EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR2016/0004

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTION

Applicant

-AND-

ANDREAS NORFORD

Defendant

Appearances: Mrs. Kim Hollis, QC, Director of Public Prosecution and Mrs. Tiffany Scatliffe Esprit, Principal Crown Counsel, Counsel for the Crown
Ms. Akilah Anderson, Counsel for the Defendant

2019: 7th, 10th July, 23rd September, 4th October

Ruling on Crowns Application to Quash the Array

BACKGROUND

[1] **Smith J:** Concerns with the Jury Act 1914 have been raised over the years. The Eastern Caribbean Court of Appeal and the Privy Council have both raised concerns with how the Jury List is compiled in the Territory of the British Virgin Islands. Due to the small population of the British Virgin Islands it has become clear that the time has come for the reform of the Jury Act. **Section 7** of the Jury Act requires the Registrar to choose candidates from a list of all eligible jurors in the Territory-a category that includes non-Belongers who have lived in the Virgin Islands for at least 10 years. Unfortunately up to the time of the filing of this application before the Court by the Crown, no such list existed[1]. As far back as 2012 in the Throne Speech the then Governor indicated that the then government of the day had plans to reform the Jury Act, however nothing has been done.

[1] However, information could be gathered from the Immigration Department and the Social Security Department.

The Legal Framework

[2] **The Virgin Islands Constitution Order 2007, Section 16 (2)** provides as follows:

> *"Every person who is charged with a criminal offence shall – (g) when charged in the High Court, have the right to trial by jury.*

[3] **The Criminal Procedure Act (Cap 18) Section 20** provides as follows:

> *"If any person, being arraigned upon any indictment of any indictable offence, pleaded thereto "not guilty", he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court may in the usual manner order a jury for the trial of such person accordingly."*

[4] **The Jury Act Cap 36** details the specific procedure to be used in relation to jury procedure; in particular the selection process to ensure that every person charged is tried by a panel of his peers.

[5] Those who are qualified and disqualified to be common jurors are specified in **Section 4 (7) of Jury Act** in particular:

> **Section 4** states that:- *Every person* ***between the ages of 21 – 60 years*** *(my emphasis)*
>
> a. *Has in his or her own name, or in trust for him or her or tenements in the Territory, of the value of $240 or upwards: or b) Rents any lands or tenements, in the Territory, of the annual value of $48.00 or upwards; or c) Holds any office or situation in the Territory at a salary amounting to the allowances to the sum of $240 per annum or upwards; or d) Is in receipt of an income, from whatever source derived $148.00 per annum or upwards,* **SHALL** (my emphasis) unless exempted or disqualified under the provisions of sections 6 and 7 be liable to serve as a common juror.

[6] **Section 4** therefore imposes a mandatory requirement in relation to those who shall be liable to serve as a common juror.

The application of the Law to The Queen vs. Andreas Norford

[7] **Section 24** of the Jury Act 1914 sets of the following:

> *"Every application made at a sitting of the High Court, for the quashing of an array, shall be heard and determined by the presiding Judge, and no array shall be quashed on the ground of any formal defect, or of any breach of the provisions of this Act, unless the presiding judge is satisfied that it is expedient, on the merits and in the interests of justice, that the array should be quashed".*

[8] The application before the Court was filed prior to the Jury being empanelled. There has been much comment of the timeliness of the filing of the application. I find support for the filing of the application **prior** to the empanelling of the jury as the subsequent trial could be deemed a nullity if this issue remained unresolved prior to the start of the trial. This issue was raised in the case of **O'Connel vs R**[2] and was restated in **The DPP of the British Virgin Islands vs William Penn**[3]. **O'Connel** also says that the application should be made to the judge who is to try the case.

[9] The Application to quash the array was made on 7th July, 2019.

[10] Challenges to the array relate to the process leading to the empanelling of the array. A challenge of this nature may be made on the basis of default, error or partiality on the part of the sheriff or other officer responsible for the compilation of the array. In the **DPP of the British Virgin Islands vs William Penn,** the Privy Council said *"....no matter how great the default or the potential prejudice to the accused in the procedures leading up to the selection of the array, a conviction could never be set aside unless the default could be attributed to the sheriff or equivalent, or his or her subordinate officers. The creation by fraudulent means of a general list omitting eligible persons and its use to select the array would not be likely to be overlooked today."*

[11] The Privy Council also had this to say about **Section 24** *"it shows that the legislature intended that neither the existence of a defect in the array a nullity. The evident purpose was to confirm or in so far as this did not already exist introduce the element of discretion or more precisely* ***judicious evaluation*** *(my emphasis) "on the merits and in the interests of justice, into decisions whether or not to quash the array which A.....but* ***Section 24*** *is a remedial* ***Section*** *not itself containing any words expressly tying the existence of an array the presence on the array of jurors as defined in* ***Section 1****. The Board regards* ***Section 24*** *as wide enough to cover situations (such as discussed in* ***O'Connel)*** *where an apparent array is summoned which is, because of default on the part of the person responsible for returning the array, defective as a whole. If the array is itself otherwise regular, but included (for example) one or more persons not on the jurors register that would probably give occasion for no more than a challenge to the polls of these individuals under* ***Section 28****". In the case of* ***O'Connell*** *the challenge to the array in the Court of Queen's Bench in Dublin alleged that the jurors' book had not been completed in conformity with statutory requirement. The*

[2] (1844) XI Cl & F 155
[3] Criminal Appeal No 1 of 2006

challenge complained that 59 persons who qualified for jury service had been fraudulently omitted from the general list and jury book in order to prejudice the defendants. There were no specific accusations of unindifferency or default against the sheriff or other officer concerned in preparing the list. The challenge failed and the appellants were convicted for conspiracy".

[12] It is clear from **O'Connell** that an application to quash the array is available in respect of any default in the process leading to the summoning of an array in which the sheriff or equivalent (here the Registrar) is involved. If the whole process was defective, the remedy was thus by way of application to quash the array, falling within **Section** 24.

[13] But what is the situation where persons who are eligible to serve but are not included in the Jury Register for whatever reasons? Is the defendant at a disadvantage? Is he about to be tried by a jury truly of his peers? These issues will be explored further in this decision.

[14] The British Virgin Islands includes Anegada, Jost Van Dyke and Virgin Gorda. There are also other inhabited Islands where people reside who may or may not be eligible to serve. The Court recognizes the inconvenience and cost of 1) serving these persons who live on the outer Islands and 2) accommodating them during a jury trial. The Court also recognizes that post Hurricane Irma many persons have relocated and left the Territory. However, as Justice of Appeal Ola Mae Edwards (as she then was) stated in the William Penn case: "that the tenor of the Act does not permit the Court to ignore the definition of "juror" in order to avoid administrative inconvenience." The learned Justice of Appeal went on to say:-

> *"Though I agree with the learned D.P.P that the legislators obviously intended that a generous interpretation be afforded* ***Section 24*** *in determining the outcome of an irregularity or breach of statutory provisions under Cap 36, and that formal defects in making the array were not intended to invalidate the array unless the interests of justice so demands, the approach of the Privy Council in* ***R vs Montreal Street Railway***[4] *which is strenuously urged by the DPP, ought not to be applied, since the Privy Council did not consider the existence of any statutory definition of the word "juror" in formulating its opinion. Looking at the object of the Jury Act, to hold that the requirements for a jurors' register and jurors' book are directory and not mandatory would not promote the main object of the legislature, in my view. I am satisfied therefore that the registrar had no jurisdiction to settle the array of common jurors based on the voters' list. If she had such a jurisdiction, but was in breach of a procedural provision or there was some other formal defect, it is only then that* ***Section 24*** *would apply. The non-existence of the jurors' book*

[4] (1917) AC170

cannot therefore be cured by the operation of ***Section 24****. The array of common jurors from the voters' list was invalid."*

This Court is of the firm view that provision must be made by the Executive to provide the High Court Registry with the necessary resources to include and serve residents in the sister Islands as well as accommodating them during a Jury trial. The Registrar should also enlist the assistance of the Court Bailiffs in carrying out the task of serving eligible persons ensuring that the selection process is truly random and not contrived.

[15] In perusing the documents submitted in this application, the following has become evident:-

1. The lists submitted by the Registrar contained sixty-two (62) names and these names also appeared on the Voter's Register of the Virgin Islands.

2. The lists do not include any named persons from the sister Islands of Anegada, Jost Van Dyke and only one person from Virgin Gorda and certainly no named persons from other Islands such as Necker, Scrub Island, Norman Island nor Cooper Island.

3. The nature of qualification is absent from the list making it impossible to say whether or not these persons are of the eligible age to serve as per the requirements of **Section 4** of the Jury Act Cap 36.

Findings of the Court

[16] The Court finds the following facts from the documents submitted:-

1) As per **Sections 8 – 10** of the Jury Act Cap 36, between 1st and 7th December 2018, the Registrar made out the jurors list for the forthcoming calendar year 2019.

2) In accordance with the law the Registrar caused it to be posted at the door of the Court house and then sent to the Senior Magistrate for revision and for the relevant certificate to be issued.

3) As per the application of the Crown dated 9th July 2019, the Court granted the applicant permission to review the original list of jurors, the juror's book, the revised list of jurors and the certificate of revision for the Jurors list of April 2019 produced on 1st May 2019 and the addendum dated 5th July 2019.

4) The Registrar indicated that these documents referred to above were produced in accordance with the provisions of the Jury Act (Cap 36) i). The Court found that the current list was compiled on 3rd December 2018 and initially contained 614 names and was posted on the court house on 17th December 2018.

5) The list was sent to the Magistrate for revision and was revised on 18th December 2018 and as a consequence of reduction in the original numbers, further names were added to the list pursuant to **Section 10 (ii)** Jury Act Cap 36.

6) The final list contained a total of 482 names.

7) And the Magistrate certified the list and issued her certificate in accordance with Jury Act Cap 36, Third Schedule on 24th December, 2018.

[17] **Section 11 Jury Act Cap 36** directed that the Registrar shall cause the list to be copied in the Jurors book in alphabetical order. The inspection as requested took place on 10th July 2019. The Crown upon its inspection of the records/books found that *"only a computerized list was displayed on a screen"*. The Crown in its submissions said: *"We respectfully submit that there is no provision in the Jury Act Cap 36 to allow for such to be in electronic format.*

[18] In the Court's view this is not a material defect, bearing in mind that most governmental offices are moving towards computerized records. The fact that the list is computerized does not in my view go to the integrity of the list. We must move with the times.

[19] As already stated on Friday 5th July 2019, as a result of an order by the Court, two (2) lists were sent from the Office of the Registrar to all relevant parties in the **R v Norford** matter. The lists were described as follows:

i) Jurors List – April 2019 containing a list of forty five (45) names.

ii) Addendum issued on 5th July 2019 and signed by the Registrar containing seventeen (17) names. A total of sixty-two (62) names were thus available to be impaneled for the matter of **R v Norford**. In an examination of those names the following was evident in both lists:

i) That every name on the lists was also included on the Voters Register of the Virgin Islands.

ii) That the lists do not include any named persons from the sister Islands of Jost Van Dyke and Anegada with only a single person from Virgin Gorda.

iii) As the Nature of Qualification column does not appear on the list, we are unable to establish whether those on the list fall within the relevant age criteria pursuant to **Section 4** Jury Act Cap 36. The Court finds these omissions and discrepancies to be potentially formal defects and go to the very tenor of guaranteeing a person to be judged by the jury of his peers and thereby receiving a fair trial.

[20] Further, upon perusal of the list sent out in September 2019 list and upon comparing it to the list of granted throughout the tear 2019, (January, April, and July Addendum) which was approved in the process undertaken between the 1st – 7th December, 2019 the following was observed:

i. That out the 67 Jurors on the September list, there were 10 identical names from the July, 2019 Addendum and 5 identical names from the January 2019 list.

ii. That there is an Addendum of Jurors Nos. 68 to 82 that can be added by Counsel, with respect this is contrary to the legislation.

iii. That it is clear that the majority of the jurors are from the main Island of Tortola, and very limited (if any) from Virgin Gorda, Jost Van Dyke, Anegada and other sister Islands.

The Application to Quash the Array Pursuant to Section 24 Jury Act Cap 36

[21] Despite the application of 10th July 2019 being adjourned for the summer vacation for the Registrar to cure the defects found in the lists, the list submitted in September appeared to be crafted from the Voters List once again. It is the view of the Court that:-

i) That persons liable to serve in accordance with the provision of **Section 4** and **Section 7 of Jury Act Cap 36** were not included. Persons falling under **Section 7 (a)** Aliens who have been previously domiciled in the Territory for at least ten (10) years were not included in any of the lists.

[22] In relation to the Crown's application the Learned Director on 8th July, 2019 submitted to the Registrar and the Court a list of procedural questions on how the jury selection process was conducted. The Registrar replied on the 9th July, 2019 her answer at paragraph 8:

a) That Persons are not "qualified to serve " by virtue of ***Section 7 (a)*** *and that;*

b) The terms "aliens who had been domiciled in the Territory for at least 10 years "is not a qualification to serve nor is it so expressed in the Jury Act Cap 36. [sic]

[23] It is the view of this Court that the Registrar further erred in failing to include sufficient or the total number of names of those liable to serve from the Sister Islands especially Jost Van Dyke and Anegada.

[24] The Court finds on the documentation before it that the Registrar has continued the practice that was used by successive Registrars prior to 2008 and which was highlighted and frowned upon in **William Penn** cases. The Court is of the view that failure to include persons from the sister Islands and to not include persons who fall under **Section 7** can be viewed as a defect which would prejudice this defendant and any other subsequent defendant, and that the proper course is for the

Court at this stage to quash the array as it is expedient on the merits and in the interests of justice.

See Paras 32 – 33 ***DPP of the Virgin Islands v Penn***[5] and ***William Penn v The Queen***[6]:

> *"To extend the definition juror to include a person whose name is included in a voters list when there is no provision in the Act contemplating the use of such a list for empaneling the array of common jurors, this would be totally irreconcilable with the rest of the statute in my view. Such an extension would be tantamount to judicial legislation which is not an option for this court."*

[25] Importantly, the age qualification in relation to the Electoral register (minimum age of 18 years) compared to that of qualification as a juror **Section 4** "Every person between the ages of 21 and 60 years " is also different and this is a further important matter that the Court has considered for the reasons detailed in Para 21 below.

[26] Jury Act Cap 36 8 (a) provides as follows:

> *"Between the 1st and 7th day of December of every year the Registrar*
>
> *a) Shall make out in the form in the second schedule a list for the ensuing calendar year. "The second schedule provides for a form with five (5) columns, including a column marked "nature of qualification.""*

[27] This column relates to the relevant statutory qualification of the juror who is liable to serve. The intention of the legislation was to specify the nature of the qualification of any particular juror to serve in accordance with the act ie age, land, income alien domiciled for over ten (10) years. The Crown has indicated that their inspection of the electronic list on 10th July 2019 demonstrated that there were no entries at all in this column of the schedule for the entire list that was compiled in December 2018. The current list shows that all the jurors are only qualified by the fact that they are liable to serve because they are employed and make in excess of the minimum amount stated in **Section 4 (c)** of the Jury Act.

[28] Under the Juries Act 1974, to qualify for jury service in the United Kingdom one must be aged 18 – 70; registered to vote; resident in the UK, Channel Islands or the Isle of Man for at least five years since their 13th birthday; not mentally disordered or disqualified from jury service. Here it is a requirement that the person be registered to vote, which is not so in the British Virgin Islands. I place this information as a matter of comparison and to the 1914 Act.

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[5] 2008 UKPC 29

[6] Criminal Appeal No 1 of 2006 Per Edwards JA (Ag) Para 33

RECUSAL

[29] There was no formal application before the Court for this Court to recuse itself however it was alluded to by the Registrar on more than one occasion. That having been said the Court will address it. In ***Miley v Friends Life Ltd.***, the High Court gave some valuable guidance on the mechanics and considerations behind the making of a *recusal* application. In a criminal trial an application must also be made to the judge being asked to recuse himself. The appearance of bias as a result of pre-determination or pre-judgement was a recognized ground for recusal, and included a clear indication of a prematurely closed mind, **Steadman-Byrne v Amjad**[7] and **Otkritie International Investment Management Ltd v Urumov**[8] considered. Any prior involvement by a judge in the course of litigation would not of itself require the judge to recuse themself from a further judicial role in the same dispute.

[30] As no such application was before the Court or properly before the Court, the Court will espouse on the issue no further.

CONCLUSION

[31] The Court finds that the present Jurors list was taken from the full Jurors list that was compiled in December 2018 which was taken solely from the Voter's List. This is improper and has been frowned up by the Court of Appeal and the Privy Council and is a practice that must be discontinued for the reasons set out in the preceding paragraphs.

[32] The extension of the Jury List of September 2016 and the Addendum of July 2019 is null and void as its compilation was not provided for by the statute.

[33] That there is sufficient evidence upon an analysis of the list that has been compiled for the calendar year 2019 of those liable to serve at the defendant's trial that others within the Territory who are liable to serve have not been included and in the Court's view this is a fatal omission to the array. A combined reading and application of **Section 4** and **Section 7** states that, *"every person between the ages of 21 and 60 years who is an alien and has been domiciled in the Territory for at*

[7] [2007] EWCA Civ 625, [2007] 1 W.L.R. 2484, [2007] 6 WLUK 638
[8] [2014] EWCA Civ 1315, [2015] C.P. Rep. 6, [2014] 10 WLUK 401

least 10 years shall be liable to serve as a common juror." The Court is of the view that the legislation is clear on this point.

[34] That no explanation has been provided to this Court to show that an effort was made to properly remedy the error and deficiencies that were raised in July 2019, despite the opportunity that was given to do so. The burden of jury service needs to be distributed evenly and equally between all liable to serve. The goal is to secure for the use of the Courts effective lists of Jurors likely to attend when called, the names of dead men and absent or exempted men/women being left out and to prevent the selection of particular individuals for any jury commonly called "packing".

[35] In all the circumstances, as set out in the preceding paragraphs, it is the Court's view that it is expedient on the merits and in the interests of justice in relation to this defendant's trial that the array should be quashed. The compilation of the jury in the British Virgin Islands is a matter that had been expressly considered by the Privy Council in 2008 stating at paragraph 32 of that ruling, *"If the whole process was defective, the remedy was thus by way of application to quash the array, falling within* ***Section 24"***.

[36] As already stated, the ECSC Court of Appeal also considered the issue in in relation to the application of the Jury Act Cap 36 in the Virgin Islands. The issues raised are not new. Recommendations were made and there has been limited compliance with the judgment.

[37] It also follows that the Jury array for the other matters currently listed will be quashed.

[38] The Court will ask that a copy of this decision be forwarded to the Honourable Attorney General for his perusal.

Ann-Marie Smith
High Court Judge

By the Court

Registrar