

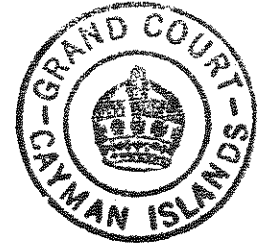
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

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5 **INDICTMENT NO: 0105/2012**
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7
8 **THE QUEEN**

9
10 **V**

11
12 **ELVIS KELSEY EBANKS**
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15 **Appearances:**

Ms. Laura Manson for the Crown

16
17 **Mr. Michael Wingrave of Stenning &**
18 **Associates for the Defendant**
19

20 **Before:**

The Hon. Mr. Justice Charles Quin

21 **Submissions heard:**

4th November 2013

22 **Ruling delivered:**

5th November 2013
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24 **RULING ON ADMISSIBILITY OF EVIDENCE**
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- 26 1. Following the empanelling of jurors but prior to the opening of the case, the
27 Defence made an application to oppose the admission into evidence of the
28 transcripts and/or audio recordings of two telephone calls made from the
29 Defendant's phone to a telephone owned by the Complainant. The Defence submits
30 that the two calls were "intercepted" without the required warrant from His
31 Excellency, the Governor, and therefore the transcripts and or audio recordings are
32 inadmissible.
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1 *THE LAW*

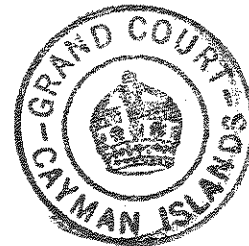
2 2. The Information and Technology Authority (Interception of Telecommunications
3 Messages) Regulations 2011 (hereafter annotated **the “Regulations”**) defines
4 ‘intercept’ as “including monitoring and interrupting” and “message” as “a
5 communication sent, delivered, received, or transmitted, or intended to be sent,
6 delivered, received or transmitted by telecommunication and includes and
7 information that enables the identification of the origin and destination of the
8 communication and the date and time it was transmitted or received.”

9 3. Regulation 9(1) reads:

10 *“9.(1) No evidence shall be adduced, question asked, assertion or disclosure*
11 *made or other thing done in, for the purposes of, or in connection with, any*
12 *legal proceedings or proceedings....”*

13
14 4. Regulation 9(2) reads:

15 *“9.(2) In this section “intercepted communication” means any*
16 *communication intercepted in the course of its transmission by means of a*
17 *postal service or telecommunication system.”*



DEFENCE SUBMISSIONS

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- 5. Counsel for the Defendant, Mr. Wingrave, submits that Regulations 4 and 5 clearly state, not only that a warrant from the Governor is required before an intercept may take place, but also that such a warrant may only be issued on specified grounds.

- 6. The Defence submits that there is no warrant in this case and the specified grounds set out in Regulation 5, for which one might be issued, are absent.

- 7. The Defence argues that the Regulations are almost identical to the provisions of the United Kingdom Interception of Communications Act 1985, with the same general prohibition being set out in s.9 of that Act. The Law in England has moved on with the passage of The Regulation of Investigatory Powers Act (2000) (“RIPA”), however, no parallel law has been passed in the Cayman Islands.

- 8. The Defence rely on the House of Lords case of *Morgans v. DPP* [2001] 1 A.C. 315 where the Law Lords found that any such evidence would always be inadmissible.

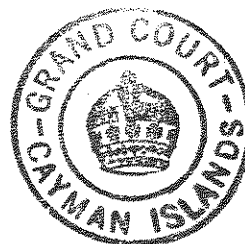
- 9. The Defence submit that, in the Cayman Islands, the Regulations are even more restrictive, because they refer to the prohibition of the evidence in any legal proceedings and, accordingly, on the basis of the above-intercepted telecommunications, the evidence is inadmissible by operation of the Regulations. Furthermore, the Defence submits this evidence will always be inadmissible even if the consent is obtained from one of the parties to the call.



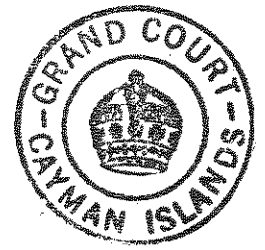
1 10. The Defence further submits that the Royal Cayman Islands Police Service (RCIPS)
2 only obtained the evidence by removing a SIM¹ card from a cell phone and placing
3 into a recording device with the consent of the Complainant, but, without the
4 knowledge of the Defendant. First, the Defence submits that the telecommunication
5 did not reach the cell phone it was intended for and was thus interrupted. Secondly,
6 the telecommunication was monitored, in that it was listened to and recorded
7 without the knowledge of the caller.

8 11. On the basis of the above submissions, the Defence submits that the transcripts
9 and/or the audio recordings of the two telephone calls made from the Defendant's
10 phone to the phone (SIM card) owned by the Complainant, are inadmissible.

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¹ Subscriber Identity Module or Scientific Instrument Module (SIM) card – a data storage unit used for mobile devices.



CROWN SUBMISSIONS

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12. Ms. Manson on behalf of the Crown submits that the recordings are not interceptions and as such are admissible.

13. The Crown further submits that the telephone calls from the Defendant's phone to the Complainant's phone were not "monitored" or "interrupted" within the meaning of the Regulations.

14. The Crown's position is that the two telephone calls were recorded by means of the SIM card of the Complainant being placed into another device, which allows the calls to be recorded. The electronic signal was not diverted or interrupted in any way and it was simply as if a tape recorder had been held to the earpiece of the telephone.

15. Crown counsel contends that technology has advanced since the early days of the tape recorder, and this digital recording is the modern equivalent of the old tape recorder.

16. The Crown also relies upon the fact that the Complainant gave his permission for the call to be recorded and the permission was granted by the Deputy Commissioner of Police for the recording equipment to be used for this purpose.

17. To illustrate the difference: Crown counsel accepts that, if the police had sought to intercept a call – a method usually used when neither party is aware of the recording of the call – then a warrant from the Governor would have been obtained. However, the two calls in this case were not interrupted or monitored; they were simply recorded with the permission of the receiver.

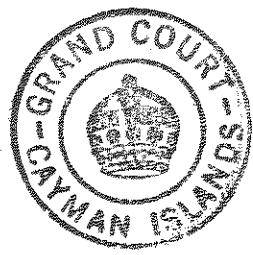
1 18. The Crown relies upon the following United Kingdom cases to illustrate that this
2 method of recording calls does not fall within the Regulation of Investigatory
3 Powers Act 2000.

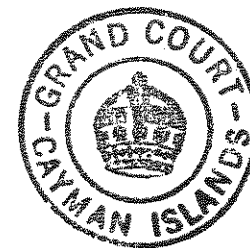
4 19. Crown counsel, Ms. Manson, cites the case of *R v. Tea* 2000 W.L.R 1213020
5 where the English Court of Appeal held that a recording was not intrusive
6 surveillance. In order for the act to bite – interference must take place by bugging or
7 other covert surveillance methods.

8 20. The Crown also cites the English Court of Appeal decision of *R v. E* [2004] EWCA
9 Crim 1243, which held that interception denoted some interference or abstraction of
10 the signal and further, what was done in this case did not become an interception
11 simply because, what the Defendant said was not only recorded, but, by a separate
12 process, was transmitted by a telecommunication system.

13 21. Further, the Crown relies on the case of *Porter v. HM Advocate* 2005 S.L.T. 271
14 and the decision of the High Court of Justiciary – the highest criminal court in
15 Scotland – which held that conversations between the Defendant and two witnesses,
16 which had been recorded by conventional tape recorder, were not interceptions.

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1 *ANALYSIS AND CONCLUSION*

2 22. Regulations 2 and 9(2) of the Information and Technology Authority (Interception
3 of Telecommunications Messages) Regulations 2011 do not provide a clear
4 definition of "intercept".

5 23. The word intercept comes from the Latin words "intercipere" which means "to
6 seize before arrival" and "interceptus" which means "seize between places."

7 24. The word intercept is often used in a sporting context. In both Association Football
8 and Rugby Football a player intercepts when he seizes or cuts off a pass on its way
9 from one opponent to another.

10 25. In the world of telecommunications, interception amounts to telephone tapping or
11 bugging. With both tapping and bugging the calls in and out of the telephones are
12 monitored, and then when the Intelligence-seeking authorities see something of
13 interest, they intercept the transmission from one phone to another.

14 26. I find considerable guidance from the English Court of Appeal case of *R v. E* and
15 the Scottish High Court of Justiciary case of *Porter v. HM Advocate*. In the former
16 case, Mr. Justice Hughes (as he then was), giving the judgment of the Court,
17 reviews s.2(2) of RIPA and states at paragraph 20:

18 *"In our view, the natural meaning of the expression 'interception' denotes some*
19 *inference or abstraction of the signal, whether it is passing along wires or by*
20 *wireless telegraphy, during the process of transmission. The recording of a*
21 *person's voice, independently of the fact that at the time he is using a telephone,*
22 *does not become interception simply because what he says goes not only (go)*
23 *(sic) into the recorder, but, by separate process, is transmitted by a*
24 *telecommunications system."*

1 27. At paragraph 22 Mr. Justice Hughes states:

2 *“What was recorded here was what happened independently of the operation of*
3 *the telecommunications system.*

4

5 28. In the case of *Porter v. HM Advocate* the High Court of Justiciary in Scotland also
6 examined the question of admissibility of tape recorded telephone calls and whether
7 an interception of a telecommunications had taken place. Like the English Court of
8 Appeal in *R v. E*, they cited with approval Lord Oliver’s dicta in the House of
9 Lords case of *R v. Effik* [1995] 1 A.C. 309, who in turn cited with approval the
10 dicta of Evans LJ in *R v. Ahmed* unreported (CA Crim.), and described telephonic
11 communication as follows: “consists of what has been variously described as the
12 electrical impulse or signal which is affected by the interception that is made.”

13 At paragraph 26 Lord Kirkwood refers to both *Effik* and *Ahmed* and quotes from
14 Lord Oliver’s dicta:

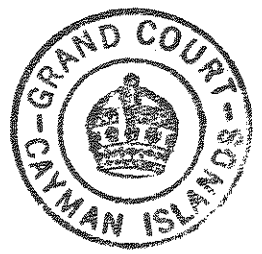
15 *“It is sufficient to constitute a communication by means of a public*
16 *telecommunications system for the purpose of the Act, for an electrical impulse*
17 *or signal to be transmitted from the telephone number from which the impulse*
18 *or signal is sent to the telephone number with which it has been connected. The*
19 *sending of an electrical impulse or signal in either direction will do,*
20 *irrespective of the response which it elicits from the recipient, and the length or*
21 *content of the message which it conveys. Any intentional interception of that*
22 *electrical impulse or signal, which, while it is in the course of transmission*
23 *through a public telecommunications system will be subject to the provisions of*
24 *the Act.”*

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26 At paragraph 28 Lord Kirkwood, analyzing the nature of a recording, states:

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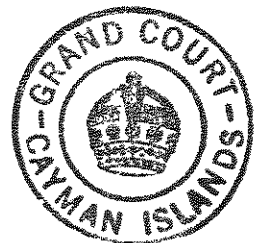
1 *“The receiver propagates sound waves by initiating airborne motion that*
2 *registers as sound in the human ear. Prior to conversation by the transmitter*
3 *the spoken word is not conveyed by electrical impulse to those in a position to*
4 *hear what is said. It comprises sound waves. Recording the spoken word of the*
5 *point of origin before it is converted into electrical or other relevant form of*
6 *energy is not interception within the meaning of the statute, because what is*
7 *then accessed is not taken on an energy form that is within the scope of the*
8 *definition provisions. Similarly, after the point at which the receiver has*
9 *performed its characteristic function and converted the incoming signal into*
10 *sound waves, what is heard is not electrical wave energy but sound waves. The*
11 *transmission of the communication by relevant means is at an end.”*

12
13 Lord Kirkwood goes to conclude at paragraph 29:

14 *“In the present case there was no attempt to access the electrical impulses*
15 *transmitted by the public communications system. What was recorded by simple*
16 *and very unsophisticated means was the spoken word. That operation was not*
17 *within the scope of the 1985 Act. It follows that the objection was misconceived*
18 *and the trial judge was correct to repel it on the first ground explained by him,*
19 *namely that the recording of the conversations did not involve interception.”*

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21 29. Accordingly, I agree with Crown counsel, Ms. Manson. The question of whether
22 these recordings of the two telephone calls and the transcript of the recordings are
23 admissible depends on the fundamental question of whether there has or there has
24 not been an interception. On the basis of the case law from the Court of Appeal in
25 England and the High Court of Justiciary in Scotland, I find that there has been no
26 interference or abstraction of the signal passing through the telecommunications
27 system during the process of the transmission.

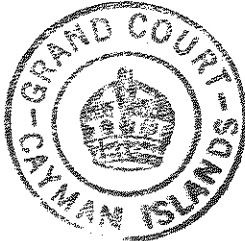
28 30. The phone calls have been merely recorded by digital device, and as was stated by
29 the English Court of Appeal in the case of *R v Smart & Beard* [2002] EWCA Crim.
30 772 by Clarke LJ:



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“There was thus no interception of an electrical impulse or signal passing through a telecommunications system. The situation was in essence the same as it would have been if the conversations had been heard by a policeman, say hiding in the boot, or standing on the pavement.”

31. In this case I also find that there has been no interception of an electrical impulse or signal passing through a telecommunications system. Accordingly, I reject the application by the defence and rule that the recordings and the transcript of the recordings are admissible.



Dated this the 5th November 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a series of loops and a long horizontal stroke extending to the right.

**Honourable Mr. Justice Charles Quin
Judge of the Grand Court**