

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL**

CAIS NO. 152 OF 2008

MELVIN MAYCOCK SR.

Appellant

V

**THE ATTORNEY GENERAL &
THE GOVERNMENT OF THE UNITED
STATES OF AMERICA**

Respondents

CAIS NO. 170 OF 2008

**LYNDEN DEAL &
BRYAN DEAL**

Appellants

V

**THE ATTORNEY GENERAL &
THE GOVERNMENT OF THE UNITED
STATES OF AMERICA**

Respondents

CAIS NO. 172 OF 2008

MELVIN MAYCOCK JR

TORREY LOCKHART

LARON LOCKHART

WILFRED FERGUSON

CARL CULMER

DERICK RIGBY

Appellants

V

**THE ATTORNEY GENERAL &
THE GOVERNMENT OF THE UNITED
STATES OF AMERICA**

Respondents

CAIS NO. 173 OF 2008

TREVOR THOMAS ROBERTS &

DEVROY MOSS

Appellants

V

**THE ATTORNEY GENERAL &
THE GOVERNMENT OF THE UNITED
STATES OF AMERICA**

Respondents

CAIS NO. 174 OF 2008

SHELDON MOORE

Appellant

V

THE COMMISSIONER OF POLICE

Respondent

CAIS NO. 179 OF 2008

SHANTO CURRY

Appellant

V

THE COMMISSIONER OF POLICE

Respondent

CAIS NO. 180 OF 2008

GORDON NEWBOLD

Appellant

V

THE COMMISSIONER OF POLICE

Respondent

Before: The Rt. Hon. Dame Sawyer, P.
 The Hon. Mr. Justice Longley, J.A.
 The Hon. Mr. Justice Blackman, J.A.

Appearances: Mr. Damian Gomez and Ms. Simone Smith for
 Melvin Maycock Sr. in No. 152 of 2008 and for
 Bryan and Lynden Deal in No. 170 of 2008

 Mr. Wayne Munroe and Mr. Jomo Campbell for
 Melvin Maycock Jr, Torrey Lockhart, Laron
 Lockhart, Wilfred Ferguson, Carl Culmer and
 Derick Rigby in No. 172 of 2008

 Mr. Maurice Glington and Mr. Paul Moss for
 Trevor Thomas Roberts and Devroy Moss in
 No. 173 of 2008

 Mr. J. H. Bostwick, Q.C., Mr. Murrio Ducille with
 him for Sheldon Moore in No. 174 of 2008

 Mr. Jerone Roberts for Mr. Shanto Curry in No.
 179 of 2008

 Mr. Murrio Ducille and Mr. Jerone Roberts for
 Gordon Newbold in No. 180 of 2008.

 Ms. Cheryl Grant Bethel and Mr. Franklyn
 Williams for the Respondents

Dates: 3 June; 28 July; 2 & 3 November, 2009; 28
 January, 2010

J U D G M E N T

Introduction:

1. In these appeals, the appellants (fourteen in all) appeal from the judgment of Justice Isaacs (now Senior Justice of the Supreme Court) ("the learned judge") which was given on 18 November, 2008 in which the learned judge remitted the matter back to the learned Deputy Chief Magistrate sitting in Magistrate's Court number 8 ("the learned magistrate") to hear and determine the proceedings in accordance with the answers given to five questions which were submitted to the Supreme Court by the learned magistrate in letters dated 9 August 2006 and 7 July, 2008. From the record before us it appears that the constitutional issue raised by respective counsel for the appellants before the learned judge is the validity of subsection 5(2) of the Listening Devices Act (Ch. 90) ("the LDA") which was enacted by the Legislature of the Colony of the Commonwealth of the Bahama Islands in 1972 before the promulgation of the 1973 Constitution ("the Constitution") and is therefore an "existing law" within the definition of that term in subsection 4 (6) of The Bahamas Independence Order 1973 (SI 1973 No. 1080). That fact, it is contended, is not a complete answer to the issues raised on behalf of the appellants in light of the Privy Council's decision in *Forrester*

Bowe Jr. and Trono Davis (No. 44 of 2005) as one then has to go back to the 7th January, 1964 and look at the law as it then was and see whether there is any conflict between the existing law and the constitutional human rights provisions as at that date.

History of the Right to Privacy in The Bahamas:

2. The Colony of the Bahama Islands was a “settled” Colony: its colonizers therefore brought the common law of England with them: see section 2 of the Declaratory Act (Ch. 4), the Lauderdale Peerage Case (1885) 10 App Cas 692 at page 744 to 745 per Lord Blackburn; and *Pictou Municipality v Geldert* [1893] AC 524 to mention a few of the authorities on the point.

3. At common law, entry on to private property in order to effect a search or execute an arrest on reasonable suspicion of the commission of a criminal offence required a magistrate’s warrant with exceptions in cases where, for example, a constable has to enter private premises to prevent a felony being committed, or to prevent or suppress a breach of the peace or to recapture someone who has escaped from lawful custody/arrest - see also *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 and *Ghani v Jones* [1970] 1QB

693 at page 709.

4. In *Davis v Lisle* [1936] 2 KB 434, a Divisional Court of the King's Bench Division of the High Court in England held that the police have no right, without a warrant, in connection with a summary offence as opposed to a felony, not involving a breach of the peace, to enter private premises, or to remain against the owner's wishes on premises into which they are invited to enter. No counsel has advanced any arguments as to whether the alleged offences of conspiracy to possess dangerous drugs or to import dangerous drugs and so on are summary or indictable offences so we say no more about that.

5. At common law, a general warrant which did not specify either the person or the property which was to be searched was held to be illegal – see for example *Wilkes v Wood* (1763) 19 St. Tr. 1153, 98 ER 489; and *Entick v Carrington* (1765) 19 St. Tr. 1030, 95 ER 807.

6. On 7 January, 1964 when the 1963 Constitution entered into force, the statutory powers of entry and search of private premises by police officers included section 45 of the Magistrates Act (Ch. 36 of

the 1965 Edition of the Statute law of the Bahama Islands) which provided that, "Where a magistrate, the Registrar General, or some other justice of the peace is satisfied on evidence upon oath that there is reasonable cause to believe that any property whatsoever on or with respect to which any offence has been committed is in any place or places he may grant a warrant directed to any peace officer to enter and search such place or places, by force if necessary, and at any time of the day or night. And if such property or any part thereof be there found, to bring the same and the person or persons in whose possession such place or places then may be, or any person in any such place being reasonably suspected of being privy to such property being therein before the magistrate having jurisdiction in the district in which the warrant was executed." In the case of these appellants there is no evidence that the listening devices which were used by the police were installed on any private premises belonging to any of them nor is there any evidence that the telephone calls which were intercepted were made in circumstances of privacy as defined in section 2 of the LDA.

7. It has not been suggested that telecommunication by electronic or other similar means is "property" or that information or

conversations carried over a publicly-owned telecommunication system or via satellite and which is not encrypted, or said in public places, can be viewed as being stated privately or in confidence so as to bring the interception of such communications within the prohibition in Article 21 of the Constitution. Nor has it been suggested that freedom of expression extends to the commission of criminal offences or civil wrongs so as to bring the interception of such communications by the police within the prohibition in Article 23 of the Constitution.

8. As a matter of history, when the 1963 Constitution entered into force, telecommunications in the Bahama Islands, including telecommunications by telephone were quite rudimentary and were regulated by the Telecommunications Act (Ch. 16) of the 1965 Edition of the Statute Law of the Bahama Islands, which received the assent on 2 July, 1947 and entered into force on 1 July 1948 – before the United Nations' Universal Declaration on Human Rights and the European Convention on Human Rights. At that time and until fairly recent developments occurred, what were called "party line" telephones were the norm and separate telephone numbers were rare. Party lines allowed any number of persons to listen in to the

telephone calls of others, hence the provisions in sections 24 and 25 of that Act which provided:

“24, Any person who without authority in writing first had and received from the Director intercepts any telegraph or communication intended for the general public and with intent to prejudice the rights or interests of others deliberately discloses the contents or existence of such communication or any person who unlawfully or maliciously in any manner whatsoever prevents or obstructs the sending, conveying or delivery of any communication by telegraph or telephone shall be guilty of an offence and on conviction thereof shall be liable to a fine of fifty pounds or to imprisonment for one year or to both such fine and imprisonment.

5. Any person employed or engaged in any capacity whatsoever at a telecommunications station who, contrary to his duty, discloses or in any way makes known or intercepts the contents or any part of the contents of any message transmitted or received or to be transmitted or received to or at any telecommunications station shall be guilty of an offence and on conviction thereof shall be liable to a fine of fifty pounds or to imprisonment for one year or to both such fine and imprisonment.” (Emphasis added)

9. See also section 47 of the Bahamas Telecommunications Corporation Act (Ch. 277) of the 1987 Edition of the Statute Law of The Bahamas in which the Corporation was substituted for the Director in the earlier version of the statute. Those provisions were similar to provisions in the laws of other Commonwealth nations and territories at that time. In the late 1960's, 1970's and 1980's, various countries and territories enacted legislation to penalise the unauthorised interception or interference with private communications whether by mail or telecommunications; Australia, Canada, the United Kingdom and The Bahamas were among them. One Australian state's statute to which reference was made in the course of the hearing, pre-dated the Bahamian LDA but was apparently not the precedent followed in drafting the LDA while the United Kingdom's legislation post-dates the Bahamian legislation.

10. From those provisions it appears clear that before 1964 the law of the Bahama Islands did not vest a judicial officer with the power to oversee telephone tapping as opposed to searches of persons and private property. In the case of telecommunications, it was in fact exercised by the Director of the Department who, in technical terms, would have been a member of the Executive Branch of Government

and, after 9 June 1966, by the Corporation, an emanation of the government. In addition, in light of the rapid advances in the development of telecommunication by electronic means since the advent of the microchip – for example, via satellite – it is clear that very little that is said over any telephone – be it a landline or mobile telephone – cannot be overheard or intercepted by amateurs or ordinary citizens, even if they are not listening intentionally – see for example *Regina v Effik and Another* [1995] 1 AC 309. In that case, the House of Lords, in dealing with evidence of telephone calls made or received using a cordless telephone which were intercepted by the police in England, it was held that such interception was not intercepted in the course of transmission by means of a public telecommunication system under the Telecommunications Act 1984 of England. Their Lordships dismissed the appellants' appeal. After dealing in depth with the legal arguments, Lord Oliver of Aylmerton at page 320 stated the terms of the Court of Appeal (Criminal Division) decision in *Regina v Ahmed* (unreported), 29 March 1994 by Evans LJ –

**"Our conclusions are as follows: first,
we hold that the interception of a**

communication takes place when, and at the place where, the electrical impulse or signal which is passing along the telephone line is intercepted in fact. Secondly, if there is an interception of the private system, the communication which is intercepted is not at that time passing through the public system. It is not, in our judgment, in the course of transmission by means of the public telecommunication system. Thirdly, the fact that later or earlier signals either have formed part of, or will form part of, the same communication or message does not mean that the interception takes place at some other place or time. Finally, 'communication,' in our judgment, does not refer to the whole of a transmission or message; it refers to the telephonic communication which is intercepted in fact, and on the evidence to which I have referred that consists of what has been variously described as the electrical impulse or signal which is affected by the interception that is made."

11. In the context of The Bahamas, then, when sections 7 and 9 of the 1963 Constitution came into force, there would have been no existing right to privacy of a criminal conspiracy or even of non-criminal telephone conversations via party line telephone service as not only the telephone lines but also the telephone instruments in private homes were owned by the government department and were only rented to the home owners. Nowadays, and for some years

now, it is possible for individuals to buy cordless telephones from various shops in The Bahamas and the United States; however, as the landline aspect of telecommunications is still a monopoly owned by the government-owned (at this writing) Bahamas Telecommunications Company Limited, such cordless systems are usually connected to the government-owned system by means of an electric "jack" which is plugged into an electrical outlet. On the other hand, cellular or mobile telephones are not at all dependent on the government-owned land line system although a chip is necessary to be able to use such instruments in this country.

12. By 10 May, 1969 when the second Constitution came into force, while telecommunications would have improved in the Bahama Islands, the availability of private telephones was still very limited.

13. By 1973 when the present Constitution entered into force, all of the telephone instruments in use in The Bahamas were still "owned" by Bahamas Telecommunications Corporation which was created by the Bahamas Telecommunications Corporation Act (No. 13 of 1966) with effect from 9th June, 1966. As a result of that ownership, if the rental was not paid for how ever long a time the Corporation

stipulated, the Corporation would have the right, at a reasonable time of day, to enter a person's home and repossess their instrument under the third paragraph of Article 21 and its predecessor section 7 of the 1964 and 1969 Constitutions. The right to privacy of telephone calls was therefore, at best unclear.

14. In my judgment, the provisions of Chapter 3 of the Constitution, and in particular Articles 16 to 27, put in concrete terms those human rights which had been fought for over hundreds of years since the battle of Hastings, starting with the establishment of courts presided over by the king's judges rather than local landowners, appeals of felony and so on in which the relatives or clans of the victim dealt with the suspect; or even trials by various ordeals; along that path, the signing of the Magna Carta in 1215 by King John is looked upon as an important milestone as is the Bill of Rights 1688.

15. While the Human Rights provisions of the Constitution, like the constitutions of other countries, were, and are, meant to establish the permissible limits of governmental intrusion in the lives of citizens and other persons and entities in The Bahamas, they are not meant to protect wrong doing or the commission of crime by any person or

entity in the country: as the learned authors of Halsbury's Laws of England, 4th Edition Volume 3(1) Reissue at paragraph 526 when dealing with the privilege of communications between barristers and their clients state: "...The privilege does not extend to communications made for the purpose of committing a fraud or a crime.". Several cases are noted as authorities for that proposition: namely, *R v Cox and Railton* (1884) 14 QBD 153, *Williams v Quebrada Railway Land and Copper Co* [1895] 2 Ch 751, *R v Smith* [1915] WN 309, CCA; *O'Rourke v Darbishire* [1920] AC 581 HL, *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593; and *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336, CA. It therefore follows that when one is dealing with allegations of crime and criminal conduct such as conspiracy to commit a drug trafficking offence, one is not dealing with any "right" known to the law since the agreement to commit the offence is itself an offence. In law there can be no confidentiality in criminality so that, for example, if A decides he wishes to commit a criminal offence and goes to B, a lawyer, seeking legal advice as to how he could commit the offence with impunity, if B gives such advice, it would not be covered by legal professional privilege one of the oldest privileges

known to the law see the passage from Halsbury's Laws 4th Edition extracted above.

16. Now it is not contended that the conversations ascribed to the appellants which were listened to by the police were "innocent" or of personal matters of no concern to anyone other than the parties to those conversations. Instead, it is argued that the appellants have a constitutional right to make private telephone calls and any interference with that right, unless under a constitutionally valid law, is a breach of that constitutional right.

17. In my view, however, when the Constitution speaks of "rights", it is not speaking of the commission of wrongs or crimes by one person in The Bahamas against another person in The Bahamas or elsewhere since there can be no "right" to commit a crime or a civil wrong.

Background:

18. The appellants in these appeals are the subjects of extradition proceedings which are still pending in Magistrate's Court No. 8; all of the issues raised in this appeal could more conveniently have been

raised following the completion of the hearing before the learned magistrate on an application for habeas corpus if she decides to rule against the appellants or, on appeal by the Government of the United States of America ("USA") if the learned magistrate refuses to commit the appellants for extradition to the USA.

19. Be that as it may, in the course of the hearing before the learned magistrate, counsel for the appellants (other than Messrs Melvin Maycock Jr., Torrey Lockhart et alios) questioned the constitutional validity of the exercise by the Commissioner of Police of the power vested in him by subsection 5 (2) of the LDA in the cases of these appellants as a matter affecting the admissibility of the evidence obtained by the police using listening devices. Messrs Melvin Maycock Jr and others represented by Mr. Munroe applied to the Supreme Court for redress by notice of motion under Article 28 of the Constitution.

20. With regard to the issues raised as constitutional questions, the learned magistrate, acting in accordance with Article 28 (3) of the Constitution, would have had no choice but to refer the six questions to the Supreme Court. The questions were:

"1. Whether to pass the test of constitutionality, a document purporting to be an Authorization given by the Commissioner of Police to the police officer to use a listening device in accordance with section 5 (2) of the Listening Devices Act must in order to authenticate itself in law in manner and form provide or specify the following particulars:

- (a) the identity of the person authorized to use a listening device to conduct an investigation into an offence that has been committed;**
- (b) the date as from when such authorized use of a listening device was given;**
- (iii) the offence that has been committed or that is about to be, or is reasonably likely to be committed, it being the very reason for the authorized use of a listening device in the police officer's conduct of the investigation.**

2. If the answer to question (1) is in the affirmative, whether the Authorizations comply in such manner and form as required by law.

3. If the answer to question (2) is in the affirmative, whether the use now known to have been made of the Authorizations as given is lawful.

4. Whether to pass the test of constitutionality, the power to authorize the use of a listening device to "here, listen and record" a private conversation in accordance with section 5(2) of the Listening Devices Act, may lawfully avail any authority or person for its or his (or her) use or purpose at their absolute discretion (as in the instance of the Commissioner of Police under the section) or for any use or purpose without prior judicial supervision.

5. Whether the law as represented and regulated by the provision of the Listening Devices Act, particularly by section 5 (2) therefore, satisfies a qualitative test in that it provides essential safeguards and protections consistent with the rule of law in a democratic society.

6. Whether the powers and discretion availing the Commissioner of Police under section 5 (2) of the LDA violate Article 23 of the Constitution."

21. At the time when those constitutional questions were raised, there were two extant judgments of this court (differently constituted although I was a member of the panel in both cases) which, according to the doctrine of precedent, would have been binding on all lower courts and the learned judge referred to them in giving his

decision to remit the matters to the learned magistrate for the preliminary inquiry to continue. Those decisions are *Butterfield v Commissioner of Police* (unreported) and *Dwight and Keva Major v Superintendent of Prisons and Others* (Unreported). In *Butterfield's* case, the decision of this court would have been final - see section 14 (3) of the Court of Appeal Act (Ch. 52).

22. The learned judge, after considering the arguments of counsel for the appellants and the respondents regarding the interpretation of subsection 5(2) of the LDA, concluded at page 18 of his judgment –

“Thus, I would answer question one as follows: (a) Yes; (b) No, but the period during which the Authorisation is to operate must be stated in the Authorisation; and (c) Yes.”

23. At page 21 of his judgment, the learned judge answered the second question thus –

“The failure to specify the manner in which such device(s) are to be employed in the Authorizations in this case and no mention as to how long they are to run suggest they do not, to my mind, comply in such manner and form as required by law. However, the Court of Appeal found the Authorizations in *Butterfield* and *Major and Major* which were cast in almost identical terms as the Authorizations in this case to

be valid and I am bound by those decisions. Thus, I answer this question in the negative."

24. Having answered question 2 in the negative, the learned judge declined to answer question 3 since an answer to that question would only have been required if the answer to question 2 was in the affirmative.

25. At page 31 of the judgment, the learned judge concluded his consideration of question 4 of the learned magistrate's reference thus:

"The Court of Appeal addressed the issue in Major and Major and decided that the exercise of the Commissioner of Police's power 'was clearly within the rule of law and, Mr. Kemp has been unable to persuade us that its exercise was not reasonably justifiable in a democratic society.' (at p. 15, para. 26). But for the decision of the Court of Appeal, I would have answered this question in the affirmative." (Emphasis supplied)

26. As to question 5 of the reference, the learned judge again concluded that "But for the decision of the Court of Appeal I would have answered this question in the negative".

27. After discussing at some length the process adopted by the Commissioner of Police in issuing the Authorizations and the decisions of other courts of high standing on the interpretation of similar provisions in their respective fundamental laws, the learned judge concluded his consideration of question 6 on page 49 of his judgment in this way:

“The authorities suggest that the use of listening devices involves an entry and search as contemplated under the Canadian Charter of Rights and the European Convention on Human Rights. I accept readily that no breach of this right has been disclosed in this case but it is precisely because of the lack of particulars supplied in the Authorisation that such a state of affairs can make proving such a breach nigh impossible; and demonstrates why it is necessary that the manner of the use of the listening device must be specified in the Authorisation.” (Emphasis added)

Pausing there, having found that there was no evidence of a breach of the right not to have one's right to privacy infringed by the "entry and search" of property or private communications, that should have been the end of the matter in the Supreme Court because to go on and state that that inability was due to the lack of particulars supplied in the Authorisation amounts to speculation and does not take into

account the fact that the persons who were best able to adduce evidence of such invasion would be the appellants since they were the ones alleging that their constitutional right to privacy had been infringed by the actions of the police. The law is that the burden of proving the allegation of infringement of constitutional rights rests on the person who alleges that his or her constitutional right has been infringed.

28. An examination of decisions from Canada and Australia reveals that the claims of infringement of the right to privacy arose out of situations in which the investigating officers were authorised to enter private property in order to install listening devices. In these appeals there is no evidence before this court that any entry was made onto the private property of the appellants in order to install any listening device.

29. Furthermore, by the dates when the listening devices complained of in these appeals were allegedly used, it was common knowledge in The Bahamas and elsewhere that by a comparatively simple exercise, using cellular/mobile telephones, it was possible to listen to the conversations of others where those others also use

cellular/mobile telephones. In addition, because of the use of satellites in orbit around the planet which carry the necessary electronic signals, it is easy for the authorities to track persons using such telephones – see, for example, Regina v Effik [1995] 1 AC 309 and compare Regina v Preston [1994] 2 AC 130 in which the decision of the Court of Appeal in England in Effik (1992) 95 Cr. App. R. 427 was overruled.

30. The learned judge continued:

“Nevertheless, it is for the same reasons obtaining in respect of Article 23 that I would have, but for the decision of the Court of Appeal in Major and Major, concluded that section 5(2) was inconsistent with Article 21 of the Constitution and void to the extent of that inconsistency. Thus, I must answer this question in the negative.” (Emphasis added)

31. The conclusion that subsection 5 (2) of the LDA is inconsistent with Article 21 of the Constitution would necessarily have been based on the assumption that there had been an unjustified invasion of the privacy of the appellants by the police when, as pointed out at paragraph 29 above there is no evidence of any such invasion.

32. At page 51 – 52 of his judgment, the learned judge dealt with the collateral attacks on the whole process in relation to the admissibility of evidence obtained using listening devices authorised by the Commissioner of Police under subsection 5(2) of the LDA. He said:

“Inasmuch as Mr. Turner has submitted that I ought to dismiss the reference because they are nothing more than a sham, to wit, they seek to re-litigate issues already decided, I note such decisions of the Privy Council as *Harikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, *Thakur Persad Jaroo v Attorney General of Trinidad and Tobago* [2002] 5 LRC 258 and *Chokolingo v Attorney-General* (1980) 32 WIR 354 that speak to a court refraining from entertaining collateral attacks on perfectly proper criminal proceedings; and I refer to the Court of Appeal’s decision in *Terry Delancey v The Attorney-General* SCCivApp No. 43 of 2006 made along the same lines. Despite these authorities I have proceeded to consider and answer the questions raised because although the learned Deputy Chief Magistrate has already ruled on the issue of admissibility in relation to a number of the Applicants, the point remains outstanding in respect of Melvin Maycock, Sr.

“While I have entered upon a consideration of the questions posed by the learned Deputy Chief Magistrate despite the submissions of Mr. Turner that I decline to do so, I am nevertheless constrained by

the weight of the decisions of the Court of Appeal in Butterfield and Major and Major to give the answers contained above.

“The matter is remitted back to the learned Deputy Chief Magistrate to hear and determine the proceedings in accordance with the answers given to the questions.”

33. In light of dicta in *Bowe v Government of the United States of America* [1990] 1 AC 500 at page 526F – G that –

“The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships’ decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied.” (Emphasis added)

It may well be that the better practice would be for the magistrate to complete the preliminary inquiry to determine whether or not extradition should be ordered in respect of any of the appellants and,

if so, who (where a request is in respect of several persons), and in respect of what charges, before any similar challenges to those in these appeals should be raised. One thing that seems to militate against the suggested practice is the apparently mandatory requirement that if the learned magistrate finds that persons in the position of the appellants should be extradited that they must be committed to custody. It is true that these appeals are not in respect of applications for certiorari or prohibition as in *Bowe's* case cited above, nevertheless, as indicated earlier, all of the issues raised in these appeals could more conveniently have been raised following the completion of the preliminary inquiry when this court as well as the Supreme Court may have been in a better position to judge the merits of the arguments on the validity of subsection 5(2) of the LDA against an established factual background.

34. The foregoing is, to an extent, based on a reading of Article 28 (3) of the Constitution which appears to require any court - except the Supreme Court and this court - to refer any constitutional question raised before such a court to the Supreme Court. In my judgment, therefore, the learned magistrate was bound to refer the constitutional questions to the Supreme Court.

35. The Supreme Court has original jurisdiction to hear and determine constitutional questions regarding the actual or anticipated infringement of any of the rights and freedoms guaranteed by Articles 16 to 27 (inclusive) of the Constitution; once a final determination is made by that Court, both sides have a right of appeal to this court under Article 104(1) of the Constitution even though such applications have the effect of truncating as well as prolonging what should be a comparatively simple hearing by a magistrate to see whether there is sufficient evidence to justify ordering the extradition of an alleged fugitive.

36. While we had reservations as to whether the decision by the learned judge was a "final" decision regarding a constitutional right/freedom, we heard extensive argument about the constitutional validity of subsection 5(2) of the LDA and reserved our decision.

The Appeals:

37. The grounds of appeal in Melvin Maycock Sr's appeal and the appeals of Lynden and Bryan Deal are identical; one of them is set out here for ease of reference:

“1. The Learned Trial Judge erred in law in the answers given to the questions referred by the Deputy Chief Magistrate, in that, he felt bound to follow the decisions of the Court of Appeal in *Butterfield v the Commissioner of Police* [2003] BHS J No. 42 and *Dwight Major and Keva Major v The Superintendent of Her Majesty’s Prison and the Government of the United States of America* CONST/CIV APP No. 14 and 15 of 2005, which decisions were per in curiam (sic) and made in error without consideration of or reference to authorities pertinent to the respective ratio descidendi of the said Court of Appeal decisions.

2. The Learned Trial Judge erred in law in that having correctly found at page 17 of his said Ruling that upon conjoining the judgments of the Court of Appeal in *Butterfield v The Commissioner of Police* [2003] BHS J No. 42 and *Dwight Major and Keva Major v The Superintendent of Her Majesty’s Prison and the Government of the United States of America* CONST/CIV APP No. 14 and 15 of 2005, the inference to be concluded is that the law requires that *the Authorisation must prescribe on it’s face, inter alia: 1) the manner in which it is to be used; 2) the length of time the Authorisation is to last; and 3) the identity of the police officer(s) to whom the Authorisation is issued.*” He nevertheless failed to hold that the authorizations which are the subject matter of the said questions referred to the Supreme Court failed to satisfy the said legal requirements, and as such, were ineffective and void.

3. The Learned Trial Judge erred in law in failing to hold that the use now known to have been made of the authorizations which are the subject matter of the said questions referred to the Supreme Court was unlawful and unconstitutional.

4. The Learned Trial Judge erred in law in that having correctly found at page 31 that it is imperative that whoever makes a decision to authorize the invasion of the privacy of an individual, must do so independently of the applicant agency, and there must be a separation of the decision making from the executive function of law enforcement, and having earlier and correctly found that having regard to the provisions of Sections 4 and 6 of the Police Act, Cap 205, Section 55 of the Criminal Procedure Code, Cap 91 and Article 78(1) of the Constitution of the Commonwealth of The Bahamas, 1972, both the Attorney General and the Commissioner of Police ought to be precluded from determining whether or not an authorization for the use or deployment of a listening device should be given, and having correctly referred to *Bruno Grollo v Michael John Palmer, Commissioner of the Australian Federal Police and Others* (1995) 131 ALR 225; *Patrick Ousley v The Queen* (1997) 192 CLR 69; *Kopp v Switzerland* (1999) 27 EHRR 91; *Christie v UK* (1994) and *Klass* (1978) 2 EHRR 214, all of which cases were neither cited to nor considered by the Court of Appeal in *Butterfield v The Commissioner of Police* [2003] BHS J No. 42 and *Dwight Major and Keva Major v The Superintendent of Her Majesty's Prison and the Government of the United States of America* CONST/CIV APP N0. 14 and 15 of

2005, yet nevertheless, the Learned Trial Judge felt bound to follow the said Court of Appeal decisions and to hold that it was unnecessary for the Listening Devices Act, Cap 90 to provide for prior independent supervision of the deployment and use of the listening devices in order to satisfy the constitutional requirements of Article 23 of the Constitution of the Commonwealth of The Bahamas, 1973. The Learned Trial Judge ought to have held that Listening Devices Act Cap 90 was inconsistent with Article 23 of the Constitution, 1973 and that as a result of such inconsistency, the Listening Devices, Cap 90 is ultra vires and void.

5. The Learned Trial Judge erred in law in that he failed to hold and ought to have held that in order for the Listening Devices Act, 1973 (sic) to satisfy the qualitative test set out in Article 23 of the Constitution of the Commonwealth of The Bahamas, 1973, the Listening Devices Act, Cap 90 ought to, but failed to provide for judicial supervision prior to the use or deployment of a listening device, and that as a consequence of this failure so to provide, the Listening Devices Act, Cap 90 is unconstitutional and void.

6. The Learned Trial Judge erred in law, in that he failed to hold and ought to have held that the powers and discretion availing the Commissioner of Police, under section 5(2) of the Listening Devices Act, Cap 90 are ultra vires Article 23 of the Constitution of the Commonwealth of The Bahamas, 1973 and are void. The Learned Trial Judge erred in law, in that he failed to hold and ought to have held that Section 5(2) of the Listening

Devices Act, Cap 90, is inconsistent with Article 21 of the Constitution of the Commonwealth of The Bahamas, 1973, and as a consequence is ultra vires and void.

8. The Learned Trial Judge erred in law, in that he failed to hold and ought to have held that the use of the fruits of the unlawful use and deployment of listening devices by making public the alleged private communications compounds the breach and violation of Articles 21 and 23 of the Constitution of the Commonwealth of The Bahamas, 1973, and he ought to have ordered, but he failed to order, that the transcripts of the alleged communications be ignored by the Learned Deputy Chief Magistrate and that the said transcripts be delivered to the Supreme Court and destroyed.” (Italics in the original)

38. In their notice of appeal filed December 15, 2008, the appellants Trevor Thomas Roberts and Devroy Moss, set out the following as their grounds of appeal “as to substantive matters”:

“1. The learned Judge having definitively adjudicated upon the said Questions referred under Art. 28(3) of the Constitution aforesaid, erred both in law and in fact in that, inter alia, he:

- (i) misread and/or misapplied the Court of Appeal decisions in *Butterfield v Commissioner of Police* [2003] BHS J. No. 42**

(Quicklaw reference) and in *Dwight Major and Keva Major v Superintendent of Her Majesty's Prisons and Government of the United States of America* (Const/Civ App No. 14 & 15 of 2005); and in the result he mistakenly regarded the said decisions as binding precedent in disposing of the said Questions in the manner that he did, and thereby confounded and/or prejudiced his answers thereto remitted to the learned Deputy Chief Magistrate; and because,

- (ii) he misapplied the doctrine of stare decisis to the Constitutional Reference in these Appellants' case in that neither he nor the issues before the Court of Appeal in those two cases forming the ration decidendi of either of its decisions warranted or justified the application of the doctrine, namely, that when an appellate or other a superior court of record of equal jurisdiction has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future

cases, where facts are substantially the same, regardless of whether the parties and property are the same; and because,

- (iii) the arguments on the issues of law then before the Court of Appeal and necessary to its determination in Butterfield and Major and Major, show those cases if correctly decided are distinguishable and could not have been authority or binding precedent applicable to subsequent cases unless, it is clear from arguments and also apparent from the record, that the very point was again in controversy (which, it is submitted, is not the situation here); and**
- (iv) misconstrued the purpose of Art. 28(1) in granting standing and creating a cause of action in persons invoking the Supreme Court's special jurisdiction alleging facts particular to their circumstances an actual or likely apprehended contravention of a fundamental right as of admitting of a general application of of the doctrine of stare decisis**

when (as the Appellants respectively contend), the said provision does not as a matter of construction.

2. The learned Judge having noted in relation to Question 6 of the Constitutional Reference that the issue was not argued in either *Butterfield* or *Major and Major*, it is submitted that his finding as to the status of the impugned law is dispositive for purposes of his remittance of the matter to the learned Deputy Chief Magistrate. In the premises the learned Judge in deeming it reasonable to conclude the Court of Appeal must have considered at the time of its decision in *Major and Major* the Privy Council decision in *Bowe and Davis* 'although not specifically mentioned' and that, but for which, 'I would have concluded that section 5(2) was inconsistent with Article 21 of the Constitution and void to the extent of that inconsistency', erred in the exercise of his jurisdiction.
3. The learned Judge gave a wrong interpretation to Art. 28(3) as regard the manner and form of a constitutional reference thereunder by the learned Deputy Chief Magistrate in these Appellants' case.
4. The learned Judge erred in his interpretation of certain dicta in the Privy Council judgment in *United States Government v Frederick Nigel Bowe* [1990] 1 AC 500 (at p. 526),

to mean that the procedure that was there held appropriate to applications to the Supreme Court for orders of certiorari and prohibition, 'exercising revisional jurisdiction', where no issue of Art 28 redress was involved and the exercise of jurisdiction is discretionary, was suitable and applicable in circumstances of constitutional references under Art. 28(3) where the right to the procedure for redress there prescribed is not only a constitutional entitlement but one which was automatically invoked upon an allegation by the person of an allegation of actual or likely apprehended contravention of one of the fundamental rights and freedoms provisions of the Constitution. (Italics and underlining in the original)

39. The grounds of Messrs Roberts' and Moss' appeal as to procedural matters are –

"5. Having regard to the function of the Judge exercising the Supreme Court's jurisdiction under Art. 28 (3), the learned Judge ought to have approached each of the said Questions the matter of the Constitutional Reference as raising issues de novo without reference to any possible effect of the Court of Appeal decisions in Butterfield and Major and Major, inasmuch as:

(i) the question as to
the relevance or

other effect of those decisions upon the answers to be given to the said Questions was not an issue properly before the Court for determination; and because

- (ii) the learned Deputy Chief Magistrate declined to sight (sic) proffered for her signature that adverted to the issue as to the possible effect of the Butterfield case as binding precedent; and
- (iii) in any event, any such relevance or other effect of the said decisions as binding precedent was not a matter for consideration in the limited abstract context of the particular Constitutional Reference.

6. In the premises the learned Judge ought to have remitted (sic) the matter to the learned Magistrate having answered Questions 2, 4, and 5 in the negative and Question 6 in the affirmative."

40. The grounds of appeal in the case of the appellant, Sheldon Moore are identical to those in the case of Roberts and Moss so they need not be inserted here else this judgment would be overlong.

41. Similarly, as the grounds of appeal in the case of the appellants Melvin Maycock Jr., Torrey Lockhart, Laron Lockhart, Wilfred Ferguson, Carl Culmer and Derick Rigby are identical to those set out above in respect of the appellants Melvin Maycock Sr. and Bryan and Lynden Deal they are not repeated here.

42. The grounds of appeal in respect of the appellants Shanto Curry and Gordon Newbold are as follows:

“1. The Appellant did not have a *fair hearing* in that:

(1) the Appellant was not heard on the issue of *transferring* the Reference from Madam Justice Watkins to Mr. Justice Jon Isaacs; and/or

(2) the Appellant was not heard on the substantive issues, namely the constitutional challenge to the Listening Devices Act.

2. The Learned Judge erred in law in deciding that a letter from Mrs. Bethell

to the Chief Justice constituted a 'Reference' for the purposes of Article 28 (3) of the Constitution.

3. The Learned Judge erred in law in deciding that he was bound by the Court of Appeal's decisions in:

- (1) *Butterfield v COP; and*

- (2) *Dwight Major and Keva Major v Supt. HM Prison et al*, and he so erred particularly in relation to his answer to question 6.

4. The Learned Judge erred in law when he answered:

- (1) questions 4 and 6 in the negative; and

- (2) question 5 in the affirmative." (Italics in the original).

43. By consensus of counsel for the appellants, Mr. Glinton presented the arguments on behalf of his clients first and Messrs Bostwick, Gomez, Munroe and Roberts adopted those arguments insofar as they affected their respective clients and added other arguments from the particular perspective of their clients.

44. The point raised by Mr. Roberts on behalf of his clients that the decision to transfer the learned magistrate's reference from one

Justice of the Supreme Court to another Justice of that Court was wrong in law since his clients were not heard before the transfer took place is, in my judgment, misconceived since the learned judges of the Supreme Court have equal jurisdiction and the Chief Justice, as Head of Judiciary is charged with the administration of that Court as well as all magistrates' courts. Where a matter is re-assigned to a different Justice from the Justice to whom it was originally assigned either because the latter may have been unable to complete it or because that Justice is assigned to other duties or has taken ill, it is for the Chief Justice, in his administrative capacity, to ensure that it is assigned to a Justice who is able to complete it. There is no merit in that ground of appeal as a person, in a democracy like The Bahamas, has no legal or constitutional right to choose his judge.

45. Without attempting to reproduce all of the arguments which have been advanced in support of, and against, the contentions of the appellants, it is clear that the main issue for this court to decide is whether or not subsection 5(2) of the LDA contravenes Articles 21 and/or 23 of the Constitution because if it does, the authorizations issued by the Commissioner of Police would be nullities and any evidence obtained thereunder would be inadmissible as against the

appellants – see *Simmons & Green v Regina* PC Appeal No. 33 of 2005.

46. An issue that arises even if subsection 5(2) is consistent with those Articles is whether the authorizations themselves were valid if they did not contain the particulars required by the subsection.

47. A third issue, but one which should be considered first as it relates to the jurisdiction of this court to entertain these appeals, is whether this court has the jurisdiction to hear and determine these appeals in light of Article 104 (1) of the Constitution and two earlier decisions of this court in *Butterfield v Commissioner of Police* and *Dwight and Keva Major v the Superintendent of Prisons and the Government of the United States of America*, bearing in mind the principles laid down in *Young v Bristol Aeroplane Co. Ltd* [1944] 1 KB 718. In that case, it was held by the Court of Appeal in England that the Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction. It was held that the only exceptions to that rule are where: (1) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not

expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e. g., where a statute or rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court – see Lord Greene MR giving the judgment of the court at page 729 – 730.

48. However, in *Regina v Gould* [1968] 2 QB 65, Diplock LJ in giving the judgment of the Court of Appeal in England said:

“In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Aeroplane Co. Ltd.* as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case (*Rex v Taylor*). A fortiori, we are bound to give effect to the law as we think it is if the previous decision to the contrary effect is one of which the ratio decidendi conflicts

with that of other decisions of this court or its predecessors of co-ordinate jurisdiction.” (Emphasis added)

49. As the jurisdiction of this court is statutory and constitutional, and as these appeals arise out of extradition proceedings (which are criminal proceedings – see *Ex parte Woodhall (Alice)* (1888) 20 QBD 832 - the views of the Court of Appeal of England in *Regina v Gould* cited above are persuasive and we therefore adopt them and will examine the law afresh in order to determine whether subsection 5 (2) of the LDA contravenes Articles 21 or 23 of the Constitution and whether the decisions in *Butterfield* and *Major and Major* that subsection 5 (2) of the LDA is constitutionally valid, should be followed or not, if necessary.

50. Mr. Glinton argues that the learned judge was not in fact or in law bound by those decisions since the issues raised and the authorities referred to in hearing the references and the notice of motion in the cases of these appellants, were not argued before this court in *Butterfield* or *Major and Major*. In other words, the issue of the constitutionality of subsection 5(2) of the LDA was not canvassed before this court or, if it was, it was done only tangentially and the

points now being made were not fully argued in those cases, if at all. In light of the decision in Gould's case cited earlier, we have decided to look at that issue afresh.

51. Mr. Ginton did not deny the principle of the binding nature of judicial precedent in a court system such as this, which, like many others with a common law background, is an hierarchical one so that the decisions of the higher courts bind the lower courts on matters of legal principle. As, however, the Constitution is a "living document" it is contended that its provisions should be considered afresh bearing in mind the changes in understanding of the nature and extent of human rights as developed and developing not only in the Commonwealth of Nations but also by international tribunals such as the European Court of Justice (Strasburg Jurisprudence) and others. It is therefore contended that inasmuch as the decisions in Butterfield and Major and Major appear to be considered judgments of this court, if it is shown that those decisions were in fact made "per incuriam" it is open to this court to reconsider and decide differently. We heard the matter afresh, that is, we heard all of the arguments advanced orally and in writing and reserved our judgment.

52. In these appeals, counsel complain of the generality of the authorisations issued by the Commissioner of Police and submit that for that reason as well, they ought not to be held to be within the spirit and intention of the LDA and the Constitution and contend that none of the grounds raised in Butterfield's case raised for determination the constitutional validity of subsection 5 (2) of the LDA as in these appeals; the judgment of the court in Butterfield's case dealt with the issues in that case and at page 28 Osadebay, JA, said:

“...Section 5 of the Act has to be construed having regard to the scheme of the legislation as a whole and the role of that provision in that scheme. Those authorizations, in our view, comply with the requirements of section 5 of the Act and were therefore not invalid.”

53. In these appeals we are invited to hold that subsection 5(2) of the LDA is unconstitutional as it is in contravention of Articles 21 and 23 of the Constitution because it infringes the appellants' right to privacy and freedom of expression and the infringement is not reasonably justified in a democratic society.

54. In *Dwight and Keva Major v the Superintendent of Prisons and the Government of the United States of America*, three of the grounds

of appeal deduced by Ganpatsingh, JA from the submissions of counsel for the Majors were – “(iii) the inadmissibility of the evidence relating to the contents of and, the witnesses’ interpretation of the jargon used, in the intercepted telephone conversations...(v) the Listening Devices Act Chapter 90, which gave authority for the intercepts was unconstitutional; (vi) a fundamental right was violated in that the appellants were not given adequate time and facilities for the preparation of their defences, habeas corpus applications and appeals; (vii) a fundamental right was violated in that the appellants were denied the protection of the law in the committal proceedings and”...

55. Ganpatsingh JA, dealt with the issue of the constitutionality of the LDA at paragraphs 22 to 26 of the judgment stating at paragraph 24 that this court did not find the case of *Malone v United Kingdom* (1984) 7 EHRR 14 to be applicable to the Bahamian situation. The learned Justice of Appeal then continued:

“Interception of communications in this country is governed by statute which comes within the limitation to the fundamental right relied on. The threshold test in our case is whether the authorisation to listen is reasonably justifiable in a democratic

society and the burden is on the appellants to show it was not..."

56. After setting out the terms of subsection 5 (2) of the LDA,

Ganpatsingh, JA, continued at paragraphs 25 and 26 thus:

25. We are of opinion that there are adequate safeguards in the provision to ensure as far as reasonably possible that an authorization is issued under section 5(2) would likely be reasonably justifiable in a democratic society. We find the following constraints on the exercise of the power vested in the Commissioner of Police to be of significance; (i) the authorisation can only be issued after consultation with the Attorney General; (ii) it must be in writing; (iii) it is only given where necessary; (iv) it is given for the clearly defined purpose of investigation into an offence that has been committed; or (v) for the purpose of obtaining evidence of an offence or the identity of an offender where an offence is about to be or is reasonably likely to be committed; (vi) the authorisation must prescribe the manner in which it is to be used; (vii) it must be for a limited period as specified, not exceeding fourteen days; and (viii) a record of the particulars of every authorization must be kept.

6. These limitations on the power of the Commissioner of Police to authorise the use of a listening device are clearly intended by Parliament to ensure effective control over the use of the procedure. They are also equally designed to instill

confidence in the public that the power will be used responsibly for the purpose of bringing to light criminal conduct and the identity of the offenders. In our view the exercise of the power in this case was clearly within the rule of law and, Mr. Kemp has been unable to persuade us that its exercise was not reasonably justifiable in a democratic society.”

57. Generally speaking, a conversation that takes place over a system or systems not owned by the persons using the system or systems would not be considered private nor would a person who happens to listen to such a conversation be considered to be carrying out a search or entry on the private property of the parties to it, I shall say more about this aspect of the matter later.

58. In these appeals there is no suggestion of any breaking and entering on to the private property of any of the appellants.

59. The second point to be considered is whether the decision by the learned judge in the appellants' cases is a “final” decision within the meaning of Article 104(1) of the Constitution so as to confer on the appellants a right of appeal to this court since the only effective decision the learned judge made was that he remitted the matters to the learned magistrate for completion of preliminary inquiry and that

he was bound by two earlier decisions of this court so that even though he was minded to make a contrary decision, he did not feel himself able to do so.

60. Article 104 (1) of the Constitution provides:

“104. – (1) An appeal to the Court of Appeal shall lie as of right from final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by Article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms). (Emphasis supplied)

61. In the circumstances I was of the view that these appeals could quite properly be disposed of by simply holding that the decision of the learned judge is not a “final” decision within the meaning of Article 104(1) of the Constitution and that there is therefore no jurisdiction in this court to hear these appeals.

62. However, in light of the fact that arguments have been advanced on both sides regarding the substance of these appeals, it is necessary for this court to consider the substance of those arguments and reach decisions on them, so far as the court is able in the absence of any factual evidence.

63. Article 21 (1) of the Constitution prohibits the search of any person (which includes a legal entity like a company – see Attorney General of Antigua v Antigua Times [1976] AC 16) or a person's property or the entry by others on a person's property except with that person's consent. Had that Article ended there, Mr. Ginton's propositions of law may have been unanswerable.

64. As it is, however, Article 21 (2) goes on to provide:

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision –

(a) which is reasonably required -

(i) in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; or

- (ii) for the purpose of protecting the rights and freedoms of other persons;
- (b) to enable an officer or agent of the Government of The Bahamas, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or
- (c) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society." (Emphasis added)

65. Sections 12, 15 and 16 of the Criminal Procedure Code Act (Ch. 91) ("the CPC") which received the assent on 31 December,

1968 and took effect on 2 April, 1969 that is, after the 1963 Constitution of the Bahama Islands entered into force on 7 January, 1964) are examples of statutory provisions which permit the authorities to search persons and property. To date, as far as we are aware, no complaints have been made about the constitutional validity of any of those provisions.

66. Subsection 5(2) of the LDA like all statutory provisions, is to be interpreted in the context of the statute of which it is a part: the section reads:

“5. (1) Where the Commissioner of Police after consultation with the Attorney-General is satisfied –

- (a) that for the purpose of the conduct by a police officer of an investigation into an offence that has been committed or that the Commissioner believes to have been committed, the use of a listening device is necessary; or**
- (b) that an offence is about to be, or is reasonably likely to be, committed and that, for the purpose of enabling a police officer to obtain evidence of the**

**commission of the offence
or the identity of the
offender, the use of a
listening device is
necessary,**

**the Commissioner after consultation with
the Attorney-General, may in writing
authorise the use by a police officer of a
listening device for that purpose in such
manner and for such period (not exceeding
fourteen days) as may be specified in the
authorisation.**

67. Section 3 of the LDA makes it an offence for a person to use a listening device to hear, listen to or record a private conversation to which he is not a party. It is not an offence under that section if the hearing of a private conversation over a telephone is unintentional or where the person using the listening device does so in accordance with an authorisation given to him under section 5 of the LDA.

68. Section 4 of the LDA makes it an offence to communicate or publish to any other person a "private conversation" or a report of or the substance, meaning or purport of a private conversation that has come to his knowledge as a result of the use of a listening device used in contravention of section 3 of the LDA; a similar prohibition is made by subsection 4(2) of the LDA in respect of a party to a "private conversation" which he recorded using a listening device.

69. The prohibitions in subsections 4(1) and (2) do not apply where the communication or publication is not more than is reasonably necessary in the public interest or is made in the performance of a duty of the person making the communication or publication or... is made in accordance with an authorisation referred to in paragraph (a) of subsection 3(2) of the LDA.

70. And a “private conversation” is defined by subsection 2(1) of the LDA as “...any words spoken by one person to another in circumstances indicating that those persons or either of them desire the words to be heard or listened to only by themselves or by themselves and some other person, but does not include a conversation made in circumstances under which the parties to the conversation ought reasonably to expect the conversation to be overheard.” Clearly, if one is using a cellular/mobile telephone on the high seas or from a moving vehicle (whether boat or aeroplane) using modern wireless technology, the parties ought reasonably to expect that the conversation is likely to be overheard, in which case no issue of “privacy” of such a conversation will arise under the law; in fact the coded language used in some of the conversation gives force to this argument.

71. Subsection 5(3) of the LDA gives similar powers to the Comptroller of Customs and a customs officer for the purposes of the Tariff Act (Ch. 295) or the Customs Management Act (Ch. 293) and subsection 5 (4) requires that a record of the particulars of every authorisation given by any person under that section is to be kept by him.

72. Counsel compared the provisions of section 5 of the LDA with statutory provisions from Queensland, Australia as well as sections 2 and 3 of the English Interception of Communications Act, 1985. The latter sections read:

"2. – (1) Subject to the provisions of this section and section 3 below, the Secretary of State may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by post or by means of a public telecommunication system, such communications as are described in the warrant; and such a warrant may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the warrant.

(2) The Secretary of State shall not issue a warrant under this section unless he considers that the warrant is necessary –

- (a) in the interests of national security;**
- (b) for the purpose of preventing or detecting serious crime; or**
- (c) for the purpose of safeguarding the economic well-being of the United Kingdom.**

(3) The matters to be taken into account in considering whether a warrant is necessary as mentioned in subsection (2) above shall include whether the information which it is considered necessary to acquire could reasonably be acquired by other means.

(4) A warrant shall not be considered necessary as mentioned in subsection (2) (c) above unless the information which it is considered necessary to acquire is information relating to the acts or intentions of persons outside the British Islands.

(5) References in the following provisions of this Act to a warrant are references to a warrant under this section.

3. – (1) Subject to subsection (2) below, the interception required by a warrant shall be the interception of –

- (a) such communications as are sent to or from one or more addresses specified in the warrant being an address or addresses**

likely to be used for the transmission of communications to or from –

(i) one particular person specified or described in the warrant; or

(ii) one particular set of premises so specified or described; and

(b) such other communications (if any) as it is necessary to intercept communications falling within paragraph (a) above.

(2) Subsection (1) above shall not apply to a warrant if -

(a) the interception required by the warrant is the interception, in the course of their transmission by means of a public telecommunication system of –

(i) such external communications as are described in the warrant; and

(ii) such other communications

(if any) as it is necessary to intercept in order to intercept such external communications as are so described; and

- (b) at the time when the warrant is issued, the Secretary of State issues a certificate certifying the descriptions of intercepted material the examination of which he considers necessary as mentioned in section 2(2) above.

(3) A certificate such as is mentioned in subsection (2) above shall not specify an address in the British Islands for the purpose of including communications sent to or from that address in the certified material unless –

- (a) the Secretary of State considers that the examination of communications sent to or from that address is necessary for the purpose of preventing or detecting acts of terrorism; and
- (b) communications sent to or from that address are included in the certified material only in so far as they are sent within such period, not exceeding three months, as is specified in the certificate.

(3) A certificate such as is mentioned in subsection (2) above shall

not be issued except under the hand of the Secretary of State.

(4) References in the following provisions of this Act to a certificate are references to a certificate such as is mentioned in sub-section (2) above."

73. Coco v The Queen 1993-1994 Vol. 179 CLR 427 is a decision of the High Court of Australia on appeal from the Supreme Court of Queensland on the issue as to whether the authority to use a listening device issued by a Judge also authorized the entry on to premises to install the device under section 43 and 46 of the Invasion of Privacy Act 1971 of Queensland. Sections 43 and 46 read:

"43. (1) A person is guilty of an offence against this Act if he uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a penalty not exceeding \$2,000 or to imprisonment for not more than two years or to both such penalty and imprisonment.

(2) Subsection (1) of this section does not apply -

(a) where the person using the listening device is a party to the private conversation;

(b) to the unintentional hearing of a private

conversation by means of a telephone;

(c) to or in relation to the use of any listening device by –

(i) a member of the police force acting in the performance of his duty if he has been authorized in writing to use a listening device by –

(a) the Commissioner of Police;

(b) an Assistant Commissioner of Police; or an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorize the use of listening devices, under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matter specified in the approval;

- (ii) an officer employed in the service of the Commonwealth in relation to customs authorized by a warrant under the hand of the Comptroller-General of Customs and Excise to use a listening device in the performance of his duty;
- (iii) a person employed in connexion with the security of the Commonwealth when acting in performance of his duty under an Act passed by the Parliament of the Commonwealth relating to the security of the Commonwealth.

(3) In considering any application for approval to use a listening device pursuant to subparagraph (i) of paragraph (c) of subsection (2) of this section a judge of the Supreme Court shall have regard to –

- (a) the gravity of the matters being investigated;
- (b) the extent to which the privacy of any

person is likely to be interfered with; and

- (c) the extent to which the prevention or detection of the offence in question is likely to be assisted,

and the judge may grant his approval subject to such conditions, limitations and restrictions as are specified in his approval and as are in his opinion necessary in the public interest."

"46. (1) Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device used in contravention of section 43 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings.

(2) Subsection (1) of this section does not render inadmissible –

- (a) evidence of a private conversation that has, in the manner referred to in that subsection, come to the knowledge of the person called to give the evidence, if a party to the conversation consents to that person giving the evidence;

- (b) evidence of a private conversation that has, in the manner referred to in that subsection, come to the knowledge of the person called to give the evidence, notwithstanding

that he also obtained knowledge of the conversation in such a manner, or

(c) in any proceedings for an offence against this Act constituted by a contravention of, or a failure to comply with, any provision of this part, evidence of a private conversation that has in the manner referred to in that subsection come to the knowledge of the person called to give the evidence."

74. In Coco's case, Mason CJ, Gaudron and McHugh JJ, considered the argument of counsel for the respondent that an authorisation under section 43(3) to use a listening device extended to the installation of such a device where it is necessary to enter onto premises in order to listen to a private conversation in light of a decision of the United States Supreme Court in *Dalia v United States* (1979) 441 US 238 per Stevens J, with whom Brennan and Marshall JJ agreed. At page 439 of Coco's case, they said:

"In *Dalia v United States*, Stevens J, adopted as his starting point the proposition that 'it is most unrealistic to assume that Congress granted such broad and controversial authority to the Executive without making its intention to do so unmistakably plain'. In his Honour's view,

the implication of such powers into the statute was 'in all other respects ... exhaustive and explicit'. According to Stevens J:

'Congressional silence should not be construed so as to authorize the Executive to violate state criminal laws or to encroach upon constitutionally protected privacy interests ... Without a legislative mandate that is both explicit and specific, I would presume that this flagrant invasion of the citizen's privacy is prohibited.'

It may be that Stevens J was influenced by constitutional considerations not present in the Australian context. However, the same comment cannot be made about the dissent of Dickson J in *Re Application for an Authorization*, as the question in that case arose for decision before the introduction of the Canadian Charter of Rights and Freedoms. In that case, Dickson J held that a judge granting an authorization to use a listening device under the relevant Canadian legislation did not possess any authority to include a right of entry as a term of authorization.

First, Dickson J was not convinced that the interception of communications contemplated by the statute could not have been achieved without a trespass; interception may well have been more difficult, but it would not have been impossible. 'The fact that [communications] could perhaps be intercepted more

frequently and more conveniently if there were such a power constitutes ... scant justification for inferring such a power'. Secondly, Dickson J preferred as we do the dissenting opinion of Stevens J in Dalia v United States - that where:

'a legislative scheme speaks in considerable detail about most aspects of an issue, but is silent on one aspect, that silence is particularly telling ... Parliament's silence cannot be taken to sanction what amounts to breaking and entering.'"
(Emphasis supplied)

75. In Forrester Bowe Jr. and Trono Davis (No. 44 of 2005), Lord Bingham writing for the Privy Council, pointed out that the human rights provisions in the Constitution are modeled on the provisions of the European Convention on Human Rights and so the Constitution should be interpreted in like manner as the provisions of that Convention. It is worthy of note that all of the human rights provisions in the European Convention were in fact rights enjoyed by British subjects and citizens of common law countries under the common law and various statutes/constitutions for many years before 1950 when that Convention was signed. Without intending any disrespect to any of the persons who participated in the discussions

leading to the signing of the European Convention, from a reading of its terms, it seems clear that they were crafted by draftsmen skilled in the common law. Like all such rights, where the individual or entity is concerned, they extend only so far as they do not interfere with the similar rights and freedoms of every other individual or entity or the public good; hence the usual corollary to the apodictic provision in most of the human rights Articles in the Constitution that things done under a law which may at first glance look like an interference with a human right is not to be regarded as an interference or contravention of such a right if it is reasonably necessary for the public good and is reasonably justifiable in a democratic society.

76. It seems to me that in any democratic society, the control of criminal activity is necessary for the welfare of the majority of citizens and even for the production of real wealth. With regard to The Bahamas in particular, it must be noted, that it was no idle thought which resulted in the first motto of this country being "Expulsis Piratis Restituta Commercia" or, "Pirates Expelled, Trade Restored"; for sound economic growth and prosperity are not possible where crime and criminal activity are rampant.

77. Turning now to the fact of interception of communications, in *R v Senat and Sin* (1968) 52 Cr App R 282, the English Court of Appeal held that recordings of conversations obtained through telephone tapping by private individuals were admissible in evidence on the trial of a charge of conspiracy to pervert the course of justice. See also *Noor Mohamed v R* [1949] AC 182 at page 192; *Harris v Director of Public Prosecutions* (1951) 36 Cr App R 39; [1952] AC 694 at page 707; *Kuruma son of Kaniu v The Queen* [1955] AC 197, *Harz and Power* (1967) 51 Cr App R 123, [1967] 1 AC 760 and *Ali and Hussain* (1966) 50 Cr App R 230, [1966] 1 QB 688.

78. It is appreciated that up until the promulgation of the Human Rights Act in England in 1998, the issue of breach of the European Convention would generally not have arisen in criminal cases in that country and so some of the authorities dealing with the admissibility of illegally obtained evidence may no longer be good law in that country. In *The Bahamas* the decision of the Privy Council in *Simmons and Greene v Regina* (No. 33 of 2005) that the confession of Simmons that had been obtained in the absence of his lawyer even though he had indicated he wanted his lawyer to be present should have been ruled inadmissible because of the deliberate breach by the

police of Simmons' constitutional right to have his lawyer present notwithstanding their Lordships' decision in the earlier case of *King v The Queen* [1969] 1 AC 304 in which the Privy Council did not interfere with the trial judge's exercise of discretion even though there had been a breach of the constitutional right of the appellant to consult a lawyer. Indeed, in the earlier works on the constitutional law of England, it used to be said that the Parliament of the United Kingdom is Supreme and the courts could not declare legislation duly passed by Parliament invalid. That position has now changed apparently as a result of the Human Rights Act 1998 of England and the European Convention on Human Rights which has now become part of the law of the United Kingdom.

79. Whether or not subsection 5(2) of the LDA is constitutionally valid or infirm will have to be determined bearing in mind its context in the LDA which is *prima facie* saved from constitutional infirmity by the express provisions of Article 30 of the Constitution regarding existing law, and also in light of the fact that before 7 January, 1964 there was no statutory or common law right to privacy for suspected criminal activity over a telephone. While the LDA defines what a private conversation is, it does not, however, either by express words or

necessary implication, give legitimacy to the use of the telephone system for the purpose of enabling persons to use those facilities in order to conspire to commit crimes or other wrongs; indeed it is an offence to use the public telephone system to harass others and so on. The corollary to that is that if what counsel for the appellants say is correct then it would mean that even if one person overhears another two or so persons in a telephone conversation plotting to kill someone, if it is being said as part of a "private" conversation, evidence of what was said could not be given in court because it would be a breach of the conspirators' "right to privacy" of communication. Thus stated it clearly must be rejected as being both unreasonable and wrong. In so concluding, I do not ignore the definition of "private conversation" in subsection 2 (1) of the LDA set out above.

80. Now conspiracies whether criminal or not, are usually not made in broad daylight and in places where they can be overheard although they probably are sometimes so made by persons who use agreed codes. It may well be that in using mobile telephones or land lines, persons are not aware of the very real probability that their conversations may be overheard and so would consider them

“private”. Bearing in mind, that mobile telephones, in particular, use wireless methods of communication; that communications satellites are the main conduit by which such signals are carried; and that persons engaged in the transportation of dangerous drugs through this Archipelago, generally use mobile telephones to communicate information to their co-actors, it is difficult, if not impossible, to consider conversations using such means as “private” or as being made in circumstances under which the parties do not reasonably expect their conversation to be overheard.

81. In *Ousley v The Queen* (1997) 192 CLR 69, the High Court of Australia had to consider the validity of warrants issued by a judge in the state of Victoria, Australia. Now that State had enacted the Listening Devices Act 1969 which vested the power to issue warrants under section 4A of that statute in judges of the Supreme Court of Victoria. Section 4A(1) provided that a complaint made by a member of the police force that he or she suspects or believes – (a) that an offence has been, is about to be or is likely to be committed; and (b) that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is

necessary – the Supreme Court may, if satisfied that there are reasonable grounds for that suspicion or belief, authorise, by warrant, the use of a listening device.

82. And section 25(1)(f)(i) of the Supreme Court Act 1986 (Victoria) provided that where an Act “confers any jurisdiction on a court... the authority having for the time being power to make rules or orders regulating the practice and procedure of that court... may, unless the contrary intention appears, make such rules or orders ... as appear to the authority to be necessary for regulating the practice and procedure of that court ... in the exercise of the jurisdiction so conferred.”

83. The facts were that tape recordings of conversations were made under the authority of the warrants and a person was then charged with drug related offences. At the start of the trial, in response to submissions by counsel for the accused, the judge ruled that he had no jurisdiction to permit a collateral attack on the validity of the warrants. The recordings were admitted into evidence and the accused was convicted.

84. It is important to note that the majority of the judges in the High Court held, among other things, that the issue of a warrant under section 4A is an administrative, not a judicial act. Hence its validity was not open to collateral review by a trial judge.

85. Justices Gaudron and Kirby disagreed with that view. By the time the matter reached that court, the applicant for leave to appeal against his conviction had served in full the non-parole period of his sentence which rendered a retrial an unlikely prospect as a matter of practicality and the police and judges concerned had acted with complete apparent propriety since they had followed the form of the warrant then provided by law.

86. In *Grollo v Palmer and Others* 1995 184 CLR 348, the High Court of Australia held that Divisions 3 (ss 35-44) and 4 (ss 45-61A) of Pt VI (amplified by ss 6D and 6H) of the Telecommunications (Interception) Act 1979 of the Commonwealth conferred power to issue telecommunication interception warrants in specified circumstances on any federal judge who consented to being appointed as an "eligible judge" and was so appointed.

87. It was held, by Brennan CJ, Deane, Dawson, Toohey and Gummow JJ, McHugh J dissenting, that ss 6D and 6H and Divisions 3 and 4 of Pt VI of the Act were valid laws of the Commonwealth; by Brennan CJ, Dean, Dawson and Toohey JJ that the power to issue a warrant must be exercised judicially, but this of itself does not characterise the power as a judicial power and that the power conferred by sections 45 and 46 to issue warrant is not part of the judicial power of the Commonwealth because it does not involve an adjudication to determine the rights of parties.

88. The court also held that "The designated person conception, when adopted to acknowledge that there is no necessary inconsistency with the separation of powers mandated by Ch III of the Commonwealth Constitution if non-judicial power is vested in an individual judge detached from the court they constitute, should not be rejected. But the power to confer non-judicial functions on judges as designated persons is subject to the conditions that the conferral must be consented to by the judge and function must not be incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power."

89. It seems to me that that last caveat is important in a small jurisdiction such as The Bahamas since the involvement of judicial officers (in which I include Magistrates as well as Registrars of the Supreme Court) at the investigatory stage of suspected criminal activity would create serious problems of perception of objectivity at the trial stage of such activity and may well lead to the blurring of the line between executive and judicial functions. It also tends to confuse the continental system in which there are investigating judges/magistrates with a system in which the courts are separate from the executive which has the duty to investigate and prosecute persons for the commission of criminal offences.

90. Mr. Gomez highlighted the approach of the Supreme Court of Canada in a number of decisions regarding the guarantee of the right to privacy under section 8 in that country's Charter of Rights.

91. In *R v Garofoli* [1990] 2 SCR 1421, the Supreme Court – Dickson CJ 1 and Lamer CJ 2, La Forest, L'Heureux-Dube, Sopinka, Gonthier and McLachlin, JJ – by a majority, allowed the appeal and ordered a new trial. They also held that “The failure of the authorizing judge to impose conditions minimizing the interception of irrelevant

communications does not result in the authorization of an unreasonable search and seizure in violation of s. 8 of the Charter. An absolute requirement of live monitoring in all cases would impose too heavy a burden on Canadian law enforcement officials. While a requirement of live monitoring or visual confirmation would generally be appropriate when telephone calls are to be intercepted at public pay telephones, the same considerations do not apply with respect to the private residence of a person named in an authorization unless there are special circumstances calling for live monitoring, and appellant has not satisfied the Court that any special considerations are involved here."

92. In their dissent, L'Heureux-Dube and McLachlin JJ held that "Since the power of a judge to grant a wiretap authorization subject to the preconditions set out in s. 178.13(1) of the Code must be exercised in conformity with the Charter, the section should be read so as to require that the judge be satisfied that there are reasonable grounds to believe that the specified offence has been or is being committed, and that evidence of the offence will be obtained by the interception sought. Apart from this limitation on a judge's ability to authorize a wiretap, the direct protection for individuals comes from

two sources: s. 178.16(1)(a) of the Code, which states that to be admissible in evidence an electronic interception must have been 'lawfully made', and s. 24(2) of the Charter, which provides for the exclusion of evidence where the evidence was obtained in a manner that infringed a Charter right and it is established that its admission would bring the administration of justice into disrepute..."

93. Article 8 of the European Convention provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Emphasis added.

94. In *Kopp v Switzerland* (13/1997/797/1000) 25 March 1998 the European Court of Human Rights had to consider whether the monitoring of a law firm's telephone lines on orders of the Federal Public Prosecutor contravened the Article 8 rights of Kopp. The law did not state clearly how, under what conditions and by whom

distinction was to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.

95. In that case, the European Court held, among other things, that –

“64. ...Article 8 section 2 requires the law in question to be ‘compatible with the rule of law’. In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures...”

96. The Court then went on to examine the quality of the legal rules applicable to Mr. Kopp's case. Having considered the express provisions of the statutes which protected the privacy of a lawyer's conversations with his clients and the statute under which the tapping of all of Mr. Kopp's law firm's telephones had been tapped, the court stated at paragraph 72 et seq:

"72. The Court, however, is not persuaded by these arguments. Firstly, it is not for the Court to speculate as to the capacity in which Mr. Kopp had had his telephones tapped, since he was a lawyer and all his law firm's telephone lines had been monitored. Secondly, tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated... In that connection, the Court by no means seeks to minimize the value of some of the safeguards built into the law, such as the requirement at the relevant stage of the proceedings that the prosecuting authorities' phone-tapping order must be approved by the President of the Indictment Division... who is an independent judge, or the fact that the applicant was officially informed that his telephone calls had been intercepted.

73. However, the Court discerns a contradiction between the clear text of the legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law has established the principle, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how under what conditions and by whom the

distinction is to be drawn between matters specifically connected with a lawyer

74. Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence.

75. In short, Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter. Consequently, Mr. Kopp, as a lawyer, did not enjoy the minimum degree of protection required by the rule of law in a democratic society. There has therefore been a breach of Article 8." (Emphasis added)

97. Returning to the comparison between section 5 of the LDA and the Queensland statute, it is apparent that sections 43 and 46 of the Queensland Act have no exact counterpart in the LDA and that point was emphasised in the submissions of counsel for the appellants as support for the proposition that the LDA is unconstitutional because of the lack of specificity both as to what considerations ought to be borne in mind by the Commissioner of Police when deciding whether to issue an authorization under section

5(2) of the LDA and also as to what safeguards there may be for a citizen whose right to privacy under Articles 21 and 23 are likely to be infringed by the use of a listening device authorized by the Commissioner under that section.

98. These are all very weighty submissions: however, it is difficult to accept them in the circumstances of these appeals since there are no known facts on which to base a conclusion despite the statement by the learned judge that that was because of the lack of specificity in the authorisations, and there is no evidence that the constitutional rights of any of the appellants was infringed by the issue of the authorisations. In addition, it seems clear from the Constitution itself as well as the common law and the authorities cited that where there is no infringement or apprehended infringement of a person's right to privacy of home and communications, then there can be no requirement for the Supreme Court or this court to grant any constitutional relief.

99. The appeals are therefore dismissed and the matters are sent back to the learned magistrate to be dealt with expeditiously. This is now the 4th time that these matters are being remitted to the learned

magistrate, which ought not to be since the hearing before the magistrate is only a preliminary inquiry. These multiple applications serve only to make a mockery of the administration of justice in this country and put the learned magistrate in the position of being unable to abide by the orders of the higher courts - see *Bowe v Government of the United States of America* [1990] AC 500 at page 526.

Rt. Hon. Dame Sawyer,
P.

I agree.

Hon. Mr. Justice Longley,
J.A.

I also agree.

Hon. Mr. Justice Blackman,
J.A.

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