

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 2A of 2009

BETWEEN:

KEITH HAROLD MILLS

Appellant

AND

THE QUEEN

Respondent

BEFORE: The Honourable Marston C.D. Gibson, Chief Justice, The Honourable Peter D.H. Williams and The Honourable Sandra P. Mason, Justices of Appeal.

2012: April 3

2016: September 20

Mr. Stan O. Smith for the Appellant

Mr. Elwood Watts for the Respondent

DECISION

PETER WILLIAMS JA:

I. INTRODUCTION

[1] This appeal requires consideration of the appropriate sentence for importation of, possession of, and trafficking in 573.5 kilograms (x 2.204

=1,263 pounds) of cannabis taking into account the circumstances of the offence and of the offender.

- [2] The facts of the case were outlined at the trial to *Goodridge J* (now *JA*) by Mr. Charles Leacock Q.C., Director of Public Prosecutions. The defendant is a national of St. Vincent and the Grenadines and resided in St. Vincent. He prepared the engine of the boat that was used to transport cannabis from St. Vincent to Barbados. He was also invited to accompany the boat on the trip with four other men including one Barbadian. His role can simply be described as mechanic on board. He told the police:

“All I do was fix the boat and come to Barbados to make sure the boat get here.”

- [3] The police were tipped-off and on 19 September 2007 the boat was intercepted by the Coast Guard in the area of Barclays Park, St. Andrew. The crew and the cannabis were taken into custody. The defendant was cooperative with the police and gave them a full explanation of his involvement in the matter.

II. GUILTY PLEAS AND SENTENCES

- [4] On 17 February 2009, the defendant pleaded guilty to importation of, possession of and trafficking in cannabis contrary to *sections 4(3), 6(2) and 18(4)* respectively of the *Drug Abuse (Prevention and Control) Act, Cap.*

131 (the *Drug Act*). On 7 April 2009, he was sentenced to 10 years' imprisonment for importation and possession and 12 years' imprisonment for trafficking. The sentences were ordered to run concurrently and to take effect from the date of conviction (they should have been ordered to take effect from the date of sentence).

[5] The reasons given by the judge in support of the sentences were as follows:

“Persons who get themselves involved in the illegal drug trade must expect to receive sentences which reflect the gravity of the situation; the strong disapproval of courts of this type of offence and our Parliament has prescribed severe penalties in respect of such offences.

Having regard to the substantial amount of the drugs in your case, it seems to me that **the starting point in your case is 16 years with respect to the drug trafficking and 14 years for the offences of importation and possession.**

Now, as required by the Penal System Reform Act, I have considered the aggravating and mitigating factors in your case, in order to arrive at a sentence which is appropriate.

The aggravating factors are as follows: the quantity of the drugs involved, the substantial amount 573.5 kilograms. Drugs were being brought into this Island by boat and you were the mechanic to ensure that the engine and the boat reached its destination. Your motivation was the idea of earning some easy money.

What are the mitigating factors? You have no previous convictions. You co-operated fully with the officers and readily admitted your participation

in this matter. You have spent some time on remand. **You have been on remand since September 2007.** You have indicated that you are sorry for being involved in this matter and I have taken into account your plea in mitigation. From looking at the facts **it does not appear to me that you were the master mind or the brains behind the enterprise.** I have also noted the contents of the pre-sentencing report and I note that you are the father of 17 children and you have been described by your relatives, friends and neighbours as a well respected individual in your home country, friendly and a dedicated and loving father...

Your early guilty plea will, of course, earn you a discount on your sentence.” (Emphasis added.)

III. APPEAL

(a) Grounds of appeal

- [6] The appellant’s case was that the sentences were manifestly excessive based on a number of grounds set out in the perfected grounds of appeal filed on 20 March 2012. The grounds can be grouped under a number of heads in the order in which they are discussed, namely, that the judge: (i) failed to state why a custodial sentence was justified; (ii) failed to assess the extent of the culpability of the appellant; (iii) wrongly imposed a greater sentence for trafficking than for possession and importation; (iv) imposed sentences that were inconsistent with previous decisions of the courts; and (v) failed to give

credit for the time spent on remand. We impliedly gave leave to appeal by proceeding to hear the appeal.

(b) Submissions

[7] Mr. Smith produced 16 pages of skeleton arguments which he presented with oral argument. It should be noted that the appellant was unrepresented at the High Court and did not have the assistance of counsel. Mr. Smith was highly critical of the judge's approach in arriving at the sentences imposed. He submitted that the judge did not follow the procedure prescribed by law, which demands "completeness and precise adherence to a process". In this regard counsel was really relying on the decision of the Caribbean Court of Justice (CCJ) in *R. v. Gittens (2010) 75 WIR 126* (though not naming the case in his written submissions). The CCJ gave extensive guidance on the *Penal System Reform Act, Cap. 139* (the *Act*) and outlined clearly what was required of the judge in order to comply with the provisions of the *Act*. However, two points need to be made at the outset. First, the judge imposed sentence on 7 April 2009 when she did not have the benefit of the decision in *Gittens* which was not given until 11 February 2010. Secondly, the consequence of non-compliance with the procedural requirements of the *Act* does not necessarily invalidate the sentence imposed.

- [8] Mr. Smith submitted that the judge was obliged to conduct “a quantitative exercise involving interpreting” the sections of the *Drug Act* relevant to the pleas of guilty of importation, possession and trafficking. The judge was required “to consider the nexus between the elements of the offences and such factors as (i) the nature and complexity of the execution of the enterprise; (ii) the importance of the offender to the composite of the enterprise; (iii) motivating factor(s); (iv) personal investment in the aims of the enterprise; and (v) the form and/or extent of benefit from the enterprise, among other factors”.
- [9] Mr. Smith contended, in effect, that the judge failed to comply with the procedural requirements of the *Act* by not stating that the court was of the opinion that the offences were so serious that only custodial sentences could be justified for the offences and by not explaining why the Court was of that opinion: *section 35(4)* as set out in *Gittens* at *paragraph [9] to [11]*. Counsel further contended that the court’s breaches of the *Act* in “assessment of the rightness of custodial sentences and in fixing the threshold of imprisonment” violated the appellant’s “constitutional right to the protection of personal liberty” and in order to avoid further injustice the sentences should be quashed and the appellant released forthwith.

[10] Mr. Watts in response submitted that the judge clearly stated the reasons why she was of the opinion that custodial sentences were warranted, namely, the seriousness with which drug offences were treated by the law and the substantial amount of the drugs involved in the case. He also stated that a mechanic on board played an important function in ensuring that the boat arrived and returned safely. He was of the view that the judge in compliance with *section 37(3)* of the *Act* took into account the aggravating and mitigating factors of the offence and information about the offender in forming an opinion that the offence was so serious that only a custodial sentence could be justified.

[11] The *Act* seeks to limit the imposition of a custodial sentence (*section 35(2)*); it is in this context that the court is required to form an opinion of the seriousness of the offence. By the defendant's plea of guilty, he admitted that he brought into Barbados and was in possession (far in excess) of a trafficable quantity (15 grammes) of cannabis. The court must state to the offender "in ordinary language" its opinion and explain the reasons for its opinion: *Gittens* at *paragraph [10]*. The requirements of the *Act* to give full and detailed reasons for the imposition of a custodial sentence in the case of a serious offence may seem unnecessarily burdensome. However, it is clear from the CCJ judgment that a high degree of compliance with the statutory

provisions will be expected as set out by this Court in *R. v. Doyle (2010) 79 WIR 59* at *paragraph [81]*. The judge would doubtless have given fuller reasons if the decision in *Gittens* had been available prior to the imposition of the sentences. Nevertheless, we are satisfied that the judge sufficiently complied with the provisions of the *Act*. We therefore cannot accept Mr. Smith's submissions that the sentences were invalidated by non-compliance with the *Act*. The defendant was not unlawfully deprived of his liberty in breach of the *Constitution* but pursuant to the lawful authority of the court.

- [12] Counsel submitted that the defendant was not in possession of cannabis pursuant to *section 6(4)* of the *Act* because the defendant was "not in possession [of the drug] for the purpose of supplying". There are two answers to this submission: first, a person found in possession is "*deemed* to be in possession for the purpose of supplying" and secondly, the defendant pleaded guilty to the offence. Similarly, counsel submitted that the defendant did not import the cannabis because import means "to bring in or cause to be brought into Barbados by air or water". Again, the defendant pleaded guilty to the offence. Whereas counsel conceded that the defendant "was guilty of trafficking to the extent that he assisted in dumping off packages of cannabis into Barbados's territorial waters", he submitted that this was a low level of culpability and should have engaged the trial judge in

considering that the defendant did not own or navigate the boat or act as agent of the enterprise or conduct any business in relation to the production or ownership or quantity or sale of the cannabis.

[13] The next complaint of counsel was that the judge should have engaged in “a proper assessment of the extent of culpability” of the defendant in “the elements of the three charges against him”. Culpability refers to the factors that determine the extent to which the offender should be held accountable for his act. Counsel submitted that the defendant was present to repair the boat at sea if the need arose and his “fee of EC \$500 was proportionate to his service for mechanical support rather than in cognizance of any expected bonanza from the enterprise” and consistent with the minor role he played. Counsel continued that the defendant was at the “lowest range of the scale” of punishment provided by the *Act* and that the proper punishment was a fine with the alternative of imprisonment.

[14] Counsel further submitted that the judge wrongly imposed a greater sentence for trafficking than for possession and importation. There is no merit in this submission because the maximum punishment for trafficking is life imprisonment in contrast to that for importation and possession which is imprisonment for 20 years. However, the guideline decision in *Walter Prescod v. R., Criminal Appeal No. 32 of 2001, unreported decision of 10*

March 2006 did not distinguish clearly between the sentencing levels for importation, possession and trafficking.

- [15] Counsel next submitted that the sentences were inconsistent with previous decisions of the courts. He referred to a number of High Court cases in which foreign offenders convicted for drug offences appear to have been sentenced more leniently than the defendant in the instant case but sufficient details of those cases were not produced. He particularly referred to recent Magistrate Court cases in which heavy fines were imposed for drug offences with the alternative of imprisonment. The *Act* does provide for fines or imprisonment on conviction on indictment for importation and possession but not for trafficking. *Walter Prescod* did not state the circumstances in which it would be appropriate to impose a fine rather than a custodial sentence. However, a custodial sentence was appropriate in this case.
- [16] Another ground of appeal was that the judge failed to give credit for the time spent on remand. Counsel submitted that the judge was in error in treating the time spent on remand as one of the “mitigating factors”. This Court, unlike the judge, now has the benefit of the CCJ decisions in *da Costa Hall v. R.* (2011) 77 WIR 66 and *Burton v. R., Nurse v. R.*, (2014) 84 WIR 84. *Anderson J* delivering the judgment in *Burton* and *Nurse* at *paragraph [34]*:

(i) affirmed the principle of granting full credit for the time spent in pre-trial custody; and

(ii) stated that the time spent on remand is not to be treated as a factor in mitigation because the prisoner is *prima facie* entitled to have that time deducted from the sentence imposed.

(c) Discussion: Walter Prescod and Mark Jack

[17] It is necessary to ask whether the judge complied with the guideline decision of *Walter Prescod* and subsequent decisions of this Court on sentencing. The instant case was one of importing, possession and trafficking 1263 pounds of cannabis with an early plea of guilty. The relevant categories are at *paragraph [22]* of *Walter Prescod* as follows:

“(2) Where in a contested case the quantity of cannabis **imported** exceeds 100 lbs, the starting point shall be 12 years with increases reflecting the weight of the drugs.

(3) **Possession** in the amounts referred to...above should be punished similarly...

(4) For **trafficking** in amounts of cannabis not exceeding 100 lbs the starting point should be a sentence of 10 years. Larger amounts will attract sentencing **starting at 12 years** [with increases reflecting the weight of the drugs].

(5) An early **plea of guilty will earn a discount** on the sentence.” (Emphasis added.)

The guideline makes no specific provision for the extent by which the sentence should be increased to reflect the weight of the drug nor does it

give any indication of the magnitude of the discount that should be given on an early guilty plea.

- [18] Cases are rarely identical but *Mark Jack v. R., Criminal Appeal No. 9 of 2008, unreported decision of 30 January 2009* is a case very similar to the instant case. The appellant, *Mark Jack*, was a 28 year old shopkeeper and was also a resident of St. Vincent. There was no evidence of his personal circumstances or of his having any previous convictions. He was on a boat that brought cannabis from St. Vincent to Barbados and partook in the organization of the mission as well as swimming ashore with some of the drugs. He pleaded guilty to importation of, possession of and trafficking in 221.1 kilograms (x 2.204 = 487 pounds) of cannabis, less than half the quantity in the instant case. However, *Mark Jack* was in possession of a gun and ammunition and also pleaded guilty to firearm offences for which he was sentenced to 4 years' imprisonment. He was sentenced concurrently to 8 years' imprisonment for trafficking and convicted, reprimanded and discharged on the importation and possession charges. *Goodridge J* imposed the sentences on *Mark Jack* a year before (14 April 2008) she imposed the sentences in the instant case (7 April 2009). This Court dismissed *Mark Jack's* appeal against sentence. Unfortunately, *Mark*

Jack's case was not referred to in the record of the sentencing hearing of the instant case.

- [19] The guideline judgment of *Walter Prescod* was also not referred to in the sentencing hearing. It is the function of this Court first, to fix the tariff of punishment by establishing the necessary benchmarks and guidelines and secondly, to ensure that sentences in individual cases conform to the tariff, as stated in *Gittens* at *paragraph [19]*. From the record, prosecuting counsel was present but was not invited to and did not give the judge any assistance on sentence. The assistance of prosecuting counsel was particularly desirable in this case as the defendant was unrepresented though he did mitigate on his own behalf. It is now standard practice that the sentencing judge should invite prosecution counsel to assist the court in arriving at an appropriate sentence. The duty of prosecution counsel in relation to sentencing was discussed in detail by *Peter Williams JA* in *Padmore v. R., Criminal Appeal No. 18 of 2005* at *paragraph [34] to [38], unreported decision of 30 March 2007*. It is desirable that the sentencing judge should refer to any guideline decision and expressly identify the offence category of the guideline which is applicable to the case under consideration. If the case does not fall within the guidelines the sentencing judge should explain why this is so. It will also be helpful to consider cases subsequent to (but

generally not prior to) the guideline decision which illustrate the application of the guidelines.

(d) Aggravating and mitigating factors

[20] Following the *Walter Prescod* guideline the starting point for importing, possession and trafficking quantities over 100 lbs is 12 years (in a contested case) with increases in the number of years reflecting the weight of the drugs. The judge started at 16 years for trafficking and 14 years for importation and possession. The starting point of 4 additional years seems to have been determined by “the substantial amount of the drugs”. The starting points therefore took account of the real aggravating factor, the quantity of cannabis. Mr. Watts stated that the 16 and 14 year starting points were appropriate. I agree.

[21] The judge stated that the appellant did not appear to be the master mind or the brains behind the enterprise. Counsel submitted that the appellant did not play a major role in the enterprise. In his statement to the police the appellant said that he was **paid** \$500 “for fixing the boat”. The appellant told the Probation Officer that “he was employed to repair a boat engine and was **promised** EC\$500 for his efforts”. It is also not clear whether he was paid for accompanying the boat from St. Vincent to Barbados. The judge said to him, “your motivation was the idea of earning some easy money”.

An interesting twist to this account is that according to the appellant's statement to the police, when the boat reached the east coast of Barbados they "dumped off the marijuana" but then "the boat start playing the fool" and "we then see the Coast Guard". He was obviously not able to exercise his mechanical skills in time for the boat to escape. It may therefore be that his services were not used on the trip and because of what transpired he received no fee for the same. However, the appellant played if not a leading, a significant role in the operation by being on standby in view of the faulty boat engine.

[22] The difficulty in this case is to determine what reduction from the starting points should be made for the mitigating factors. These factors were significant: co-operation with the police, evidence of genuine remorse, no previous convictions and the defendant's personal circumstances. The defendant was 39 years old at the time of sentence and resided in St. Vincent operating a welding and mechanics business. He had lived with his girlfriend for 19 years; she was the mother of five of his children. Shortly before the incident she died of breast cancer which seems to have adversely affected him emotionally and financially in taking care of his children. The money that he had saved was spent on his girlfriend's cancer treatment in Trinidad. He has a total of 17 children. As the pre-sentence report stated it

was regrettable that the appellant had to be taken away from his business and family responsibilities.

[23] Mr. Watts in the best tradition of prosecuting counsel assisted this Court in arriving at a proportionate sentence for trafficking from a starting point of 16 years. He stated that “in the final analysis Mr. Mills may have good reason to complain about his sentence”. The mitigating factors in this case warranted a deduction of 4 years for trafficking thereby reducing the sentence to 12 years and a similar deduction for importation and possession thereby reducing those sentences to 10 years.

(e) Discount for guilty pleas

[24] This Court has not yet provided definitive guidelines on the amount of discount that should be given for a guilty plea. The current position is that the matter is left to the discretion of the judge as discussed in *DPP's Reference No. 2 of 2010, R. v. Hurley, unreported decision of 8 July 2011* at *paragraph [91]* and *[92]*. However, the modern cases suggest that in sentencing, a judicial discretion should be circumscribed and definitive figures stated for guidance. In this spirit *Hurley* suggested a discount of approximately 20% for a guilty plea. In the special circumstances of this case; the co-operation with the police, the remorse and the early guilty plea, a 25% discount would be appropriate for the trafficking offence which

further reduces the sentence by 3 years from 12 to 9 years. A similar reduction of 25% for importation and possession would reduce the sentence by 2½ years from 10 to 7½ years.

(f) *The notional sentences*

[25] Following the decision in *R. v. da Costa Hall*, (2011) 77 WIR 66 at *paragraphs [26]* and *[29]* it is important for the court to “state with emphasis and clarity...the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors (the notional term)...but for the time spent...on remand” and but for any redress for unconstitutional delay. The notional sentences in this case are therefore 9 and 7½ years.

(g) *Credit for time spent in custody*

[26] The time spent in custody that must be credited is 564 days from the date of remand (21 September 2007) to the date of sentence (7 April 2009). The sentence for trafficking now becomes 9 years less the said credit of 564 days or 7 years and 167 days and that for possession and importation now becomes 5 years and 349 days.

(h) *Unconstitutional delay*

[27] It is the duty especially of this Court to examine possible unconstitutional delay. The offence was committed on 19 (remanded on 21) September 2007 and sentence was passed on 7 April 2009, one year and 6 months after the

offence. The appeal was filed on 8 April 2009 and has therefore been pending for over 7 years. The Director of Public Prosecutions stated at the High Court hearing that the defendant wished a speedy trial and asked for the same to be expedited. Nevertheless, the courts have taken 9 years (September 2007 to September 2016) to dispose of this case.

[28] The appellant has been in custody for the whole period. There has been a glaring breach of his constitutional right to have his case disposed of within a reasonable time.

[29] Final appeal courts in two-tier appellate systems have become far more stringent than previously in not tolerating unconstitutional delay. Even what may appear to be not inordinate delay is subject to scrutiny especially when the delay has been caused by first-tier appellate courts. A flavour of the judicial pronouncements on the matter can be appreciated from the following paragraphs in the recent Privy Council decision of *Sabapathee v.*

The Director of Public Prosecutions (Mauritius) [2015] 1 LRC 148:

“Unconstitutional delay

[23] It was submitted on behalf of the appellant that his constitutional right to the conclusion of the proceedings within a reasonable time was breached by the Supreme Court allowing the DPP’s appeal against sentence 1 year 10 months after the imposition of the original sentence.

[24] ...

[25] The Board is aware **that judicial resources in Mauritius are strained**, but that **is not a satisfactory explanation for the length of time which elapsed in this case**. The Court record shows that the hearing of the appeal on 13 February 2012 occupied the Court for 47 minutes. The date of the appeal appears to have been fixed [for] hearing on 15 February 2011, at which the parties were represented. The Board is not aware of the full circumstances, but on the face of it the Board considers it highly regrettable that an appeal of this kind should be fixed for a hearing date in a year's time. It is also regrettable that it took nearly six months thereafter for the court to deliver a 4 page judgment.

[26] ...

[27] The Board is troubled by **the overall delay...a factor which justice required should be taken into account in deciding the outcome of the appeal.**" (Emphasis added.)

[30] It should be added that in the instant case the trial judge was not in error for not taking into account the unconstitutional delay. The trial itself was heard before the judge within a year and a half after the offence. That timing was not unreasonable except that guilty pleas should be disposed of in a much shorter time by the adoption of a special fast track procedure for early guilty pleas. The significant delay occurred after the judge had imposed sentence and was caused by this Court. I should state for the record that I do not accept responsibility for the regrettable delay (over four years) of the Court in giving its decision in this appeal.

[31] The sentences should therefore be further reduced to take account of the unconstitutional delay. In the distressing circumstances of this case a reduction of sentence of two years would be reasonable.

IV. DISPOSAL

[32] The appellant has been the victim of prolonged delay and uncertainty over the past 9 years. There may have been changes in his personal circumstances since the date of the imposition of his sentence. It is clear that in deciding the appropriate sentence this Court would be entitled to take into account changed circumstances since the appellant's conviction. In *Sabapathie* at *paragraph 34* the Privy Council considered the circumstances since the appellant's conviction; that he had married, that his wife was pregnant and that he had employment at a gym, as relevant in quashing his sentence and substituting a lesser sentence.

[33] I would therefore allow the appeal, quash the sentences imposed by the High Court and substitute the following sentences. The notional sentence for trafficking of 9 years is therefore substituted for the 12 year sentence imposed by the judge. The notional sentences of 7½ years for importation and possession are therefore substituted for the 10 year sentences imposed

by the judge. The appellant is to be given credit for the time already spent in prison and his notional sentences are also reduced to afford redress for the unconstitutional delay as set out above. It follows that the appellant would already have served his sentences. Delay does cause injustice.

[34] A similar situation occurred in a recent appeal to the CCJ also from this Court. In *Clarence Elloyd Sealy v. R., unreported decision [2016] CCJ 1 (AJ), delivered on 29 January 2016* the CCJ at *paragraph [107]* found that the appellant had been held in prison beyond the time that his sentence properly expired taking into account the remission of sentence to which prosecuting counsel stated he was entitled. The appellant in the instant case may have been entitled to remission of sentence but there was no evidence before the Court on the matter. As sentencing is becoming more exact, it will often be necessary for the Court to obtain from the prison authorities information on the record of the appellant. In the special circumstances of this case I would declare that the appellant be deemed to have already served his sentences in respect of the importation, possession and trafficking convictions and that his term of imprisonment shall expire by the conclusion of today's hearing.

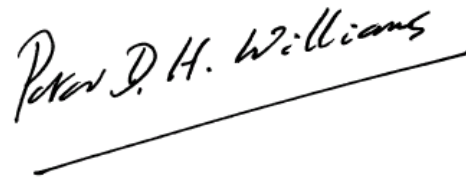
V. **POSTSCRIPT - DEPORTATION**

- [35] Something needs to be said by this Court about the correct approach to the sentencing of foreign prisoners. A foreign prisoner generally has no friends or family in this country, he may be discriminated against by other prisoners, he may not fit into the local prison system, his prospects of rehabilitation may be hindered, he may even speak a different language or the same language with a different accent. The court reporter during the trial had “a difficulty with the accent” of the defendant. There may be numerous other considerations of which the Court is unaware.
- [36] It must not be thought for one moment that a two-tiered sentencing regime should exist, one for nationals and another for foreigners. If not unconstitutional, such an arrangement would flout principles of equality before the law. However, the proper approach is to consider carefully the pre-sentence report which should assist the court in determining the most suitable method of dealing with the foreign offender: *section 37(4) and (5) of the Act*. There is nothing to be gained from housing foreign prisoners for longer than is absolutely necessary.
- [37] There appear to be no specific legislative provisions for the High Court to make a deportation order when sentencing a foreign offender to imprisonment. There is legislative provision for the transfer of prisoners in the *Repatriation of Prisoners Act, Cap. 168B*, which commenced on 28

October 2002 and is “an Act to make provision for the transfer of certain prisoners to the country of which they are nationals for the completion of their sentence in accordance with an Agreement to that effect and for related matters”. However, St. Vincent is not a “receiving state”. In fact, there are only two receiving states listed in the First Schedule of the Act, namely, the United Kingdom and Canada. Barbados also recently concluded a Prisoner Transfer Agreement with Switzerland.

[38] There appear to be no treaty arrangements for the exchange of prisoners within the Caribbean Community.

[39] The *UK Borders Act 2007, sections 32 to 39*, places the Secretary of State (**not the court**) under a duty to make a deportation order in respect of a “foreign criminal” unless certain exceptions apply: see *Archbold 2013* at *6-1267 to 1271* and *Blackstone’s Criminal Practice 2016, Section E20.1*. A foreign criminal is a person who is not a British citizen and who is convicted of an offence in the United Kingdom and who has been sentenced to imprisonment or detention for at least 12 months or who has committed specified offences. A deportation order is made on the basis that the country has no use for criminals of other nationalities, particularly if they have committed serious crimes.

A handwritten signature in black ink that reads "Peter D. H. Williams". The signature is written in a cursive style and is positioned above a solid horizontal line.

Justice of Appeal

GIBSON CJ:

[40] I have had the opportunity to read in draft the judgment proposed by *Peter Williams JA*. I concur in the statement of facts and in the result that the appellant should be immediately released, and so I do not propose to repeat them at great length. But I write separately because there are some aspects of the judgment with which I disagree.

Facts

[41] On 19 September 2007 the Appellant, a national of St. Vincent and the Grenadines, entered the territorial waters of Barbados, by boat, for the purposes of providing mechanical assistance to his co-accused during the commission of a drug trafficking enterprise. The Appellant and his co-accused were intercepted by officers of the Barbados Coast Guard who recovered 34 packages of vegetable matter, weighing 573.5 kilograms, from the boat. The matter was analysed and found to be cannabis, a controlled drug under the *Act*.

- [42] On 17 February 2009 the Appellant, Mr. Mills, was charged on indictment and pleaded guilty to the following offences under the *Drug Abuse (Prevention and Control) Act, Cap. 131* (“*the Act*”) of the Laws of Barbados: (1) importation of a controlled drug contrary to **section 4(3)** of the *Act*; (2) possession of a controlled substance contrary to **section 6(2)** of the *Act*; and (3) drug trafficking contrary to section 18(4) of the *Act*.
- [43] On 7 April 2009 *Goodridge J*, as she then was, sentenced the Appellant to concurrent terms of 10 years for the offences of importation and possession and 12 years for the offence of drug trafficking. The sentence for trafficking is the subject of this appeal.

Grounds 1 to 4 – The Effect of *Romeo Hall v R*

- [44] Counsel for the appellant submitted the trial judge: (1) erred in not considering pre-sentence imprisonment as a mitigating factor; (2) failed to declare that pre-sentence imprisonment was to count as time served under the sentences; (3) failed to identify ‘trafficking’ as the offence among the three charges against which a declaration of credit of pre-sentence imprisonment would be set-off against; and (4) failed to state the reasons for not granting full credit or any credit of the pre-sentence imprisonment as a set off against any of the sentences.

[45] He relied on the decision of the Caribbean Court of Justice (CCJ”) in *Romeo Da Costa Hall v The Queen (2011) 77 WIR 66 [CCJ]* (“*Romeo Hall*”) in support of his submissions. Mr. Watts, for the Crown, submitted that *Romeo Hall* did not apply retroactively. Further, there was no binding common law precedent which obliged a sentencing judge to give full credit for time spent on remand in circumstances where an appellant was sentenced prior to the pronouncement of *Romeo Hall*.

[46] This aspect of the appellant’s argument, and the Crown's response, can be put to rest by simply referring to the CCJ decision in *Jeffrey Ray Burton v R; Kemar Anderson Nurse v R, [2014] CCJ 6 (AJ; decided 26 March 2014)*. In that consolidated appeal, the CCJ held that this Court, when seised of an appeal in which the trial judge had imposed sentence prior to the decision in *Romeo Hall*, must apply the principle enunciated in *Romeo Hall* and give full credit for time served on remand. Writing for a unanimous Court, *Anderson JCCJ* observed, at para [30] that

[w]e consider that the basic rule is that prisoners whose cases or appeals are pending or in respect of whom the statutory period to appeal to the courts has not yet expired are entitled to benefit from the ruling in *Romeo Hall*.

[47] The appellant was arrested on April 2007, and had been incarcerated ever since. That amounts to just over nine years that he has been in custody, part of it pre-trial on remand and, thereafter, pursuant to the sentence imposed by

the sentencing judge. It is, therefore, clear that the appellant is entitled to benefit from the decision in *Romeo Hall*, and must succeed on grounds 1 to 4. He must, therefore, be accorded full credit for the time which he had spent on remand. In other words, his sentence must be calculated as running from the earlier date on which he was taken into custody, and not from the later date on which the sentence was imposed.

Ground 5

[48] Mr. Smith submitted that the learned trial judge failed to justify her finding that a custodial sentence was warranted, thus infringing the appellant's right to protection of liberty under **section 13(1)** of the *Constitution of Barbados*. Mr. Watts, in response, submitted that the trial judge's sentencing remarks clearly illustrated her opinion that custodial sentences were warranted and why she was passing such sentences.

[49] In essence, Mr. Smith takes the position that, in failing to pronounce the justification for the sentence imposed, the sentencing judge did not correctly apply the provisions of **section 35(4) (b)** of the *Penal System Reform Act* ("*the PSRA*"). **Section 35** provides:

- (1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed bylaw.
- (2) *Subject to subsection (3), the court shall not pass a custodial sentence on the offender unless it is of opinion.*

- (a) *that the offence, or the combination of the offence and one other offence associated with the offence, was so serious that only such a sentence can be justified for the offence; or*
 - (b) *where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender.*
- (3) Nothing in subsection (2) prevents the court from passing a custodial sentence on an offender if the offender refuses to consent to a community sentence which is proposed by the court and requires that consent.
- (4) *Where a court passes a custodial sentence it is the court's duty*
- (a) *in a case not falling within subsection (3), to state in open court that it is of the opinion that either or both of paragraphs (a) and (b) of subsection (2) apply and why it is of that opinion; and*
 - (b) *in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on the offender.*
- (5) A court shall cause a reason stated by it under subsection (4) to be specified in the warrant of commitment and to be entered in the record of the court.

(Emphasis added)

[50] Just a cursory examination of the sentencing record shows that it is beyond cavil that the trial judge fully complied with the provisions of **section 35(4)** of the *PSRA*. At pages 17 to 18 of the record, the trial judge stated:

You readily admitted to the police officers your role in the matter, which is that of fixing the boat to make sure that boat reached Barbados.

Persons who get themselves involved in the illegal drug trade must expect to receive sentences which reflect the gravity of the situation; *the strong disapproval of courts of this type of offence and our Parliament has described severe penalties in respect of such offences.*

Having regard to the substantial amount of the drugs in your case, it seems to me that the starting point in your case is 16 years with respect to drug trafficking and 14 years for the offences of importation and possession.

(Emphasis added)

[51] The sentencing judge commented on the disapproval of both the Courts and Parliament of the illegal drug trade (“this type of offence”) and then applied a sentence based on the “substantial amount” of drugs which the appellant’s assisted in bringing into the territorial waters of this country. This was a proper exercise of her sentencing discretion as enacted in the *PSRA*. Since, except in narrowly defined circumstances, it forms no part of the jurisdiction of a Court of Appeal to substitute its discretion for that of a sentencing judge, there was no breach of the appellant’s right under **section 13(1)(c)** of the *Constitution*.

Grounds 6 and 8: The Tariff

[52] Mr. Smith submitted that the trial judge failed to adequately consider the mitigating factors as well as the aggravating factors as required by **section**

37(3)(a) of the *PSRA*. He urged that the learned judge should have considered that the appellant had “no true relationship with the enterprise” as he was merely present to provide technical support and to assist during the enterprise should the boat encounter problems. This secondary role, counsel said, should have resulted in a more lenient sentence.

[53] Mr. Watts responded, referring to this Court’s decision in *Walter Prescod v The Queen, Criminal Appeal No. 32 of 2001 (date of decision 10 March 2006)* (“*Walter Prescod*”) that the trial judge adequately addressed those issues. He argued that a trafficking enterprise requires a level of organised criminal activity. To be successful the offenders must evade the authorities of both jurisdictions. For this reason, the role of the appellant, whilst secondary, was still integral to the enterprise as he was solely responsible for ensuring that the vessel on which the illegal drugs were transported would reach its destination, return to St. Vincent and/or evade apprehension should pursuit arise.

[54] Mr. Smith’s argument, in essence, posits that the sentencing judge offended the principle of the tariff. He did not cite any case in support of his argument. While sometimes the “tariff” is seen as a talisman with the ability to lead judges unerringly to the right sentence to be imposed, this misunderstands the true nature of the sentencing discretion. Indeed, if one

thing is clear, it is that there is no universal meaning to the word “tariff.”

Put another way, it means different things to different people.

- [55] In *Emmins on Sentencing* (4th Edn, Oxford University Press Reprint 2007; “*Emmins*”) **Professor Martin Wasik** starts off his discussion of the concept of the tariff by comparing and contrasting the reductivist approach with the desert approach to sentencing.

The reductivist approach holds “that the imposition of hardship through punishment is justified whenever certain benefits are achieved by that punishment, and where those benefits outweigh the hardship and make its imposition, on balance, worthwhile. This is the principle of utility, expounded by Jeremy Bentham and others. In particular, the imposition of punishment is here designed to reduce the overall incidence of offending within society. The offender is thus being used as an instrument in an effort to achieve this beneficial result. . .

The desert approach emphasises the moral requirement of maintaining a proper proportion between offence and punishment. It states that punishment involves censuring the offender for his wrongful behaviour. Thus the prime determinant of sentencing should be to ensure that the punishment imposed is that which is deserved for the offence, having regard to the seriousness of the harm caused or risked by the offender and the degree of the offender’s culpability. It should be understood that, in contrast to the various approaches, desert principles do not require that sentencing practice should affect overall crime levels.

(*Emmins*, at pp. 47-48).

- [56] **Prof. Wasik** then goes on to describe the tariff in the following passage:

[D]evising a scale of penalties in terms of severity is beset with difficulties just as acute as those of comparing the seriousness

of offences. Penalties are very different. How can one compare imprisonment with a community rehabilitation order? A useful starting point is to gauge all the various sentences in terms of their relative impact upon the average offender, or perhaps the extent to which they can be expected to impinge upon and restrict the average offender's liberty. This rough kind of scaling amongst sentences has always been part of the sentencing system in England and Wales, and it formed the basis of the description of the various sentencing powers available to the courts . . . It is referred in some texts on sentencing as the sentencing 'tariff', reflecting, in a rather non-specific way, that more serious offences require more severe penalties. The traditional picture of sentencing is more complex than this, however. First, there is a degree of ambiguity about the meaning of the 'tariff'. Sometimes the term has been used to mean that an offender should progress up the sentencing ladder in the event of offence repetition. Thus a burglar who was sentenced to a community sentence last time he was convicted of burglary must expect to receive something more severe if he reoffends. This approach, however, has much more to do with reductivist ideas of sentencing than with desert principles. Secondly, some of the available sentences have traditionally not been regarded as punishments at all. The community rehabilitation (in its former title, probation) order is a clear example. CRO was not regarded as occupying any particular place in the tariff. . . It was an individualised measure addressed to the offender's needs, rather than to the seriousness of the offence.

(*Emmins*, at pp 49-50)

- [57] In *Sentencing: Theory, Law and Practice* (2nd Edn., Butterworths 1996.), **Prof. Nigel Walker** and **Nicola Padfield** understand "tariff" to mean something entirely different. At para 10.20, p. 134, they explain the word "[t]ariffs" as follows:

The role of the [Court of Appeal] in issuing guideline cases is most striking when the maxima are high: the courts have evolved a ‘tariff’ in which the range of sentence-lengths regarded as normally permissible for each offence ends well below the statutory maximum. The ‘tariff’ will not be found in any official publication, although Thomas’ Current Sentencing Practice can be regarded as semi-official.

[58] *Taylor on Appeals (London, Sweet & Maxwell, 2000), para 9-041* states:

The Court of Appeal will intervene and quash a sentence if it considers that it is “manifestly excessive.” It is not always easy to define a sentence that falls into this category, but some assistance is available in referring to “guideline” cases for the particular type of offence.

The Court of Appeal has also set out guidelines in various cases in relation to the general approach to sentencing, such as the desirability of lower sentences, the threshold for a custodial sentence, and the guidance on the appropriate bracket of sentences for particular offences [“the tariff”]. . .

A sentence which is “*substantially out of line with the appropriate tariff for the particular offence*”, or is considered to be unnecessarily harsh in that it applies a particular type of penalty, may be “manifestly excessive”. Each case will, however, be considered on its own individual facts and circumstances, and the Court of Appeal has stressed on a number of occasions that sentencing involves an exercise of discretion by the judge, and that whilst reference should be made to guidelines cases, such authorities are by their very nature “guidelines” and were not meant to be applied rigidly to every case. What the Court of Appeal is aiming for is not uniformity of sentence but uniformity of approach. They are therefore likely to intervene where a sentence suggests that the judge has applied the wrong *approach* in light of the guideline cases. . .

The Court of Appeal will not intervene where a defendant has been lawfully sentenced in accordance with the prevailing

tariff, and when all the relevant factors are known to the sentencing judge.

(Emphasis added)

[59] Clearly then, to the extent that there is agreement on the meaning of “tariff” at all, at least as understood by **Walker and Padfield**, and **Taylor**, it is “the range of sentence-lengths” or “the appropriate bracket of sentences” which are below the statutory maxima and established in “guideline cases.” But there is a guideline case establishing the tariff or sentencing bracket for drug offences in Barbados, namely the decision of this Court in *Walter Prescod*, where *Simmons CJ*, in this Court, propounded sentencing guidelines to be utilised in drug-related offences. In that case, the appellant had pleaded guilty to importation of 127.18 kilograms of cannabis and to possession of the same amount. He pleaded guilty and was sentenced to concurrent terms of 12 years imprisonment for each count. The appellant had 8 previous convictions. He contended that the sentences were excessive.

[60] This court (*Simmons CJ, Peter Williams JA* and *Moore JA*) held that “[w]hen the aggravating and mitigating factors are balanced, a term of 12 years could not be said to be wrong in principle, having regard also to the appellant’s criminal history.” (See para. 24). *Simmons CJ* set out the sentencing guidelines for drug related offences at paragraph 22 as follows:

The guidelines below are for use in criminal trials in the High Court. We adopt the general approach in sentencing in distinguishing between importation, possession and trafficking.

In a contested case of importation of 100 lbs or less of cannabis, the starting point for a sentence should be 10 years.

Where in a contested case the quantity of cannabis imported exceeds 100 lbs, the starting point should be 12 years with increases reflecting the weight of the drugs.

Possession of the amounts referred to in (1) and (2) above should be punished similarly and the sentence should run concurrently with that passed in respect of importation.

For trafficking in amounts of cannabis not exceeding 100 lbs the starting point should be a sentence of 10 years. Larger amounts will attract sentences starting at 12 years and increasing on the same basis as in (2).

An early plea of guilty will earn a discount on sentence.

Previous convictions for drug offences will, of course, be relevant to sentence.

Where the facts permit, a trial judge should take into account the different roles played by the joint accused. In that regard, an accused who plays a secondary or subordinate role to another who was the mastermind or central actor, may be given a lesser sentence than the principle offender.

(Emphasis added)

[61] *Simmons CJ* also set out, at paragraph 23, the circumstances to be considered by the sentencing Court. His Lordship stated:

At the time of sentence a court must examine the total circumstances of the case and weigh the aggravating and mitigating factors respectively. Aggravating factors include:

the quantity of drugs; substantial quantities imply that the drugs are expected to generate illegal profit;
the level of sophistication used in the criminal enterprise;
 refusal to co-operate with the police;
 the use of violence in the commission of the offence;
 possession or use of a firearm in carrying out the crime;
 previous convictions for drug offences.

Mitigating factors include:

the age of the offender;
 the mental or physical health of the offender;
 co-operation with the police;
 evidence of genuine remorse;
 an early guilty plea.

(Emphasis added)

[62] The issue, then, is whether the trial judge erred in applying these factors in sentencing the appellant, thereby exceeding the tariff. Clearly, she did not.

At page 18 of the sentencing record, her Ladyship stated:

Now as required by the Penal System Reform Act, I have considered the aggravating and mitigating factors in your case in order to arrive at a sentence which is appropriate.

The aggravating factors are as follows: the quantity of the drugs involved, the substantial amount 573.5 kilograms. Drugs were being brought into this island by boat and you were the mechanic to ensure that the engine worked and the boat reached its destination. Your motivation was the idea of some easy money.

What are the mitigating factors? You have no previous convictions. You cooperated fully with the police officers and readily admitted your participation in this matter. You have spent time on remand. You have been on remand since September 2007. You have indicated that you are sorry for being involved in this matter and I have taken into account your plea in mitigation. From looking at the facts it does not appear to me that you were the master mind or the brains behind this enterprise. I have also noted the contents of the pre-sentencing report and I note that you are the father of 17 children and you have been described by your relatives, friends and neighbours as a well-respected individual in your home country, friendly and a dedicated and loving father.

[63] While the sentencing judge did not make specific reference to *Walter Prescod*, she obviously had in mind the principles enunciated there in coming to the appropriate sentences. Accordingly, her application of aggravating and mitigating factors was fully compliant with the provisions of section 37(3)(a) of the *PSRA* and the guidance provided in *Walter Prescod*.

[64] Turning to counsel's argument that the judge failed to assess the culpability of the appellant, at pages 17 and 18 of the trial record, the judge said:

You readily admitted to the police officers your role in the matter, which is that of fixing the boat and coming to Barbados on the boat to make sure that the boat reached Barbados. There is no doubt in my mind Mr. Mills *that the offences to which you have pleaded guilty are of such a serious nature that only custodial sentences will suffice.*

...

Drugs were being brought into this island by boat and you were the mechanic to ensure that the engine worked and the boat

reached its destination. Your motivation was the idea of earning some easy money.

...From looking at the facts it does not appear to me that you were the mastermind or the brains behind this enterprise.

(Emphasis added)

[65] The record clearly reflects that the judge was acutely aware that the appellant played a secondary role in the entire enterprise. Nonetheless, secondary or not, this role was essential to the commission, and consummation, of the offence. Drugs do not, of their own volition, take wing or sail, and come to Barbados. As Mr. Watts pointed out, it requires a level of organised activity on the part of criminals, individually or collectively, to bring drugs into this country. And the record reflects that it was the mechanical skill and acumen of the appellant which was needed to complete the enterprise. Put simply, if the boat did not have a working engine, the drugs would not, indeed, could not, have been brought by sea to Barbados.

[66] The appellant blithely ignores the compendious language of **section 18(2)** of *DAPCA* which provides that no person shall:

- (a) traffic in a controlled drug;
- (b) offer to traffic in a controlled drug or in a substance he believes to be a controlled drug;
- (c) *do or offer to do an act preparatory to or for the purpose of trafficking* in a controlled drug or in a substance he believes to be a controlled drug.

(Emphasis added)

[67] A person can contravene this section, and therefore be guilty of the offence of trafficking, even though his acts are merely “preparatory to or for the purpose of trafficking” and, indeed, if he should merely “offer to do” such an act. Nowhere in the section is the distinction drawn between a principal, such as a mastermind who finances the enterprise, and a secondary person who, for example, packages the drug or captains the boat or, as here, is the mechanic who is there to fix the boat in case of engine trouble. Any act which is preparatory to trafficking falls within the rubric of “trafficking.”

[68] Moreover, the appellant admitted that he was fully aware of the objective for which his skills were sought and utilised. In his oral statement to the police on 19 September 2007 he said:

Monday a fellow from home came to me and tell me that he wanted his boat fixed and that he had to bring some marijuana to Barbados. I fixed the boat and he gave me \$500.00 for fixing the boat. Yesterday I was at work and the same man come and tell me that he wanted me to take the trip just in case the boat break down that I could fix it. I agree to help he...

[69] I can find no fault in the sentence of the judge on these grounds.

Ground 7

[70] Counsel for the appellant submitted that the sentencing judge wrongly exercised her discretion in sentencing the appellant to “two more years

imprisonment for trafficking than the sentences for possession and importation of a controlled drug respectively.” Mr. Smith argued that the appropriate tariff ought to have been between two to four years. Counsel for the Crown again invited us to consider the application of the sentencing guidelines outlined in *Walter Prescod, supra*.

[71] In *Prescod, Simmons CJ* stated in the fourth guideline that trafficking a quantity of cannabis in excess of 100 lbs subjects the accused to a notional sentence of 12 years, a sentence which increases proportionate to the quantity at issue. In *Walter Prescod* the quantity of cannabis imported was 127.18 kilograms (approximately 280 lbs). In the instant case the appellant was convicted of trafficking a quantity of 573.5 kilograms (approximately 1,301 lbs), almost five times the quantity of that in *Walter Prescod*.

[72] But quite apart from the guidance in *Walter Prescod*, **Schedule Four** of the *DAPCA* provides that the maximum sentence, on indictment, for a **section 18(4)** trafficking offence is imprisonment for life. The maximum imprisonment for **section 4(3)** (possession) and **section 6(2)** (importation) offences is 20 years.

[73] When the *Walter Prescod* guidelines are applied to this case, against the backdrop of the statutory provisions, one first notes that the sentencing judge began with a notional sentence of 16 years for the trafficking offence, clearly

in application of guideline four. There is no room for argument on this starting point due to the quantity of the drug in question, which was the sole aggravating factor in this case. The judge then considered the mitigating factors outlined at paragraph [18] above.

[74] It is clear from the **Fourth Schedule** to the *DAPCA* that Parliament considered trafficking to be a significantly more serious offence than possession or importation. For this reason, the sentence imposed for trafficking was justified under both statute and this Court's decision in *Walter Prescod*. The sentencing judge correctly exercised her discretion in imposing a higher sentence. This ground is unmeritorious and also fails.

Grounds 9 to 13

[75] Mr. Smith submitted that the learned trial judge failed to adhere to the principle of proportionality implicit in **sections 35 and 36** of the *PSRA* and/or that she failed to comply with **section 41(2)** thereof and, in particular, failed to consider that the gravity of a punishment must be commensurate with the gravity of the offence. In essence, he believed the sentences to be excessive.

[76] These grounds are repetitive of those contended for above and the rulings on grounds 5 to 8 above adequately dispose of them. No basis can, therefore,

be found either in the statute or cases for interfering with the exercise of the sentencing judge's discretion.

Delay

[77] Notwithstanding the conclusions above, however, this Court is aware of the length of time which it has taken for the disposal of this matter, for which the Court sincerely apologises to both parties and, particularly, to the appellant. In *Elvis Alexander v R*, this Court took the view that where an inordinate amount of time has elapsed between hearing and decision, that the appellant in a criminal case is entitled to some remission of time (see, *Elvis Alexander*, at para [108], per *Williams JA*). In *Archbold 2011* at *7-143a*, it is stated that “where there is delay in the hearing of the appeal for which the appellant is blameless and the delay is such as to amount to a violation of the right to determination of the criminal charge within a reasonable time, the appropriate redress will generally take the form of a reduction of sentence.”

[78] In *Walter Prescod* where the appeal had taken 4½ years to reach this court, it was held that, taking the systemic failure into consideration, the sentence should be reduced to 10 years. The record indicates that the appellant was arrested on 19 September 2007 and was immediately remanded in custody at HMP Dodds where he has remained ever since. As at today's date, he would therefore have been in custody for nine calendar years and one day.

Accordingly, when the Court rises today, the appellant will be deemed to have served his sentence.

Disposal

[79] The appellant's appeal is dismissed and the sentence for drug trafficking is affirmed. However, owing to the special circumstances regarding the delay in the completion of this matter, the appellant is entitled to be credited with "time served" and when the Court rises, shall be released from custody.

Chief Justice

MASON JA:

[80] Having had the opportunity to read the decisions of my brothers, I am in agreement with their determination that the appellant should immediately be released from prison. It is my view, however, that the question of deportation must be left to the Immigration authorities.

[81] It cannot be gainsaid that since there was a single issue – that of excessive sentence – to be determined by this Court, the delay in rendering the decision was inordinate.

[82] While I agree that some consideration ought to be given to that delay, it nevertheless cannot be refuted that, given the large quantity of cannabis involved – 573.5 kilograms – the sentences initially imposed by **Goodridge J** were entirely appropriate for the offences for which the appellant pleaded guilty.

[83] These Courts, as guardians of this society, must never lose sight of the havoc which can be caused, especially to our young people, by the scourge of illegal drugs. Parliament in its wisdom sought to deter this type of illicit activity by legislating stiff penalties for the possession, importation and trafficking in illegal drugs. It is expected therefore that our Courts, while never disregarding the rights of individuals, will do their part in maintaining public confidence in the administration of justice by ensuring that any offender of the law gets his just deserts.

Justice of Appeal