

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 INDICTMENT NO: 0112/2016
5

6 JAY CALVERT EBANKS
7

8 V
9

10 THE QUEEN
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15 **Appearances:**

Mr. Guy Dilliway-Parry of Priestleys for the
Applicant

16
17
18 Mr. Scott Wainwright for the
19 Crown/Respondent
20

21 **Before:**

The Hon. Mr. Justice Charles Quin Q.C.

22 **Hearing on**

23 **Application to Exclude Evidence:**

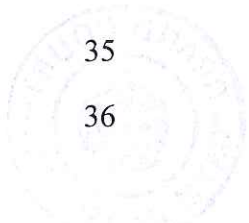
20th January 2017

24 **Delivery of Judgment:**

25th January 2017
25

26 **HEADNOTE**
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28 *Criminal Law – Charges of Possession of Unlicensed firearm and ammunition –*
29 *Application is to exclude evidence seized – Operation of s.40 of the Evidence Law*
30 *– Submission of defective search warrant pursuant to s.26 of the CPC.*
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1 8. Section 26 of the CPC (2014) (provides that:

2 *"Where ... a Justice of the Peace is satisfied by information on oath that in fact or*
3 *according to reasonable suspicion anything upon, by or in respect of which an*
4 *offence has been committed or anything which is necessary to the conduct of an*
5 *investigation into any offence is in any ... place, such Justice of the Peace may,*
6 *by warrant (called a search warrant), authorise a police officer or other person*
7 *therein named to search the ... place (which shall be named or described in the*
8 *warrant) for any such thing and, if anything searched for is found, to seize it and*
9 *carry it before the court issuing the warrant or some other court to be dealt with*
10 *according to law" [Defence emphasis added].*

11
12 9. The powers exercisable by the police under a warrant obtained pursuant to s.26 are
13 contained in s.27 of the CPC and include the power to enter a private residence by
14 force if necessary.

15 10. In addition, s.28 (3) & (4) provide that:

16 *"(3) A search warrant may be directed to one or more persons and maybe*
17 *executed by all or any one or more of them;*

18 *(4) A search warrant directed to any police officer may also be executed by*
19 *any other police officer whose name is endorsed upon the warrant by the*
20 *officer to whom it is directed or endorsed".*



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APPLICANT'S/DEFENDANT'S POSITION

11. Counsel for the Defendant places reliance on the decision of the former Chief Justice Sir John Summerfield in *R v Douglas*¹. The learned former Chief Justice, Summerfield CJ., considered the issue of search warrants obtained under the equivalent provision of s.24 of the Criminal Procedure Code (Law 13 of 1975), which is drafted in identical terms to s.26 CPC 2014 and held that:

"It is clear that on the face of the search warrant it was issued under s.24 of the Criminal Procedure Code. Having elected to proceed thus and invoke those powers, the contents and execution of the search warrant must comply with the provisions governing a search warrant issued under s.24".

Summerfield CJ said further:

"One must recognise that the liberty of the subject and the quiet enjoyment of property are involved and it is important that any legal invasion of these rights must be properly founded on legal authority and exhibit with confidence that due care was taken in invoking the provisions with knowledge of the consequence".

12. Turning his attention to the warrant in question Summerfield CJ found that:

"Section 24 specifically calls for the naming of the police officer or other person who is to execute the warrant"

13. In that instance the officer executing the search under the warrant was not named therein – although another officer was so named and the warrant was also addressed to "other officers of the Royal Cayman Islands Police Force" – and the learned judge found that, with respect to the defect:

¹ [1980 – 83 CILR 119]



1 "...this is more than a mere technicality. These provisions are so framed so as to
2 protect the liberty of the subject and must be observed".

3
4 14. Defence counsel submits that in *Douglas* Summerfield CJ had little hesitation in
5 holding that the warrant in question was defective (primarily, though not solely for the
6 reason stated above).

7 15. Unlike the warrant in *Douglas* the present warrant names no police officers and
8 defence counsel submits that in such circumstances the defect is considerably worse
9 than the circumstances in *Douglas*.

10 16. Defence counsel submits that in *Douglas*, however, the consequence of the defective
11 warrant was that the officers were found to be trespassers in the defendant's property
12 with the result that the defendant was entitled to use reasonable force to expel them
13 therefrom. It is important to record that no consideration was therefore given by the
14 learned former Chief Justice as to the consequence of the defective warrant on the
15 seizure of any evidence found within the property.



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THE RESPONDENT'S POSITION

17. Like the Applicant's counsel, Crown Counsel has also presented very well-reasoned arguments – both on paper and in court.

18. Mr. Wainwright quite properly concedes that the Warrant signed by the Justice of the Peace is defective, in that, it does not name the police officer who executed the Warrant at the Defendant's residence or any other police officer. Furthermore, the Warrant is not even dated and, as Mr. Dilliway-Parry submits, this would effectively mean that any police officer could enter the Defendant's home at any time in perpetuity.

19. Mr. Wainwright submits that the case of *Douglas*² can be distinguished from the case before this Court. In *Douglas*, the Defendant was charged with assaulting a police officer whilst the police officers were executing a search warrant at the Defendant's premises. The Detective Constable who was the alleged victim of the assault was not named on the face of the search warrant as required by the then s.24, and now s.26 of the CPC.

20. The Crown concedes that Chief Justice Sir John Summerfield also found that the defective search warrant in *Douglas* did not specify the object to be searched for and the warrant was executed before sunrise – in clear contravention of s.25(1) of the CPC, now s.27(1).

21. The Crown submits that in *Douglas* the learned Chief Justice was not addressing the question of whether or not to exclude admissible evidence such as we have in this case.

² *supra*

1 22. The Crown submits further that, in this case, although the warrant is defective in not
2 naming the police officer or dating the warrant, the JP signed the warrant because he
3 was satisfied that there is a reasonable suspicion of the commission of the offences of
4 possession of an unlicensed firearm and attempted murder, and that the articles being
5 searched for include a firearm and ammunition.

6 23. When the officers searched the Defendant's premises at #86 West Lane, Pedro Castle,
7 Bodden Town, they found and recovered a firearm and ammunition – that is, a .38
8 Smith & Wesson revolver containing two live rounds and a further ten (10) rounds of
9 .40 calibre ammunition.

10 24. In addition, during his caution interview the Defendant admitted that the firearm and
11 ammunition belonged to him.

12 25. Accordingly, there is considerable force to Crown counsel's submissions that the facts
13 and the circumstances surrounding this case are very different from the facts and
14 circumstances surrounding the *Douglas* case.

15 26. The ultimate question for this Court is whether to exclude the evidence which was
16 obtained as a result of the defective warrant.

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1 *ANALYSIS & CONCLUSION*

2 27. I turn now to the question of discretion of this Court to disallow evidence in criminal
3 proceedings. Section 40 of the Evidence Law (2011 Revision) reads:

4 “40. *Nothing in this Law derogates from the power of a court in any criminal*
5 *proceeding to disallow evidence otherwise admissible which, in the*
6 *opinion of such court, would, if allowed, operate unfairly against an*
7 *accused person.”*

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9 28. In the Privy Council case of *Kuruma, Son of Kaniu v. The Queen*³, Lord Goddard,
10 giving the judgment of the Court stated:

11 *“The test to be applied, both in civil and in criminal cases, in considering whether*
12 *evidence is admissible, is whether it is relevant to the matters in issue. If it is, it is*
13 *admissible, and the Court is not concerned with how it was obtained.”*

14
15 29. Some twenty-five years later in the House of Lords case of *R v. Sang*⁴ which has been
16 applied by the Grand Court Lord Diplock laid down the test which still applies today
17 and reads:

18 *“A judge in a criminal trial has always a discretion to refuse to admit evidence if*
19 *in his opinion its prejudicial effect outweighs its probative value. But, save with*
20 *regard to admissions and confessions and generally with regard to evidence*
21 *obtained from the accused after commission of the offence, he has no discretion to*
22 *refuse to admit relevant admissible evidence on the ground that it was obtained by*
23 *improper or unfair means.”*

24
25 30. *Sang* was decided two years before *Douglas*. But as Summerfield CJ was not dealing
26 with the Court’s discretion to exclude evidence it was not cited to him nor did he refer
27 to it in his judgment.

³ Judicial Committee dated 11th January 1955 [1995] 2 W.L.R. 223

⁴ [1980] A.C. 402



1 31. In *R v. Khan (Sultan)*⁵ the House of Lords again addressed the question of a Court's
2 discretion to exclude evidence. Lord Nolan applied *Sang* – confirming the principle
3 that there is no discretion to exclude evidence discovered as a result of an illegal
4 search. In *Khan* it was accepted by the House of Lords that although the evidence
5 obtained constituted a breach of Article 8 of *The European Convention on Human*
6 *Rights (ECHR)*⁶ it was relevant and admissible. Lord Nolan stated at page 582-C:

7 *“I consider that the trial judge was fully entitled to hold that the circumstances in*
8 *which the relevant evidence was obtained, even they constituted a breach of article*
9 *8, were not such as to require exclusion of the evidence.”*

10 32. Lord Nolan went on to state at letter D on page 582:

11 *“I confess that I have reached this conclusion not only quite firmly as a matter of*
12 *law, but also with relief. It would be strange reflection on our law if a man who*
13 *has admitted his participation in the illegal importation of a large quantity of*
14 *heroin should have his conviction set aside on the grounds that his privacy has*
15 *been invaded.”*

16
17 33. Lord Nolan's words could have been written for this case.

18 34. In this case, despite the facts that the firearm and ammunition have been found at the
19 Defendant's residence, and further, despite the fact that the Defendant has admitted in
20 a caution interview to the police that the firearm and ammunition are his, he is asking
21 the Court to exclude it on the grounds of inadmissibility because the Warrant for the
22 search of his premises did not comply with the provisions of s.26 of the CPC, and
23 consequently was defective.



⁵ [1997] AC 558

⁶ Formally: *The Convention for the Protection of Human Rights and Fundamental Freedoms 1953*.

1 35. In the Privy Council decision of *King (Herman) v R*⁷, the warrant was also found to be
2 defective on the basis that the names of the officers did not appear on the face of it.
3 Notwithstanding the defect, the Privy Council held that the evidence of the drugs found
4 during the course of the search was admissible “*as the evidence had not been obtained*
5 *by conduct of which the Crown ought not to take advantage.*”

6 36. I agree with Crown counsel that this case is on all fours with the Privy Council
7 decision in *King*, and that before the evidence can be excluded the Applicant must
8 show, not only that the warrant was defective, but that the evidence was obtained by
9 conduct of which the Crown ought not to take advantage. In other words, the Applicant
10 must show some bad faith or improper conduct on the part of the police officers who
11 obtained and executed the warrant, or, alternatively, on the part of the Justice of the
12 Peace who signed the warrant before the Court could exclude the relevant admissible
13 evidence. No such bad faith has been alleged and, furthermore, even if the evidence
14 had been obtained by some improper or unfair means, the House of Lords’ decision in
15 *Sang* confirms that I have no discretion to exclude the evidence.

16 37. Finally, and for the sake of completeness I return to the Privy Council decision in
17 *King*, which was cited and relied upon by both counsel in their submissions to the
18 Court. In *King* the Privy Council quoted with approval, Lord Cooper (Lord Justice
19 General) in the Jamaican case of *Lawrie v. Muir*⁸, and stated at page 4 as follows:



⁷ (1968) 52 Cr. App. R. 353

⁸ 1950 JC

1 *“from the standpoint of principle ... the law must strive to reconcile two highly*
2 *important interests which are liable to come into conflict—(a) the interest of the*
3 *citizen to be protected from illegal or irregular invasions of his liberties by the*
4 *authorities, and (b) the interest of the State to secure that evidence bearing upon*
5 *the commission of crime and necessary to enable justice to be done shall not be*
6 *withheld from Courts of law on any merely formal or technical ground... .. it*
7 *would usually be wrong to exclude some highly incriminating production in a*
8 *murder trial because it was found by a police officer in the course of the search*
9 *authorized for a different purpose or before proper warrant had been obtained.”*

10
11 38. In determining whether or not to exclude evidence on the grounds of a defective
12 warrant I must seek to strike a balance between the rights of the homeowner to quiet
13 enjoyment of his property on the one hand, and, on the other hand, the interests of the
14 country in securing evidence bearing upon the commission of crime and the interests of
15 justice.

16 39. Moreover, it is important to note and record that the Applicant has not supplied any
17 case law authority where a defective warrant has led to the exclusion of evidence
18 obtained during the course of the execution of the warrant.

19 40. It is clear from all of the above authorities that the court must have regard to the nature
20 of the defect in the warrant, the conduct of the authorities and the seriousness of the
21 offence being investigated.

22 41. It is regrettable that the name of the officer was not listed on the search Warrant and
23 that it was not dated but I find that these omissions are formal or technical in nature
24 and, most importantly, there is no suggestion of any impropriety or bad faith on the
25 part of the police or the Justice of the Peace.



1 42. The interests of justice and the interest of the Cayman Islands in securing evidence
2 relating to the extremely serious criminal offence of possession of a firearm clearly
3 lend themselves to the admission of the subject evidence.

4 43. I agree with Crown counsel when he submits that when all of the factors are considered
5 in the instant case the Court should exercise its discretion in allowing the admission of
6 the evidence.

7 44. Accordingly, I admit the evidence and reject the Applicant's application to exclude it.

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9 Dated this the 25th January 2017



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11 **Honourable Mr. Justice Charles Quin Q.C.**

12 **Judge of the Grand Court**

