



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 429

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

**IN THE MATTER OF A CLAIM FOR DAMAGES FOR UNLAWFUL ARREST AND
FALSE IMPRISONMENT**

BETWEEN: -

ZARAH HARPER

Applicant

-and-

THE COMMISSIONER OF THE BERMUDA POLICE SERVICE

Respondent

Before: The Hon. Chief Justice Hargun

Representation: Mr. Jerome Lynch KC of Trott and Duncan for the Applicant

Mr. Brian Myrie, Attorney General's Chambers, for the Respondent

Date of Hearing: 24 July 2023

Date of Judgment: 6 October 2023

Whether search warrant issued by the Magistrate under section 9 and Schedule 2 of the Police and Criminal Evidence Act 2006 was lawful; whether there was proper “authority” to apply for the search warrant; whether arrest of the Applicant without a warrant was lawful; whether the search of the Applicant’s premises following her summary arrest was lawful

JUDGMENT

Introduction

1. This is an application by Zarah Harper (“**the Applicant**”) for judicial review of the decisions made on behalf of the Commissioner of the Bermuda Police Service (“**the Respondent**”). The relief sought by the Applicant against the Respondent in these proceedings is for:
 - (1) An order quashing the decision summarily to arrest the Applicant and a declaration that her arrest was unlawful;
 - (2) A declaration that the subsequent search of the Applicant’s home address was unlawful;
 - (3) An order quashing the warrant dated 9 October 2020 search the premises of “Vibe”;
 - (4) An order that the Respondent pay the Applicant damages by way of compensation for unlawful arrest, false imprisonment and violation of privacy, pursuant to section 67 of the Supreme Court Act 1905; and
 - (5) An order that the costs of this application for judicial review be paid by the Respondent.

Factual Background

2. The background to the judicial review issues raised in these proceedings are uncontroversial and are set out in the Notice of Originating Motion, filed pursuant to RSC Order, rule 5(2) and the written submissions filed on behalf of the Applicant dated 15 July 2023.

3. The Applicant is the owner, manager and a director of Vibe 103 radio station. She is a businesswoman of good character, with no previous convictions and daughter of the well-known Member of Parliament, Mr Zane DeSilva (“**Mr DeSilva**”).
4. On 3 July 2020 an event was held at Blu Restaurant Bar and Grill (**Blu**) in Warwick Parish, which the Applicant had been involved in organizing. There was subsequent negative publicity surrounding that event and an investigation was started by the Bermuda Police Service (**BPS**) shortly thereafter.
5. In essence the allegation centered around the provision of a letter to a public officer in order to secure an exemption from the 10-person gathering rule applied at the time as a measure to stem the spread of Covid 19. Such an exemption could be given if there were "exceptional circumstances" - the letter claimed to be for the raising of funds for the charity Meals-on-wheels. This was said to be untrue and a ruse to, in effect, have a private party.
6. The BPS applied for and were granted a warrant for the search of Blu on 10 July 2020, the Magistrate having been satisfied that there were reasonable grounds to suspect that an indictable offence under the Bribery Act 2015 and the Public Health (COVID 19 Emergency Powers) Regulations 2020 had been committed. The warrant for Blu was granted to cover:

"All documents and records relating to an event/party scheduled by Zane DeSilva and others between Friday, 3 July 2020 and Saturday for July 2020.

All emails, records, or documentation physical or digital format relating to event held at Blu Restaurant on Friday 3 July and Saturday for July 2020 by ZARABI Entertainment.

CCTV footage of the building and restaurant to include interior and exterior."

7. Similar warrants were obtained from the Department of Information and Digital Technologies on 15 July 2020, Bermuda Media on 7 August 2020 and Island Construction (the business of the Applicant's father) on 7 August 2020.

8. The Respondents had previously interviewed Angela Caldwell (from Blu) on 17 July 2020 and arrested Mr DeSilva on 2 October 2020 at his home by pre-arrangement. Subsequently, the applicant's partner in the business was interviewed by arrangement with the BPS at the police station.
9. On 5 October 2020 as part of their investigation into the matter the BPS requested through correspondence with counsel for Mr DeSilva to arrange for him to be interviewed. The interview was scheduled by arrangement for 12 October 2020.
10. The BPS applied on 9 October 2020 to the Hamilton Magistrates Court for a warrant to search the address of Vibe, again on the basis of the alleged offences under the Bribery Act 2015 and the Public Health (COVID 19 Emergency Powers) Regulations 2020. The warrant was granted for:

“All the documents and records relating to an event/party scheduled by Zane DeSilva, Zarah Harper, Zarabi Entertainment and others between Tuesday, 16 June 2020 and Monday, 6 July 2020.

All emails, correspondence, records or documentation, video footage and photographs in physical or digital format inclusive of and relating to the event held at Btu restaurant on Friday 3 July and Saturday for July 2020 by ZARABI Entertainment.”

11. The Magistrate certified that the first set of access conditions specified in Schedule 2 was fulfilled and that he would have made an order for production of the material sought *but for* the application under paragraph 4 of the schedule that it may *“seriously prejudice the investigation”*.
12. On the morning of 12 October 2020, at approximately 06:45, six officers of the BPS attended the Applicant's home address and arrested her without a warrant, for providing false information to a public officer.
13. It is common ground that the Applicant's three small children and her husband were present when the six police officers entered the Applicant's home. There is a dispute between the

parties as to whether she was arrested and searched in the presence of her children. The officers seized the Applicant's phone, her laptop, her old laptop (used by her daughter) and various paperwork. The Applicant states that she was never shown any form of warrant, either for arrest or for the search of her home.

14. Following the Applicant's arrest and the search of her, the officers then informed her that they did have a warrant to search Vibe (her place of work), which is a neighboring property. The officer subsequently seized a computer from Vibe.
15. The Applicant was conveyed to Hamilton Police Station, where after processing she was held in a cell until her interview at approximately 12:30. She refused to answer any questions. She was ultimately released at 16:57 having been in custody for approximately 9 ½ hours.
16. Her father's interview commenced at 2:53 and concluded at 4:10 by voluntary arrangement. He was not arrested, and the interview took place in police ancillary offices.
17. The Applicant maintains that access to the phone, laptops and computer were provided by the Applicant to the BPS (there is a dispute as to precisely when and by whom). The Applicant asserts that following that, repeated written requests were made by attorneys on behalf of the Applicant for the return of the computer seized from Vibe as it was essential to the operation of the business. The Applicant says that the BPS have refused all such requests and have only returned this material recently.

The Vibe Warrant

18. As noted earlier the warrant was applied for pursuant to section 9 and schedule 2 of Police and Criminal Evidence act 2006 (“**PACEA**”) by Detective Constable Bird. The warrant states that the Magistrate was satisfied that the first set of access conditions specified in Schedule 2 were made out, and that the court would have made a production order but that the warrant was appropriate by reason that service of a notice of an application for an Order under paragraph 4 of Schedule 2 may “*seriously prejudice the investigation*”. In order to consider the parties, submissions in relation to the issue of the grant of the warrant it is necessary to set out the statutory framework.

19. Section 9(1) of PACEA 2006 provides:

A police officer may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under schedule 2 in accordance with that schedule.

20. Schedule 2 provides the Special Procedure for the making of Orders by Magistrate provides:

Para 1. If on an application made by a police officer a Magistrate is satisfied that one or other of the sets of access conditions is fulfilled he may make an order under paragraph 4.

21. The first set of access conditions set out Schedule 2, paragraph 2 are that:

- (a) *there are reasonable grounds for suspecting-*
 - (i) *that an indictable offence has been committed;*
 - (ii) *that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application;*
 - (iii) *that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and*
 - (iv) *that the material is likely to be relevant evidence;*
- (b) ***other methods of obtaining material--***
 - (i) ***have been tried without success; or***
 - (ii) ***have not been tried because it appeared that they were bound to fail; and***
- (c) *it is in the public interest, having regard-*
 - (i) *to the benefit likely to accrue to the investigation if the material is obtained; and*
 - (ii) *to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given. (emphasis added)*

22. Paragraph 4 of Schedule 2 provides for a *Production Order* to hand over material to a police officer. It is made *inter partes* (para 7) and any notice served on a party requires him not to conceal, destroy, alter, or dispose, of it.

23. Paragraphs 12 to 14 of Schedule 2 sets out the grounds on which a Magistrate may issue a

warrant:

“ISSUE OF WARRANTS BY MAGISTRATE

12 If on an application made by a police officer a Magistrate-

- (i) **is satisfied-that either set of access conditions is fulfilled; and**
- (ii) **that any of the further conditions set out in paragraph 14 is also fulfilled; or**

he may issue a warrant authorizing a police officer to enter and search the premises.

13 A police officer may seize and retain anything for which a search has been authorized under paragraph 12.

14 The further conditions mentioned in paragraph 12(a)(ii) are—

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises to which the application relates;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;

(c) that the material contains information which-

(i) is subject to a restriction or obligation such as is mentioned in section 11(2)(b); and

(ii) is likely to be disclosed in breach of it if a warrant is not issued;

(d) that service of notice of an application for an order under paragraph 4 may seriously prejudice the investigation.”
(emphasis added)

24. Section 15 of PACEA provides safeguards for the use of search warrants, in particular that:

(2) Where a police officer applies for any such warrant, it shall be his duty-

(a) to state--

(i) the ground on which he makes the application;

(ii) the enactment under which the warrant would be issued; and

(iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;

- to specify the premises which it is desired to enter and search; and*
- to identify, so far as is practicable, the articles or persons to be sought.*

*(2A) An application to a Magistrate for a search warrant or production order under Schedule 2, must be supported by a signed written authority from a police officer of the rank of Inspector or above, and **must be presented to the Magistrate with the written information in support of the application.***

*(3) An application for such a warrant shall be made ex parte and **supported by an information in writing.***

(4) The police officer shall answer on oath any question that the magistrate or judge hearing the application asks him. (emphasis added)

25. In the context of this case, it is to be noted that section 15 (2A) requires that an application to a Magistrate for a search warrant or production order under Schedule 2, must be supported by signed written authority from a police officer of the rank of inspector or above, and must be presented to the Magistrate with the written information in support of the application. In this case the Applicant requested, by pre-action letter dated 4th November 2020, disclosure of copies of all material and submissions placed before the Magistrate in support of the

application for a warrant, in particular that material which was relied upon to purportedly show that the application met the access conditions under Schedule 2 until recently the Respondent refused to provide any information provided to the Magistrate in support of the grant of the warrant and took the position that it was entitled to do so until the conclusion of the criminal proceedings against the Applicant.

26. The Respondent has now disclosed to the Applicant the written authority to pursue the application before the Magistrate and the information in support of that application.

27. In relation to the issue of authority, a document headed “*Inspector’s Authority - Special Procedure Material*” dated 9 October 2020 records that:

*“In accordance with Paragraph 3 (5) of Code B of the Codes of Practice of the Police & Criminal Evidence Act 2006, I **Detective Inspector Sherwin Joseph** being an inspector of the Bermuda Police Service, hereby give my authority for an application to be made to a Magistrate under the provisions of Schedule 2 of that Act for an order to be made to produce Special Procedure Material, as defined therein ...”*

28. In a document headed “*Information in Support of a Special Procedure Application*” dated 9 October 2020, Police Constable Graeme Bird confirmed under oath that:

(1) On July 10, 2020, Police Officers from Specialist Investigations Department executed a Special Procedure Warrant (pursuant to section 9 and schedule 2 of PACEA) and seized a quantity of documents, emails and a CCTV in relation to the event which was held on 3 July 2020 at BLU (paragraph 25).

(2) On 25 August 2020, Police Officers from the Specialist Investigations Department executed a Special Procedure Warrant (pursuant to section 9 and schedule 2 of PACEA) at Bermuda Media in the City of Hamilton and seized digital information from the company’s computer system in relation to the event which was held on 3 July 2020 at BLU (paragraph 62).

(3) “*THAT, the material to which this information relates include special procedure*

material on premises specified in the application and does not include excluded material” (Paragraph 63).

(4) *“THAT, the information of a police investigation was placed in the public domain surrounding the incident and that it is believed that if this application is not granted it would give persons the opportunity to dispose of evidence which can assist with this investigation”* (paragraph 64).

(5) *“THAT, consideration had been given to the European Convention of Human Rights and the subsequent implications of the intrusion of the right to respect for private and family life, home and correspondence”* (paragraph 65).

(6) *“THAT, I now apply for a Production Order in pursuance of Schedule 2 to the Police and criminal Evidence Act 2006 in favour of VIBE 103 (Harper Digital), Ireland Construction Services Ltd and Bermuda Media in respect of the material specified in the application owing to the fact that this material is not available through any other means”* (paragraph 66). (emphasis added)

29. Having regard to the above disclosure made by the Respondent in relation to the authority to pursue the application before the Magistrate and the details of the information in support of the application, Mr Lynch KC submits that the application before the Magistrate was an application for a Production Order and *not* for a search warrant. Construing the two documents together it is clear that the authority granted by DI Joseph was for the obtaining of a Production Order and *not* for a search warrant. Accordingly, Mr Lynch KC submits that to the extent that the application was pursued as an application for a search warrant it did not comply with section 15 (2A) of PACEA in that the application for a search warrant was not supported by a signed written authority from a police officer of the rank of inspector or above.

30. Mr Myrie, appearing for the Respondent, was in understandable difficulties in that he had no instructions as to how an application which appeared to be an application for a Production Order resulted in the Magistrate signing a search warrant in respect of the business premises

of VIBE. It is unfortunate that PC Bird or any other officer who appeared before the Magistrate did not file additional affidavit evidence explaining how the initial application for a Production Order resulted in the Magistrate signing a search warrant instead. In all the circumstances and in the absence of any explanation from the Respondent, the Court accepts Mr Lynch KC's submission that any application for a search warrant in respect of the business premises of VIBE did not comply with the mandatory requirements of section 15 (2A) of PACEA and on that ground alone the Order made by the Magistrate is required to be set aside.

31. Mr Lynch KC correctly submits that before the Production Order procedure can be dispensed with and a warrant for entry and seizure granted the Magistrate needs to be assured that (i) other methods of obtaining the material had been tried and failed or were bound to fail (paragraph 2 (b) of Schedule 2); and (ii) the service of a Production Order may “*seriously prejudice the investigation*” (paragraph 14 (d) of Schedule 2).
32. In relation to the requirement that the Magistrate is to be assured that other methods of obtaining the material had been tried and failed or were bound to fail “*the judge has to be satisfied of two things: first, that other methods of obtaining the material have not, in fact, been tried. Secondly, that the reason for not trying to obtain the material by other means was that it appeared to the constable making the application for the warrant that such other means “were bound to fail”*” (Aikens LJ and Silver J in *R v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin) at [34]).
33. In relation to the requirement that the service of a Production Order may seriously prejudice the investigation “*the judge must be satisfied that the service of an application under paragraph 4, for a production or access order (being less draconian measures, of which the target will have notice and against which he will have the opportunity to object), may seriously prejudice the investigation. We consider that the contrast between the backward -looking language of paragraph 2 and the forward-looking language of paragraph 14 is not important. The safeguards of both paragraphs are aimed at the common purpose: of ensuring that the warrants are only issued where there is no less a measure which would be effective for the purpose of the investigation*” (Beatson LJ and Whipple J in *R v Newcastle United Football Company Limited* [2017] EWHC 2402 at [94]).

34. Decided authorities emphasize that a very rigorous procedure has to be followed in preparing an Information for the search warrant and also when a judge is considering it. In *Chief Constable of the British Transport Police* the Court held at [45]:

“In relation to the Information itself, which as we say, is the sole basis upon which, ultimately, the judge will grant the search warrant, it is clear from the statutory provisions of PACE to which we have drawn attention above that it must deal with the following:

(a) It must set out each of the statutory requirements which has to be satisfied in the particular case before the warrant in question can be granted. There are a number of different routes for obtaining a search warrant and only the route actually selected in a particular case should be dealt with, or else the judge will not know the precise basis of the application being made.

(b) It must show, for each of the relevant statutory requirements, how that requirement is satisfied by setting out all the relevant facts relied on including all facts and matters which are said to show that a particular "reasonable belief" is justified. It is not enough to assert that a particular requirement is satisfied without explaining how it is said to be so. It is only when the judge can review the facts set out in the Information that he can decide for himself if a requirement has actually been satisfied. Furthermore, it is only then that a party wishing to challenge the warrant can decide whether the order could be challenged because of a failure to satisfy that particular requirement. Hence, an assertion that there are "reasonable grounds" for a belief will require that basis of the belief to be explained in detail. By the same token, an assertion that, in words of paragraph 2(b) of Schedule 1 of PACE, "other methods of obtaining the material—have not been tried because it appeared that they were bound to fail" would require details of the facts relied on by the constable for that statement.

(c) It must state whether, despite there being "reasonable grounds" for the constable believing that the material sought consists of or contains "special procedure material" or "excluded material", there might be a claim for legal privilege in respect of any communication sought and, if so, how and why that would arise together with precise details of the arrangements which are to be taken to ensure that there will be an independent supervising lawyer present at the time of the search.

(d) It must make full and frank disclosure. This means, in the words of Hughes LJ in Re Stanford International Limited [2010] 3 WLR 941 at [191] that "in effect a prosecution seeking an ex parte order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with the relevant interest, he would be saying to the judge, and, having answered that question, that is precisely what he must tell". This is a heavy burden but a vital safeguard. Full details must be given. It is a useful reminder to the person laying the Information to state expressly which information is given pursuant to the duty of full and frank disclosure.

(e) If further information is supplied to the circuit judge during the hearing of the application, whether as a result of judicial questioning or otherwise, the Information should be supplemented by a witness statement or a further Information setting out such further information. This would follow what happens in civil proceedings. The objective is obvious: it is to ensure that the party against whom the order is made knows precisely and in full the basis on which the order against him or her was made."

35. The duty of candour in the provision of the information to the court has been emphasized given that the court is not simply reviewing the reasonableness of the decision of the constable and must itself be satisfied that the statutory requirements have been established. Thus, in *R v Chatwani et al* [2015] EWHC 1283 (Admin) Hickinbottom J held at [106]:

"The relevant principles are as follows:

i) On an application for a search warrant, the court is not simply reviewing the reasonableness of the decision of the constable that the statutory criteria are met: before a warrant is issued, the court itself must be satisfied that the statutory requirements have been established. That is clear from the wording of section 8 itself, but was confirmed in R (Bright) v Central Criminal Court [2001] 1 WLR 662 at page 677 per Judge LJ and regularly since.

ii) The court itself must therefore be satisfied that there are reasonable grounds for believing that (a) an offence has been committed, (b) there is material on the relevant premises which is likely to be of substantial value to the investigation of the offence, and (c) the material is likely to be relevant evidence etc. That requires "careful consideration and rigorous and critical analysis by the [court]" (Tchenguiz at [89]), which involves

particularly "detailed, anxious and intense scrutiny" in cases with a complex background such as those involving financial markets (Tchenguiz at [86]).

iii) The applicant therefore has a duty to put before the court the necessary material to enable the court to satisfy itself that the statutory conditions for the warrant are met.

*iv) However, that is not the full extent of the applicant's duty. **When applications are made without notice – particularly those that involve the potentially serious infringement of the liberty and rights of the subject, inherent in the grant and execution of a warrant to search and seize – there is a duty of candour. There must be full and accurate disclosure to the court, including disclosure of anything that might militate against the grant** (Energy Financing Team Limited v The Director of the Serious Fraud Office [2005] EWHC 1626 (Admin) ("Energy Financing"); see also, to the same effect, Golfrate at [27] per Lord Thomas). In Golfrate (at [24]), Lord Thomas quoted with approval from [191] of the judgment of Hughes LJ (as he then was) in In re Stanford International Bank Limited [2010] EWCA Civ 137 ("Stanford") (at [191]), a case concerning a restraint order in support of confiscation proceedings under section 42-47 of POCA, that full paragraph reading as follows:*

*"... [It] is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. **It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge.** That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. **In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.** This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example."*

Those comments apply equally to the duty of an applicant for a search warrant. That obligation was described by the President in Tchenguiz (at [88]) as "a very heavy duty..."

to ensure that what is put before the [court] is clear and comprehensive so that the [court] can rely on it and form [its] judgment on the basis of a presentation in which [it] has complete trust and confidence as to its accuracy and completeness". The duty extends to all known information that may be material to the court's decision, i.e. that might affect the court's decision. In a case involving complex financial matters, that presentation requires particular skill and experience (Tchenguiz at [88]). Legal advice should be sought at an appropriate level in every case of financial complexity (Golfrate at [28]).

v) The written application should be comprehensive. If an applicant supplements the written application orally – for example, in response to questions from the court – then the proceedings should be tape-recorded or, if that facility is not available, the party applying for the warrant should take a note and submit it to the court for approval (Energy Financing at [24(7)]).” (emphasis added)

36. Mr Lynch KC submits that the Respondent did not comply with his duty of candour in failing to provide to the Magistrate information which was relevant to the issue whether notice of an application for an order under paragraph 4 of Schedule 2 may “*seriously prejudice the investigation*”. In this regard there was no disclosure in the written Information provided to the Magistrate in support of the application for a search warrant that (i) Angela Caldwell, one of the persons allegedly involved in organising the event at BLU, had been interviewed by the BPS; (ii) Island Construction Ltd, a business owned and operated by, *inter alia*, Mr De Silva had been served with a search warrant in August 2020; and (iii) Mr De Silva was arrested 10 days before the Applicant’s arrest and arrangements were made for him to voluntarily attend an office for a voluntary interview on the very day of the Applicant’s arrest. The Court accepts that these facts were relevant and should have been disclosed to the Magistrate since they demonstrated that the Applicant had ample opportunity to destroy the material in question had she wished to do so. These facts were relevant to the issue whether notice of an application for a production order may “*seriously prejudice the investigation*”. Failure to disclose these facts, in view of the Court, was a breach of the Respondent’s duty of candour owed to the court and would have also justified the setting aside of the search warrant dated 9 October 2020 issued by the Magistrate.

Arrest and search without a warrant

37. It is common ground that the BPS had no warrant either for the Applicant's arrest or for the search of her home on 12 October 2020. Consequently, the Applicant was arrested purportedly pursuant to the police's powers of summary arrest under section 23(6) PACEA 2006. Section 26(6) provides that:

“Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to have committed the offence.”

38. As the police are only allowed to search premises under sections 18 or 31 of PACEA it is clear, submits Mr Lynch KC, that the lawfulness of a search under either section is parasitic on the lawfulness of the arrest. In *Lord Hanningfield of Chelmsford v Chief Constable of Essex Police* [2013] 1 WLR 3632 Eady J, interpreting section 32 of the Police and Criminal Evidence Act 1984, indeed held that to be the case. At [6] Eady J held:

“Much of the argument at the recent trial turned upon the construction of various provisions contained within the Police and Criminal Evidence Act 1984 ("PACE"). It had been determined by the SIO that the statutory regime most appropriate to the circumstances was that set out in s.32. Reliance was to be placed on the powers of search there provided which are ancillary to, and dependent upon, a lawful arrest having taken place (elsewhere than at a police station). Accordingly, if the arrest itself is unlawful, this undermines the legality of the search as well.”

39. In *Sannapareddy v Commissioner of Police and Attorney General* [2017] SC (Bda) 51 Civ (23 June 2017) Kawaley CJ held that the exercise of the summary power of arrest potentially engages sections 7 and 5 of the Bermuda Constitution. At [58] and [59] the Chief Justice held that:

“58. Section 7 of the Constitution is engaged because the summary power of arrest was utilised to carry out an extensive search of the Applicant’s home and to search the Applicant and a guest who happened to be there. Section 7 provides:

“(1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

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

(a) that is reasonably required—

(i) in the interests 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, a local government authority or a body corporate established by law for a public purpose 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 the Government or that 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, 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.

59. Section 5 contains four relevant constitutional principles in the context of the present case:

(1) freedom from non-consensual search of the person or one’s property is constitutionally protected;

(2) interference with the protected freedoms is only permitted to the extent that it is authorised by proportionate laws;

(3) the potentially relevant objects of laws authorising a search of private property in relation to a criminal investigation or criminal proceedings are limited to laws designed to advance the interests of:

(a) public safety, public order and/or public morality; and/or

(b) protecting the rights and freedoms of others.”

40. In *Sannapareddy* the Chief Justice considered that the central legal question was whether the Applicant’s arrest and the related search of his home and seizure of his personal property was unlawful because the discretion to the rest was improperly exercised. In considering the exercise of this discretion the Chief Justice held at [64]:

“Applying the legal standard contended for by the Respondent’s counsel which entails applying English persuasive case law to the interpretation of a Bermudian statutory provision based on an English statutory precedent, the discretion to arrest in a case as significant as the present one (involving an investigation running over 4 years in which a former Premier was a target) should not have been exercised without:

- legal advice being sought as to the scope of the powers of summary arrest and search it was proposed to exercise (optionally);*
- a conscious evaluation of the appropriateness of making an arrest as opposed to less intrusive means of achieving the investigative objectives (mandatorily);*
- a rational explanation as to why a summary arrest was considered preferable to a voluntary interview and/or an arrest by appointment at a Police Station (mandatorily);*
- a clear explanation of why the search and seizure of the Applicant’s property without a warrant was “reasonably required”*

41. The Court of Appeal in *Sannapareddy* ([2020] Bda LR 21) approved the analysis of the Kawaley CJ and Clarke P held at [101]:

*“In the light of that evidence it seems to me that the judge was entitled to find, as he did, that there was no or no credible evidence that the investigating officers had evaluated the appropriateness of the options. That was a judgment for him to make and I detect no error of law in his making it. **On that basis the arrest was unlawful because it was made without taking into account the question of the relative appropriateness of the options – a highly relevant consideration.**”* (emphasis added)

42. In the circumstances, the question for the Court to consider is whether it was necessary or at least appropriate to arrest the Applicant by means of sending six officers of the BPS to the home of the Applicant, on the morning of 12 October 2020 at approximately 6.45, without a warrant and without any prior warning to the Applicant. The Applicant asserts that the six police officers entered her home in the presence of her three small children and her husband and she complains that this “dawn raid” by the BPS was totally unnecessary and constituted an abuse of power on the part of the BPS.
43. In his affidavit sworn on 8 December 2022, CI Joseph states at paragraph 26 that the decision to arrest the Applicant and the subsequent search of the premises that followed was thoroughly assessed prior to the action being taken. As Mr Lynch KC correctly submits, CI Joseph does not actually explain how or by whom the decision to arrest and search was “*thoroughly assessed*” or provide any explanation or reasons for rejecting alternative options.
44. At paragraph 28 of his affidavit, CI Joseph states that the decision to attend the premises of the Applicant to effect the arrest was “*appropriate*” since this allowed the Applicant an opportunity to assist the BPS and provide information that would help the BPS to understand what had transpired during the planning of the event at BLU. He further states that it also gave the BPS the best opportunity to retrieve the material from the Applicant “*untampered*”. Again, as Mr Lynch KC correctly submits, if it was thought the Applicant would be minded to assist the police by answering the questions that could be done by a simple invitation to come to the police station. It did not require a “dawn raid”. Further, the Court accepts Mr Lynch KC’s submission, relying upon the judgment of Clarke P at [82] to [87] in *Sannapareddy*, that search is not a justification for the arrest. The lawfulness of the arrest has to be determined on its own merits. As Mr Lynch KC correctly submits, the power to search is parasitic on a lawful arrest: it cannot be a reason for the arrest.
45. Further, it seems to the Court that if there was real concern that the Applicant was likely to tamper or dispose of evidence, the BPS could have obtained a search warrant from the Magistrate at the same time as a search warrant was obtained to search the business premises of Vibe. No explanation is offered on the evidence as to why the BPS did not simply secure a warrant for the home of the Applicant at the same time. Mr Myrie was unable to provide

any explanation to the Court as to why, if there was a real concern that the Applicant was likely to tamper or dispose of the evidence, the BPS did not secure a search warrant for the home of the Applicant at the same time as the search warrant for the Vibe. Mr Myrie accepted that if such a search warrant had been secured in respect of the residential property, then there would have been no need to arrest the Applicant by means of the “dawn raid”.

46. The decision of Kawaley CJ and Clarke P in *Sannapareddy* makes clear that the discretion to utilise the summary arrest power has to be exercised in the legally requisite sense. The police officers are required to evaluate the appropriateness of exercising the power of arrest in the way it was exercised as against the less intrusive options. This exercise requires the police officers to have regard to all materially relevant considerations in the given case. In this case, the Applicant contends that the appropriateness of the exercise of the summary power of arrest by way of the “dawn raid” has to be considered with the background of the following material facts:

- (1) The event under investigation occurred over three months prior to the Applicant's arrest by which time she was well aware of the police investigation into the events on 3 July which she was instrumental in organising;
- (2) Warrants for Blu/MEF and other establishments had been obtained as early as 10 July 2020, also three months prior to the Applicant's arrest;
- (3) The BPS were arranging to speak to others in connection with the investigation voluntarily, and by arrangement at the police station;
- (4) The Applicant's father was arrested 10 days before the Applicant's arrest and arrangements were made for him to voluntarily attend an office for a voluntary interview on the very day of the Applicant's arrest;
- (5) A warrant was applied for in relation the Applicant's neighbouring work address on the 9 October 2020. For reasons known only to them, the BPS chose not to apply for a warrant for the Applicant's home address at the same time;

(6) No attempt was made by the BPS to arrange to speak to the Applicant voluntarily, or to invite her attendance at the police station or some other venue for interview there if necessary;

(7) No request was made of the Applicant to voluntarily provide material of relevance to the investigation or to seek a Production Order and

(8) No, or no credible explanation has been given by the Respondent as to why a 06:45 dawn arrest by six police officers at her home address, where her children and husband resided, was necessary or appropriate.

47. The Court accepts Mr Lynch KC's submission that, in light of the above consideration the BPS' decision to summarily arrest the Applicant was unlawful because the officers' failure to evaluate the appropriateness of exercising the power of arrest in the way they did as against the less intrusive options available to them was a serious failure to consider relevant matters.

48. The Court notes that Mr Myrie relied on a number of cases which predate the enactment of PACEA including the Court of Appeal decision in *Commissioner of Police v Julian Ernest Sinclair Hall* (Civil Appeal No. 5 of 1994). These cases have to be considered with care since PACEA made substantive changes to the practice and procedure of securing search warrants from a Magistrate.

49. As set out earlier, the Court accepts Mr Lynch KC's submission that the lawfulness of the search under sections 18 or 31 of PACEA is parasitic on the lawfulness of the arrest (*Lord Hanningfield of Chelmsford v Chief Constable of Essex Police* [2013] 1 WLR 3632). Given that the Court has held that the arrest was unlawful, it follows that the subsequent search of the residential premises and detention at the Hamilton Police Station was also unlawful.

Conclusion

50. Having regard to the above findings of the Court and for the reasons given the Court (i) quashes the decision summarily to arrest the Applicant and declares that her arrest was unlawful; (ii) declares that the subsequent search of the Applicant's home address was

unlawful; (iii) quashes the warrant dated 9 October 2020 search the premises of “Vibe”. The Applicant is at liberty to apply for a further hearing in order to determine whether and if so, the amount the Respondent should pay the Applicant by way of compensation for unlawful arrest, false imprisonment and violation of her privacy, pursuant to section 67 of the Supreme Court Act 1905.

51. The Court will hear the parties in relation to the costs of these proceedings, if required.

Dated this 6th day of October 2023.

NARINDER K HARGUN
CHIEF JUSTICE