



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2011 HCV 04186

IN THE MATTER of Section 4(4) of the
Interception of Communications Act.

And

IN THE MATTER of the unsealing of
records in relation to Applications for
warrants issued by a Judge of the
Supreme Court.

IN CHAMBERS

BETWEEN MICHAEL CHRISTOPHER COKE CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Mr Chukwuemeka Cameron instructed by Carolyn C. Reid and Company for the
Claimant.

Mr Lackston Robinson instructed by The Director of State Proceedings for the
Defendant.

**Interception of Communications – Warrant issued for interception -
Application to unseal application for warrant – Information used in the
application required for preparation of defence in criminal prosecution –
Information otherwise available - Principles governing consideration of the
application – Constitution of Jamaica s. 16 (6) - Interception of
Communication Act ss. 3, 4, 5, 14 and 17**

19 and 26 July and 17 and 19 August 2011

BROOKS J

[1] Mr Michael Coke was among several persons who were the subject of
warrants issued by this court. These were not warrants of arrest but instead,
authorised certain telecommunication providers to intercept communications, to

and from, telephones belonging to those persons. Mr Coke alleges that the interceptions were done in respect of his telecommunications and that he believes that information, obtained through them, will be used in prosecuting criminal charges against him in a court outside of Jamaica.

[2] Mr Coke asserts that the information contained in the court's records of the application for the issue of the warrants, is very relevant to the issues in that prosecution. He says that he believes that that information can assist him in the preparation and presentation of his defence. His application is for the records, which have been sealed pursuant to section 4 of the Interception of Communications Act (the Act), to be unsealed and that the information therein be divulged to him. Without that information, Mr Coke alleges, the preparation and presentation of his defence will be hampered.

[3] The Attorney General of Jamaica has been named as the nominal defendant to the claim. Counsel representing the Attorney General, Mr Robinson, informed the court that he did not oppose the application. He was, however, concerned that the disclosure should be carefully managed.

[4] The issues for this court to resolve are whether the information ought to be disclosed and if so, what orders are required to protect the identities of the persons involved in the process of the securing and issue of the warrants.

The applicable principles

[5] It must be stated, at the outset, that the principles stated hereunder as being the relevant principles, are general statements and may have no relevance

at all to Mr Coke, who is presumed to be innocent until proven guilty to the requisite standard.

[6] In outlining the general principles which are applicable to the instant case, the Act is the first point of reference. That bit of legislation is designed, as a crime-fighting tool as well as a method of protecting national security. Parliament, through the Act, sought to regulate the method by which telecommunications may be intercepted and the use to which information gleaned from the interception, may be put. In both crime-fighting and national security, the security forces sometimes oppose desperate criminals. Occasionally, non-traditional methods have to be used to uncover the illegal activities of those persons. Those methods often require extreme confidentiality.

[7] The Act, which allows the interception of the communication of persons who are suspected to have committed or are about to commit offences, has confidentiality as a consistent theme running throughout its provisions.

[8] Firstly, as a general principle, communications between persons over telecommunications networks are considered confidential, if they wish them to be so. Section 3 of the Act deems unlawful, and provides a sanction against, any unauthorised interception of any communication in the course of transmission by means of a telecommunications network.

[9] Secondly, the information used to secure the authority (a warrant) to lawfully intercept communication by telephone, is also deemed confidential. This information is required to be contained in an affidavit sworn to in support of the

application for the warrant. These applications are filed by the Director of State Proceedings. In seeking confidentiality, section 4(4) requires that:

“The records relating to every application for a warrant or the renewal or modification thereof shall be sealed until otherwise ordered by the court.”

This requirement of sealing the records, not only protects the identity of the party swearing to the affidavit, but also conceals the identity of the judge who signs and issues the warrant.

[10] It is of significance, in this regard, to note that it is not the warrant itself which is issued to the person authorised to conduct the interception. Instead, it is a certificate which is issued. That certificate indicates the contents of the warrant. In my view, that procedure is designed to conceal the identity of the judge who issued the warrant.

[11] Another method of securing confidentiality is contained in the provisions of sections 14 and 17 of the Act. These sections restrict the information, concerning the interception process, which may be given in evidence in criminal proceedings. Section 14 states in part:

“(3) In any criminal proceedings-

- (a) no evidence shall be adduced and no question shall be asked of any witness that suggests or tends to suggest the disclosure of sensitive information [being the method of the interception or the identity of the party carrying out or assisting to carry out the interception];
- (b) a statement by the witness that the interception of the communication was permitted by virtue of section 3 (2) (a), (b), (c), (d), (e) or (f), as the case may be, shall be sufficient disclosure as to the source and origin of the communication; and
- (c) **in proving the truth of a statement referred to in paragraph (b) the witness shall not be asked to disclose sensitive information.”**
(Emphasis supplied)

Section 17 (2) has similar provisions in respect of interceptions authorised by the relevant Minister of government.

[12] There are also other provisions which prohibit the disclosure of the existence of a warrant or even the existence of an application for a warrant (section 4 (5)) and require the destruction of intercepted material which is not relevant to the terms of the warrant. Those are some of the measures by which the Act seeks to ensure confidentiality.

[13] It may fairly be said that the measures to ensure the confidentiality of the process, concerning the lawful interception of communications, are born out of a policy aimed at protecting the national interest.

[14] The other relevant consideration, for these purposes, is the constitutional provision that every person charged with an offence shall be afforded adequate facilities for the preparation of his defence. (See section 16 (6) (b) of the Constitution of Jamaica, as amended on 8 April 2011.) The fact that Mr Coke is facing prosecution outside of Jamaica should not, by itself, prevent him being allowed access to information which may assist his defence. Lord Woolf in *Franklyn and Vincent v R* (1993) 42 WIR 262 at page 267 (an appeal from this jurisdiction), stated that the provisions of the Constitution, as it then stood, (and the recent changes have not affected that aspect), “do no more than codify in writing the requirements of the common law which ensures that an accused person receives a fair trial”.

[15] Neither Mr Cameron, who appeared for Mr Coke, nor Mr Robinson, was able to cite any directly relevant authority to assist the court in considering this

unusual application. Mr Cameron did, however, cite *Phillips v The Commissioner of Police* (1996) 54 WIR 38. That case emphasised the right of a person accused, to be provided with copies of the statements, on which the prosecution proposed to rely, where those statements are reasonably necessary in order to prepare his defence. The decision of our Court of Appeal in *Stewart v R* SCCA 145/07 (delivered 26 March 2010), also supports the principle stated in *Phillips*.

Analysis

[16] In line with the concern for confidentiality, Mr Robinson submitted that the information revealed, should be that restricted to Mr Coke and that the information relating to the other subjects of the relevant applications for warrants, should not be revealed. Additionally, Mr Robinson pointed out that the information, which Mr Coke has requested, was already in the public domain. Learned counsel informed the court that most, if not all, of that information, had been disclosed at the Manatt/Dudus Commission of Enquiry, which was held in Jamaica in the early months of 2011. Mr Robinson submitted that if the court were minded to make the order sought by Mr Coke, it should take such steps to ensure “that telephone numbers and other information unrelated to...Mr Coke be removed before the documents are delivered”.

[17] In this context, it is to be noted that Mr Coke exhibited to his application, copies of the certificates which were issued by this court on several dates. Those certificates had been issued to various telecommunications providers. In the vast majority of the certificates, several telephone numbers were set out. In the context of confidentiality, it is of much concern to me that it seems that not all

of those numbers were associated with Mr Coke. Some, if not the majority, were relevant to other persons.

[18] The disclosure of these certificates, it seems to me, may well be in breach of section 4 (5) of the Act. It is not clear how these certificates came to Mr Coke's attention; it may well be that they were revealed during the course of the Manatt/Dudus Commission of Enquiry, mentioned above. Whatever the source, it is my view that their exposure to persons other than the intended recipients, underscores the importance of Mr Robinson's concern, mentioned above.

[19] It is to that end, therefore, that I find that although Mr Coke should have the information that he requests, that it should be provided by the Director of State Proceedings. It is that official who had conduct of the relevant applications and who is best able to carefully cull, from the various applications, the information which is relevant to Mr Coke and to provide that information only, to him.

[20] Before parting with this judgment I wish to observe that the practice of including several telephone numbers, belonging to several different persons, in a single warrant or certificate seems to be in contravention of section 5 (1) of the Act. From my reading of the subsection, a warrant should only authorise the interception of the communications of one particular person or one particular set of premises. The subsection states:

5.-(1) A warrant shall authorize the interception of-

- (a) communication transmitted by means of a public or private telecommunications network 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 is necessary to intercept in order to intercept communications falling within paragraph (a).
(Emphasis supplied)

If those provisions were adhered to, it is unlikely that any warrant, or certificate, would contain a plethora of numbers, as is the case with many of the certificates attached to Mr Coke's application.

Conclusion

[21] Mr Coke is entitled by virtue of the Constitution to facilities to assist him with the preparation of his defence. His application is, however, in conflict with the Act's requirement of confidentiality. Because the certificate, issued in respect of the warrants to intercept Mr Coke's communications, mentioned several other numbers, apparently unconnected to him, it will be necessary to carefully extract from the documentation, the information which is relevant only to him.

[22] There is also, no necessity to reveal the identities of any of the persons involved in the process of securing or issuing the warrants.

[23] The information provided to the court is that much of the documentation, which Mr Coke requests, is already in the public domain. It was apparently exposed during the Manatt/Dudus Commission of Enquiry. The rest is in the possession of the Director of State Proceedings, who had conduct of the applications for the various warrants. It is, therefore, only necessary for Mr Coke's attorneys-at-law to communicate with the Director of State Proceedings to request what it is that they do not have, and for the Director to provide it. The

[24] The orders, therefore, are:

1. The application to unseal the records of the court in relation to warrants of interception in respect of the Claimant is refused;
2. The Director of State Proceedings is hereby directed to deliver to the Claimant's attorneys-at-law, Carolyn Reid & Co, within 7 working days of being so requested, authenticated copies of the portions of the applications for warrants of interception of the communications of the Claimant and the affidavits in support thereof, as may be in the possession of the Director of State Proceedings;

Provided that such copies shall not contain or divulge:

- a. the name or names of the relevant deponents to the several affidavits;
 - b. the name or names of the judge or judges issuing the relevant warrants;
 - c. the name or names or particulars or information relating to any person who may be mentioned in such applications or affidavits;
 - d. any information whatsoever which does not pertain to the Claimant;
3. For the purposes of compliance with order 2 above, authentication shall be effected by an affidavit sworn to in the presence of a notary public and exhibiting the relevant portions, referred to above, as being true copies of that which was filed in support of the relevant applications.
 4. The Claimant shall reimburse the Defendant the costs incurred in complying with the orders of the court;
 5. No order as to costs.