to revisit the previous ruling on the section 27 point, and like Mr. Lynch urged the court to do so, submitting that the court had embarked on judicial activism, and was writing the law.

[55] Now, it was not only the defendant, through learned Queen's Counsel who was saying this, but it was also the Learned Director saying this. A court would do well to proceed with considerable caution and give careful and due regard to the collective and forceful arguments that comes from both sides. This Court was grateful to both sides for these submissions and considered that whilst it was not the norm for a court to immediately revisit rulings, on this occasion it would reconsider its position on this matter. In this regard, the Court reminded itself that it had not had the benefit of any submissions on this narrow point from the Director himself and the defendant had been unrepresented when he raised the point earlier.

[56] Before moving on properly to this substantial point, the Director first disagreed with Mr. Lynch's arguments that the criminal court had no power to address a constitutional issue in a criminal trial but was duty bound to leave it to the constitutional court. He stated that when section 31 of the **Constitution** spoke to the 'court' it meant the 'high court' as defined by section the **Constitution**, and submitted the section was sufficiently wide to give any court the power to determine the matter.

[57] On the substantial point, as noted earlier, the learned Director submitted that the Court should consider its first ruling and its 'rewriting' section 27 of the Jury Act pursuant to section 115 of the **Constitution**. He stood fast to his earlier submissions, which as I recall them were that these points really had no merit and that section 27 was a sound

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constitutional provision, and that no stay should be granted for any arguments being raised on its construction. He did reluctantly, accept that if the court found its way back to the same path and was minded to construe section 27 under the mechanism of section 115 of the **Constitution**, the Court simply employ its earlier stated standby regulatory scheme but not go as far as for example giving the Crown any right of preemptory challenge to strike a balance. As I understand, his position the learned Director did not accept that the court should get this far as construing any substantial modifications as he seemed steadfast in his earlier points.

Analysis and Findings

Can a Court Sitting in the Criminal Jurisdiction determine Constitutional Points, and in particular rule on the Constitutionality of Legislative Provisions?

[58] I start from the proposition that in a criminal trial a court is always required to ensure that the trial is fair. Often when the issue is raised for as an issue for resolution, the criminal court is required to consider whether a fair trial is possible having regard to a variety of causes. Often it is delay. At other times, arguments are taken that adequate facilities pursuant to the **Constitution** have not been afforded to a defendant. At other times, it is that a defendant has been denied his right to counsel. At other times, arguments have even been taken that the charging section is unconstitutional. In **Gibson v The Attorney General of Barbados** [2010] CCJ 3, the Caribbean Court of Justice recognized that a defendant had a right to take the constitutional fair trial point at his trial. It was noted that it was expressed constitutional provisions that allowed a defendant to take such a point **before trial** since the defendant always had such a right at the actual trial.[9]

[59] I also note **R v Maharaj and Others** 71 WIR 303 in which matter, the Privy Council had no adverse criticisms of the defendant attempting to take a constitutional point in the middle of a criminal trial. In that case, the point being raised was the constitutionality of the murder felony rule.

[9] See paragraph 42 of the judgment

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[60] Having regard to the manner in which the point has been raised before me on the last occasion and on this occasion, I do believe that I am entitled to consider the merits of the contentions being raised. The practical effect of what the defendant has done is to raise the 'section 27 argument' to secure a stay of these proceedings for the constitutional court to rule on this point whether on any pending motion or one to be filed. The way I see it, the point having been raised, it is really a question whether it may be resolved as part of this criminal trial. A criminal court is always to be concerned about whether a defendant trial is a fair one in accordance with the fundamental rights provisions of the constitution. Here, for all practical effects and purposes, I am the view that this court would be remiss to decide that this point has merit but to resile from considering whether it can be resolved as part of this criminal trial. In fact this has nothing at all to do with section 31 of the **Constitution** but the court's own inherent jurisdiction to ensure that a criminal trial is conducted in accordance with the **Constitution**.

The Substantive Point – The Constitutionality of Section 27 of the Jury Act CAP 36

[61] I do consider that the section 27 argument being raised is one of merit for the reasons I will now set out.

[62] Section 27 reads as follows:

> *"When a common jury is being impanelled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanour –*
>
> *(a) the person charged, or each of the person charged, may preemptory and without assigning cause challenge any number of jurors not exceeding three;*
>
> *(b) the Crown shall have the same right as, at the commencement of this Act, it has in England, to ask that jurors stand by until the panel has been 'gone through' or perused."*

[63] This section allows the Crown to effectively have the right to standby the entire array. The court was informed that on the first trial, there were some 27 male jurors 'stood by' by the Crown. The Director has pointed out that the stand bys are eligible for recall once the panel is exhausted. I agree with Mr. Lynch that the likelihood of any of the standbys being

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recalled is almost zero where the panel comprises of such large numbers as the present. Where the Crown stops tactically well short of the entire array, the standbys effectively operates as preemptory challenges. The provision therefore seems weighed in favour of the Crown.

[64] As I understand, the defendant's argument, he is saying that his right to a fair trial is affected by this imbalance. Section 16(1) of the BVI **Constitution** reads:

> ***"16.**(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

[65] The fair trial guarantee enshrined in the **Constitution** is one that is made up of several components. It is now accepted that for a criminal trial to be fair, the tribunal must be independent and impartial tribunal, the trial must be a public one, and there must be what the jurisprudence now accepts to be an 'equality of arms'.

[66] This latter principle was first articulated by the European Court in Strasbourg as an integral component of the fair trial provision[10] of the **European Convention on Human Rights**[11], a provision similar to the one expressed in section 16 of the BVI **Constitution**. The principle gives due respect to equity, fairness and balance in the adversarial criminal process.[12] In seeking to ensure a fair trial, the equality of arms principles is aimed at promoting a proportionate balance. In a criminal trial therefore, there will be respect for the equality of arms principle when each side is allowed a reasonable opportunity to present its case in conditions that does not place it at a substantial disadvantage vis-à-vis its opponent.[13] The principle relates to the due process safeguards that are in place to ensure a fair trial and seek to achieve some form of procedural equality between the parties.[14] It does not require

[10] Article 6

[11] The European Convention on Human Rights and the Right to Direct Petition were extended to the BVI on the 28th September 2009

[12] Szwabowicz versus Sweden European Court of Human Rights, decision from 30th of June, 1959,

[13] Dombo Beheer BV v Netherlands (1993) 18 EHRR 213; De Haes and Gijsels v Belgium (1997) 25 EHRR 1; Edwards and Lewis v United Kingdom supra (2005) 40 EHRR 24; Kaufman v Belgium (1986) 50 DR 98 115

[14] Delacourt v Belgium (1970) 11 ECHR; Edwards and Lewis v United Kingdom (2005) 40 EHRR 24 para 52: 'It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence."

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a standard of strict mathematical equality but one of **basic and reasonable proportionality**, as it has been recognized that there can never be that complete equality of arms. As the European Court of Human Rights stated in **Steel and Morris v United Kingdom** (2005) 41 EHRR 22 paras 50 and 59:

> *'The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality...The Court recalls that the Convention is intended to guarantee practical and effective rights...It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side'*

[67] As was noted in one case, 'a reasonable proportionality had to take into account that the prosecution has the burden of providing a coherent narrative of the facts and proving the accused committed the crime beyond a reasonable doubt whilst on the other hand the defence had merely a tactical burden of introducing reasonable doubt, or when it was required to prove anything, it merely was required to do so on a balance of probabilities."[15]

[68] The principle is in practice generally invoked by the defence who contends that the might of the State has operated to his disadvantage making his fair trial impossible. Generally, the defendant hardly possesses the same resources as is available to the State. It is important therefore that whatever imbalance there is, it must be justified and be proportional and reflective of the opposing roles of the parties in the criminal process. This to my mind must apply to all those procedural rules that are in place to guide the conduct of the trial.

[69] What then is to be made of section 27 of the **Jury Act**, when it gives the Crown the right to stand by the entire array without cause? I did seek the assistance of the Director in this regard when I asked him to address me on the operation of the Attorney General's Guidelines on the Crown's right of stand by in the United Kingdom and in what circumstances should the right of stand by be exercised in the BVI.

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[15] *Prosecutor v. Oric 13 Dec. 2005*

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[70] In the UK, preemptory challenges have been abolished, and now the Crown alone has the right of stand by. It has been made clear by the **Attorney General Guidelines on the Crown Right of stand-by un the UK** there that the right shall only be exercised in certain narrow situations such as a minority involving national security or terrorism, except where it is done with the consent of the accused.[16]

[71] The Director submitted to this court that this jurisdiction was different and that it was proper that the Crown should have a right to stand by the entire array here in the BVI and that there should really be no restrictions imposed on the exercise of this right as in the case in the UK He pointed this court to the historical basis of the right of standby in the UK. He recalled that there, 'prior to 1305, the Crown had an unlimited right of unlimited preemptory challenges. Then came the **Ordinance for Inquest in 1305** which abolished the Crown's right to preemptory challenges altogether. The Crown only retained the ability to challenge for cause, but a practice had developed where the Crown was permitted to stand by jurors.

[72] 'On the other side of the scale, the defendant had 35 preemptory challenges when being charged, tried for treason or a felony. This was altered by section 29 of the **Jury Act 1925 UK** to 25 for treason, 20 for murder and felony. By the **Criminal Justice Act of 1948**, section 35 reduced the number of defence challenges to seven preemptory challenges. Later, regulation 13(1) of the **Defence Administration of Justice Regulations of 1940** removed entirely the preemptory challenge right given to the defence and this continued until 1948. In 1988, the **Criminal Justice Act** of the UK abolished all preemptory challenges for the defence. The Crown retained the right to standby jurors.

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[16] As the learned authors of Blackstone's Criminal Practice 2009 noted at paragraph D13.31, "On the assumption that the guidelines are loyally followed, the importance of the right of stand-by has been vastly reduced. Counsel will exercise the right only in (a) the tiny minority of cases which involve national security or terrorism... or (b) ordinary cases where a juror is obviously unsuitable and the defence agree. Thus the chief function of the right now seems to be to avoid the clumsy mechanics of a challenge for cause where the parties concur that a juror should not serve."
"In addition to the example given in para. 5(b) itself, subject to the defence consent, jurors could properly be stood by if e.g. counsel has been informed that they are in fact disqualified by previous convictions, or if they know the accused or any witness in the case. The guidelines are presumably not meant to inhibit prosecution counsel from challenging for cause on the grounds of bias if he considers that a juror's previous conviction or other involvement with the police might make him so prejudiced against the Crown as to unable to try the case fairly...."

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[73] The Director submitted that: "It is in that context that the **Attorney General's Reference** must be considered. Because at that stage, plainly there would have been an inequality of arms because the defence could not [preemptory] challenge any juror selected to try the case between himself and the Crown whereas the Crown could still standby jurors.'

[74] The Director further agreed that 'to ensure fairness, the **Attorney General's Reference** sought to regulate the proceedings, restricting the Crown in the execution of its duty, but not prohibiting it. It has set out therefore, a guideline as to whether it would be appropriate and suggesting that it should be exercised sparingly."

[75] The Director submitted that the BVI was a much smaller jurisdiction than the UK and that it would not be appropriate to seek to impose such guidelines in this jurisdiction. He submitted that there could be no question that in the BVI the prosecutors are expected to exercise the right of standby responsibly. When asked to give examples of when this right of standby was normally exercised, he offered that there could be cases when it was discovered just before the trial that there were persons in the array who were disqualified by the Act but who through some inadvertence were part of the array. He also stated that the right is often exercised when it is discovered that one or more of the selected jurors may have been charged by the police in unrelated matters with their case still pending.

[76] I am unable to agree with the Learned Director. I understand why in the UK, the defendant's right of preemptory challenge was abolished in 1988. It was considered then, that defence attorneys were using the right to manipulate the selection process to secure jurors who were seemingly favourable to the defence. Critics of the preemptory challenge have argued consistently that the right to preemptory challenge jurors had the potential to affect the accuracy of the verdicts in many cases. Preemptory challenges which are gender-based, such as for example, removing all men from the jury, in the trial of a sexual offence allegedly committed against a woman, may have the effect of increasing prejudices which go unchecked during the deliberation process. As one writer noted:

> *"Because of the lack of information about the jurors available to attorneys when exercising peremptory challenges, peremptory challenges are often based on stereotypes. This is harmful because the exclusion of jurors on such basis*

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perpetuates stereotypes and discrimination. This prejudging of individuals is inconsistent with democratic ideals such as equality and fairness."[17]

[77] Notwithstanding these views, there is also another school of thought that supports the retention of the preemptory challenge. Advocates for the retention of the right have argued that it allows the defendant to remove persons with extreme viewpoints. To my mind, it allows the defendant to have some say in the selection process even when he is unable to articulate a reason for seeking to exclude a potential juror. This surely would operate to give some degree of comfort to a defendant about to be tried by a jury of his peers. Further, allowing the defendant this right may also reduce the need for the court to decide on challenges for cause thereby saving the time and resources of the court.

[78] This right to preemptory challenge is given to the defendant by section 27 of the **Jury Act**. Unlike the UK when the defendant had a right to preemptory challenge 35 jurors, here in the BVI, there is a only a right to preemptory challenge 3 persons. The danger which led to the complete abolition of the right in the UK may not be as great in this jurisdiction having regard to the limited number allowed to be challenged in this manner. I can hardly see that there could be a valid criticism of the right of the defendant to preemptory challenge three jurors. When I turn to the Crown's right of unlimited standby, it is different matter.

[79] All of the reasons given by the Director that generally ground the use of this right of standby really fall within the 'challenge for cause' arena. All of the criticisms which were leveled against the defence's right to preemptory challenge as many as 35 persons in the UK are equally applicable here in the BVI in the context of the Crown's right of standby. Why should the Crown be allowed for example to act on hunches, look at gender, act on other stereotypes, and take off persons who they believe may favour the defendant? A reminder that the jurors who are asked to standby are to be recalled once the panel is exhausted, really does not cure the potential prejudice, when the generally the array comprises of over 60 persons and sometimes, as in this case, over 100 persons. In such

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[17] Patricia Henley, Improving the Jury System: Peremptory Challenges "Public Law Research Institute – University of California - http://gov.uchastings.edu/public-law/docs/plri/juryper.pdf - see *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that the prosecution's actions of striking groups of people (based on race) violated parties' right to equal protection.

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cases, the Crown may randomly seek without cause to influence the jury by standing by just so many jurors without exhausting the entire array. The effect would be the same as if the Crown had the right to preemptory challenge as much as 80 or 90 persons in a 100 person strong array.

[80] Here I consider it appropriate to recall the words **Blackstone** speaking on the common law jurisprudence of having an impartial jury.

> *"Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our Constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very Constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,* ***indifferently chosen*** *and superior to all suspicion."*[18] [emphasis added]

[81] Blackstone's admonition ought to remind us all that no side should have an unfair advantage in selecting the jury. The jury is to be indifferently chosen. The design of the scheme should promote such indifferent selection. To my mind, section 27 of the Jury Act really offends not only the **perception** of fairness and equality, but it also the equality of arms principles as the Crown has the **real** power to unfairly influence the selection process and possibly secure a jury favourable to the Crown. This to not to be construed as meaning in any way the present Director intends to abuse this provision. Nonetheless, the potential for abuse is there. In my view, this puts the defendant at a substantial disadvantage vis-à-vis the Crown and affects his right to a fair trial. I am not satisfied that the right of unlimited standby given to the Crown can be justified on the any basis or that it represents a basic and reasonable proportional response to the obligations imposed on the Crown to prove the case.

[18] Blackstone, Commentaries on the Laws of England 349 (Cooley ed. 1899) pages 349 to 350 quoted with approval in Duncan v. Louisiana, 391 U.S. 145 (1968)

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[82] It is really no answer to having a system of jury selection which gives one side an unfair advantage to say that prosecutor are expected to act properly and that they in fact act properly and remove potential jurors for all the good reasons. I have no doubt that the present team of prosecutors before this court comprises only of proper ministers of justice, acting their competent best. That, however really does not address the problem. I am in full agreement with Cory J of the Canadian Supreme Court when he said:[19]

> *"At the outset, I would agree that the Crown Attorneys play a very responsible and respected role in the conduct of criminal trials. It is true that the Crown never wins or loses a case. Yet Crown attorneys are mortal. They are subject to all the emotional and psychological pressures that are exerted by individuals and the community. They may act for the best of motives. For example they may be moved by sympathy for a helpless victim, or by contempt for the cruel and perverted acts of an accused; they may be influenced by the righteous sense of outrage of the community at the commission of a particularly cruel and vicious crime. As a rule the conduct and competence of Crown Attorneys is exemplary. They are models for the bar and community. Yet they, like all of us, are subject to human frailties and occasional lapses."*

[83] The failure of section 27 cannot be corrected by having prosecutors who are proper and competent, and there is another reason why this is so.

[84] Quite apart from the equality of arms principle in my view, section 27 of the **Jury Act** also offends that component of the fair trial provision which requires that the tribunal be fair and impartial. The jury tries the facts in any criminal trial. It is responsible for finding the defendant guilty or not guilty. Speaking in the context of the Crown in Canada having an unfairly weighed right to remove jurors, the highest court in Canada, the Supreme Court of Canada in **Craig Alexander Bain v Her Majesty The Queen and The Attorney General of Canada** stated:[20]

> *" The jury should not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be the guiding principle of justice and the hallmark of criminal trials. Yet so long as the impugned provisions of the Code remain, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness. Members of the community will be left in doubt as to the merits of a process which permits the Crown to have more than four times as many choices as the accused in the selection of the jury."*

[19] Bain v The Queen and The Attorney General [1992] 1 S.C.R. 91 at page 102
[20] [1992] 1 R.C.S. 91 at page 103, per Cory J

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[85] I agree that this overwhelming imbalance that exists in favour of the Crown in the BVI, is likely to give the reasonable person, who is fully aware of the manner in which a jury might be selected, an apprehension of bias. I consider that section 16 of the **Constitution** requires not only that there must be an independent and impartial tribunal but such a tribunal must also be perceived to be independent and impartial. In Canada the cases have established a test for such independence. Justice Le Dain of the Canadian Supreme Court framed the Canadian test as follows:[21]

> *"...I think, that the test for independence for the purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is therefore important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."*

[86] The English common law test on impartiality or bias has been well established. It is whether on the particular circumstances of the case, a fair minded and informed observer would conclude that there was a real possibility of bias.[22] In the context of jury selection, the test of impartiality must be whether the fair and impartial observer would reasonably conclude that the system of selection impairs impartiality. In this case, wearing the hat of the fair and impartial observer, I am compelled to conclude the Crown's overwhelming right to remove persons from the jury without giving any reason gives rise to a reasonable apprehension of partiality.[23]

[87] This imbalance offends section 16(1) of the BVI **Constitution**. What then is to be done about this? Do I stay this trial and await the outcome of the constitutional motion on those declarations? A court must be forever mindful that it should not shirk from resolving matters which are well within its jurisdiction simply on the basis that its resolution may lead

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[21] Valente v The Queen [1985] 2 S.C.R. 673 approved by R v Lippe [1991] 2 S.C.R. 114 and cited with approval in Bain v The Queen and The Attorney General [1992] 1 R.C.S. 91 at page 147.

[22] Porter v Magill [2002] 2 A.C. 357

[23] In this regard I agree with Stevenson J of the Supreme Court of Canada in Bain v The Queen and the Attorney General at page 148.

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to startling conclusions. Having regard to my earlier findings, and the ambit of section 115 of the BVI **Constitution** I am of the view that I am entitled, for the purposes of this trial, to consider whether section 27 of the **Jury Act** is capable of being construed in such a manner that can bring it within terms of the fair trial provision of the **Constitution**.

[88] The 'Existing Law' clause is section 115, which states in full:

> ***Existing laws***
>
> ***115.*** *(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of or in consistency with this Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.*
>
> *(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with this Constitution or otherwise for giving effect to this Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.*

[89] This provision is applicable as the current **Jury Act** which is the subject of discussion was enacted on the 1st July 1914. The current **Constitution** of the BVI in which section 115 is found, came into force on the 15th June 2007, therefore the Jury Act was an existing law when the **Constitution** came into force. Similar provisions contained in the **Constitution** in other jurisdictions have examined by regional courts. In the **San Jose** case, where section 134(1) of the Belize **Constitution** was under the judicial microscope, the question arose as to whether the modifications which the court might read into any existing legislation which was being confronted by the **Constitution**, could be substantial in nature? Justice of Appeal Liverpool answered this question in the affirmative when he stated at page 86: "

> *"...the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction." Note also page 87.*

[90] Notwithstanding that the modifications may reach to matters of substance, I have reminded myself the court must be careful not to overstep the judicial pale and tread on the toes of the legislators. The court must not write the law. In this regard I have paid careful attention

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to the caution given by Henry P. in **San Jose Farmers' Co-operative v The Attorney General** when he said:[24]

> *"The question which I have to consider is whether this is the type of inconsistency which a court may deal with under section 134 of the Constitution. In my view a distinction must be drawn between on the one hand construing existing provisions in an Act with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and **on the other hand introducing entirely new and unrelated or contradictory provisions into the Act**."*
>
> *"...the modification etc must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law in conformity with the Constitution."* [emphasis supplied]

Note also **Attorney General of St. Christopher, Nevis and Anguilla v Reynolds** (1979) 43 WIR 108 where the Privy Council held that the Court of Appeal of Belize was wrong when it held that it could not construe certain legislation with certain substantial modifications to being it into conformity with the Belize **Constitution**.

[91] So one of the tasks of the court is to ensure that no new and contradictory provisions are introduced into the Act. Further, the modification must be necessary and one that fits within the statutory scheme of the legislation with the court stopping short when the *"conflict between the existing law and the Constitution is too stark to be modified by construction."*

[92] It is very clear that the **Jury Act**, by its express provisions has created a scheme allowing the right of preemptory challenge to the defendant and the right of unlimited standby to the Crown. So the statutory scheme is that both sides should have the right, outside of the challenge for cause, to remove persons from the panel selected without giving reasons. That each side has the right to effectively remove persons without cause is not by itself contradictory to the fair trial provisions and in particular to the equality of arms principle. As stated earlier it is the unlimited and unqualified right of standby given to the Crown which offends the **Constitution**.

[24] Court of Appeal of Belize (1991) 43 WIR 63 at page 73

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[93] There is no doubt that it is sensible feature of the jury system which provides the defendant the right to challenge three jurors without cause, that the Crown should also be allowed the right of standby. Unlike the high court in Grenada, I am the view that there is some degree of utility in allowing the Crown the right of standby. I have considered the UK's position and the AG guidelines on the exercise of this power. In the UK, where there is no right of preemptory challenge by the defendant, it is seen as fair and sensible to limit the exercise of this right to situations where the defence consents or otherwise, only a few exceptional cases. In this jurisdiction, however, a defendant has the right to preemptory challenge three jurors without cause. If therefore, the Crown's present right of unlimited standby is to be curtailed and exercised sparingly as in the UK, then the equilibrium would again be disturbed; the principle applies equally to the Crown as it does the defendant. To retain this balance, and having regard to the limitation which ought to be imposed on the exercise on the right of standby, I am of the view that section 27 could be read with a substantial modification that the Crown too should have the right to preemptory challenge three jurors for each defendant on trial. Construing section 27 with such a modification does not introduce any new, unrelated and contradictory provision in the law; it fits within the scheme allowing challenges to the jury and it does so to ensure the substantial imbalance is restored.

[94] For the purposes of this trial, section 27 should also be construed with a modification that the right of the standby given to the prosecution should only be exercised with the consent of the defendant, or in exceptional cases.

[95] For the purpose of this trial section 27 of the **Jury Act** is to be therefore construed as follows:

> *When a common jury is being impanelled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanour –*
>
> *(c) the person charged, or each of the person charged, and the Crown in relation to each defendant, may preemptory and without assigning cause challenge any number of jurors not exceeding three;*
>
> *(d) The Crown shall have the right to ask that jurors stand by only with the consent of the defendant or defendants as the case may be, or in exceptional cases.*

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[96] I will also give some guidance on what would be regarded as 'exceptional' for the purposes of the standby right of the prosecution. Drawing on the **Attorney General's Guidelines** of the UK I would suggest that exceptional cases would include cases involving treason, terrorism and national security. This is not a case of treason, terrorism or national security. It is not otherwise an exceptional case. Therefore, the effect would be, that in this trial the Director may exercise the right to make three preemptory challenges, any amount of challenges for cause, but may not exercise the right of standby unless the defendant consents

[97] The aim of this court was to construe section 27 of the **Jury Act** to bring it in conformity with the 'fair trial provisions' of the BVI **Constitution**. It may be that this court will be accused of law making. I am comforted, however, that parliament by the express provisions of the **Jury Act**, has treated with and provided for a statutory scheme creating the right of challenges (preemptory and for cause) and the right of standby. These are not unknown concepts to the law in the BVI. They are provided for. It is the manner in which they have been provided for that strikes at the fairness of the trial process. One must be careful not to simply assume that if the court were to take out words or add words to the section, this would amount to law making. The test is to consider whether the court has gone past the pale in modifying and adapting to bring it into conformity with the **Constitution** and have now written laws inconsistent with the **Constitution** in the sense that these are **new and unrelated and contradictory** to the scheme of the legislation.

[98] Postscript on this point - Before leaving this matter, I must say that I understand the caution given by Learned Queen's Counsel and the learned Director when they urged this court that this ruling may have gone too far. At the date of reducing my oral decision into writing the trial had ended. It was to be noted that at the trial the Crown expressly stated that it would not avail itself of any right of preemptory challenge, and they did not. That was quite within their right do so. Perhaps of greater significance was that at the trial the Crown did not standby a single juror; the jury selection process proceeded smoothly unlike the first trial of these charges when the Crown exercised the right of standby some 26 times. Finally, I would also urge that Parliament visit this matter as soon as possible. The

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arguments taken had merit, and these issues will affect any trial in this jurisdiction, as they really do go to the heart of a fair trial.

[99] The final order on these applications was that there would be no stay of the trial.

[100] The court wishes to express its gratitude to both sides for their assistance.

Darshan Ramdhani
High Court Judge (Ag.)

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