

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No. 7 of 2009

BETWEEN:

PETER BARTON

Appellant

AND

THE QUEEN

Respondent

BEFORE: The Honourable Marston C.D. Gibson, Chief Justice, The Honourable Peter D.H. Williams, Justice of Appeal and The Honourable Kaye C. Goodridge, Justice of Appeal (Acting).

2011: October 31; November 1, 8, 9, and 24

2019: February 20

Mr. Ajamu Boardi and Ms. Keren Prescott for the Appellant

Mr. Elwood Watts for the Respondent

DECISION

PETER WILLIAMS JA:

I. INTRODUCTION

- [1] This appeal has ranged far and wide. The appellant's counsel has presented submissions on a plethora of grounds of appeal. One would not wish to deprecate counsel's enthusiasm and industry. However, ultimately, we are concerned to determine the main issue, namely, whether the verdicts of the jury (by a majority of 8 to 1) should be set aside on the ground that under all the circumstances of the case they are unsafe or unsatisfactory.
- [2] The defendant was charged with possession of and trafficking in 205 kilograms (x 2.204 = 451 pounds) of cannabis on 18 December 2001 contrary to *sections 6(2) and 18(4)* respectively of the *Drug Abuse (Prevention and Control) Act, Cap. 131 (Drug Act)*. On 3 July 2009 he was found guilty of both offences and on 15 July 2009 was sentenced by *Worrell J* to 10 years' imprisonment for possession and 14 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).

II. EVIDENCE

- [3] The appeal can readily be resolved by a thorough analysis of the evidence. The prosecution case was that the defendant was the sole occupant driving a hired car from Pile Bay, which is off the Spring Garden Highway, when the car was followed by a police car with four police officers. The hired car was chased by the police car and ran into a pavement at Tudor Bridge. The defendant escaped from the car without being caught by two of the policemen who ran after him.
- [4] The police officers in the car were Sergeant Dale Crichlow, Acting Sergeant David Leslie, Constable 1268 Blunt and Constable 606 Griffith. They are referred to hereinafter, without disrespect, by their surnames only. Leslie had known the defendant for about five years before the incident and had seen him on several occasions. He was able to identify him; he had an unobstructed view of his face from the headlights of the police car and the street light. He gave a description of the clothes that the defendant was wearing. The car contained 15 bales of vegetable matter and there was sand in the car. The car and its contents were taken into police custody.
- [5] It was not until over a year after the incident, on 10 March 2003, that the police made contact with the defendant and arrested him. On the following day the

defendant made a number of oral statements to Leslie. The defendant admitted that he was the person driving the car “out through Tudor Bridge that hit” and that he collected the cannabis from “a landing” at Pile Bay. He was shown the 15 bales of suspected cannabis and confirmed that it was the “weed” he had and that by weed he meant “marijuana”. However, he seems to have held the mistaken view that since “a year and a day gone” he was immune from prosecution.

- [6] At the trial the defendant gave a different account of what transpired. His defence was that at the material time he “was nowhere in and around Spring Garden”. The police had “framed” him as he was in fact at the time of the incident at a party with his friend Michelle. She, however, never gave evidence.

III. CONVICTIONS

(a) Grounds of appeal

- [7] On 16 November 2011, Mr. Boardi for the appellant, filed numerous Re-Amended Perfected Grounds of Appeal and provided Skeleton Arguments and oral submissions on the same. We impliedly gave leave to appeal. The grounds were repetitive but those relating to conviction can briefly be

categorised as follows: (i) a challenge to the admission of the Certificate of Analysis dated 10 November 2003 provided by the Forensic Science Centre; (ii) an allegation that the appellant was deprived of his constitutional right to a fair hearing by (a) the prosecution making “negative general characterizations of accused persons”, (b) the failure to give the appellant adequate facilities for the preparation of his defence and (c) the failure to provide an expert to assist the defence; (iii) a challenge to the admission of certain evidence and the judicial directions in relation to the same and in particular (a) the identification evidence, (b) the written statement of a police officer who was living abroad, (c) allowing the jury to see certain photographs, (d) certain evidence in relation to the cannabis, (e) evidence by way of demonstration sought to be given by the appellant and (f) discrepancies in the evidence; and (iv) the verdict was unsafe and unsatisfactory.

- [8] In the circumstances of this case it is unnecessary to give detailed reasons in support of the decision to dismiss the appeal against the convictions. Nevertheless, it may be helpful to explain briefly the reason why what appeared to be the main ground of appeal, namely, the challenge to the admission of the Certificate of Analysis, was misconceived. The verdict was therefore neither unsafe nor unsatisfactory.

(b) Certificate of Analysis

- [9] The defendant, who was unrepresented at the trial, objected to the admission of the Certificate of Analysis. The Certificate was produced pursuant to ***section 41*** of the ***Drug Act***, which came into operation on 15 August 1990. ***Section 41*** provides that evidence of a certificate in the prescribed form signed by an authorised analyst and certifying the substance in the certificate to be a controlled drug shall be *prima facie* evidence of the matters so certified and of the qualification of the analyst. The ***Evidence Act, Cap 121***, which came into operation on 1 September 1994, provides by ***section 132C*** the requirements necessary for the admission of samples as evidence in criminal trials. The ***section*** specifies a Certificate of Sampling of Seized Substance as set out in the *Fifth Schedule* and a Report with details of the sample. Samples are a means of preserving evidence in criminal cases so that the bulk can be discarded. The defendant at his trial submitted that “according to his research” the requirements for taking samples had not been complied with in this case. The trial judge, assisted by Mr. Watts, found no merit in the defendant’s submissions; the prosecution was not relying on samples but on the Certificate of Analysis.

[10] Somewhat surprisingly, Mr. Boardi advanced essentially the same submissions before this Court as the defendant had himself unsuccessfully made before the judge. Mr. Boardi imported the statutory requirements contained in the *Evidence Act* in relation to the Certificate of Sampling of Seized Substance and the Report into the *Drugs Act* in relation to the Certificate of Analysis. However, the sampling procedure and the analysis procedure are separate and distinct; they are set out in two different Acts which provide different requirements and generate different certificates (and in the case of sampling a Report as well). There is therefore no merit in the submissions which challenged the admission into evidence of the Certificate of Analysis.

(c) Convictions safe and no miscarriage of justice

[11] The verdicts can be set aside on the ground that they are unsafe or unsatisfactory: *Criminal Appeal Act, Cap. 113A section 4(1)(a)*. However, there is no doubt that the verdicts are safe and satisfactory. The appellant was caught in possession of a trafficable quantity of cannabis (which is fifteen grammes or any quantity in excess thereof). Apart from the Certificate of Analysis, the forensic scientist gave oral evidence that “the total weight of the cannabis was 205 kilograms”. The appellant was known to the police and

identified as the person transporting the cannabis. He behaved suspiciously by running away from the police and was on the run for over a year. He made an oral confession to the police that he collected the bales of cannabis from Pile Bay and confirmed that his reference to “weed” meant marijuana. There was therefore also proof by admission; in the circumstances of this case the admission of the appellant as to his knowledge of the drugs constituted sufficient evidence to identify what they were. The jury obviously believed the prosecution case and rejected the defence of the appellant that he had no connection with the drugs and was at a party during the material time.

- [12] If a conclusion is made that the conviction is safe there should be no need to discuss the proviso. However, consideration of the proviso has become so much a part of Caribbean criminal jurisprudence that for the sake of completeness the statutory provision is discussed. Even if there was some technical merit in any of the grounds of appeal this Court could properly apply the proviso because:

“The Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”
(Criminal Appeal Act, Cap. 113A, section 4 (2).)

[13] The Privy Council stated succinctly in *Stafford v. The State (Trinidad and Tobago)* [1999] 1 WLR 2026 at *paragraph 9* the principles which govern the application of the proviso:

“The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all of the evidence...where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection...and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence.”

Lord Hope of Craighead’s statement quoted above has been endorsed in the recent Privy Council decision of *Benjamin and another v. The State (Trinidad and Tobago)* (2012) 82 WIR 445 at *paragraph [52]*.

[14] The test for whether a miscarriage of justice has actually occurred was recently considered in the Privy Council decision of *Cassell & Anor v. The Queen (Montserrat)* [2016] UKPC 19 (4 July 2016). It was stated therein that it is “certainly necessary” that the appellate court is satisfied of guilt, but that “is not by itself sufficient”. “The test is normally whether the appellate court is, further, satisfied that *any jury* acting properly must inevitably have

convicted the defendant if the flaw(s) in the proceedings had not occurred”:
at *paragraph 28*. It follows that taking into account counsel’s submissions on
the inadmissible evidence, the breach of constitutional rights and judicial
error, the verdicts nevertheless did not constitute a miscarriage of justice.

[15] It is important in our system of criminal justice that every offender should
have a fair trial and that this Court is satisfied that the verdict is safe and
satisfactory within that context. However, it is equally important that
offenders who are guilty of crime be convicted and that their convictions if
safe and satisfactory be upheld by this Court. The victims of crime and the
relatives of those killed must feel comfortable in the knowledge that the
perpetrators of crime will be tried without delay and that on their conviction
proportionate punishment will be imposed. The general public demands no
less.

IV. SENTENCES

(a) *The judge’s sentencing remarks*

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

“This court has to follow the guidelines in R v. Walter Prescod...The court is not sentencing you for your previous convictions but the court has to bear in mind the fact that you have previous convictions for similar matters...[P]ossession of a controlled drug and drug trafficking cannot be visited with a non-custodial sentence...The court is taking into consideration the fact that you also spent 16 and a half months on remand pending the trial of this matter. You are still a relatively young person, the court takes that into consideration and also what your two character witnesses said on your behalf...There was no violence in respect of this particular offence. There was no use of [a] firearm...However, when one looks at the quantity of drugs and the impact that such drugs would have unleashed on society...those are aggravating factors. This is a matter that obviously must have involved some level of sophistication as far as planning is concerned...In respect of possession, the sentence is 10 years in prison. In respect of trafficking, the sentence is 14 years in prison. Both sentences will run concurrently from the time of the verdict of the jury.”

(b) *Grounds of appeal*

[17] The grounds of appeal in respect of the sentences were to the effect that the judge passed excessive sentences because he based them largely on the appellant’s previous convictions; he did not state the amount of consideration in reduction of sentence that he gave for the 16½ months spent in custody; he did not sufficiently take into account the mitigating factors of the circumstances of the offence and he did not give enough weight to the testimony of the appellant’s character witnesses. We impliedly gave leave to appeal.

(c) ***The statutory punishment provisions***

[18] The maximum punishment following a conviction on indictment for importation and possession of a controlled drug was at the time of sentencing (and is) a fine of \$500,000 or imprisonment for 20 years, or both, and the maximum punishment following a conviction on indictment for the more serious offence of trafficking was at the time of sentencing (and is) imprisonment for life (no fine): ***section 37(3) and (4) of the Drug Act*** refers to the *Fourth Schedule* with respect to the way in which offences under the ***Drugs Act*** are punishable.

(d) ***Guideline decision: Walter Prescod***

[19] The guideline decision on sentences for drug offences was given by this Court (***Sir David Simmons CJ, Peter Williams and Moore JJA***) many years ago in ***Walter Prescod v. R., Criminal Appeal No. 32 of 2001, unreported decision of 10 March 2006***. ***Prescod*** was indicted on three counts, that on 3 March 2000 he (i) imported, (ii) had in his possession and (iii) trafficked in 127.18 kilograms (x 2.204 = 280 pounds) of cannabis. He pleaded guilty to importation and possession but no evidence was offered on trafficking. ***Prescod*** was observed by the police in the vicinity of Glitter Bay Hotel loading the cannabis from the beach into two cars. He had 8 previous

convictions, 5 of which were for firearms offences, though he was not imprisoned for any of the offences. There was no record of the judge's sentencing remarks or of any reasons that he gave for the sentences. On 7 June 2001, the judge imposed a sentence of 12 years' imprisonment. However, another 4 years and 9 months elapsed before this Court decided the appeal. The Court held that the 12 year sentence was not wrong in principle having regard to the appellant's criminal history but reduced the sentence by 2 years to 10 years to take account of "unexplained systemic failure" for the delay in the time it took for the case to reach this Court.

[20] The Chief Justice took the opportunity to promulgate the following guidelines for sentencing in criminal drug trials in the High Court. The guidelines are set out at *paragraph [22]* of the *Prescod* judgment and those that are material to the instant case are emphasised 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*.

(1) In a *contested* case of importation of 100 lbs or less of cannabis, the starting point for a sentence should be ten years.

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

(3) *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.

(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 sentences starting at **12 years and increasing on the same basis as in (2).**

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

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

(7) Where the facts permit, a trial judge should take into account the different roles played by 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 principal offender.”

[21] The aggravating and mitigating factors to be weighed in drug cases are set out in *paragraph [23]* of the *Prescod* judgment. The aggravating factors are (a) the quantity of drugs; (b) the level of sophistication; (c) refusal to co-operate with the police; (d) the use of violence; (e) possession or use of a firearm and (f) previous convictions for drug offences. The mitigating factors listed are (i) the age of the offender; (ii) the mental or physical health of the offender; (iii) co-operation with the police; (iv) evidence of genuine remorse and (v) an early guilty plea (this should really be treated as a separate issue requiring a significant discount on sentence).

(e) *The English Definitive Guideline*

[22] It is also helpful to refer to the English Sentencing Council’s Drug Offences Definitive Guideline which came into effect on 27 February 2012, not for fixing the range of sentence applicable to drug offences in this jurisdiction (which would be contrary to *paragraph [21]* of *Prescod*) but for the purpose of cross-referencing the relevant principles. The Guideline states that the Court should first determine the offender’s culpability (role) and the harm caused (quantity). It states that “in assessing culpability, the sentencer should weigh up all the factors of the case to determine role...In assessing harm, quantity is determined by the weight of the product.” *Lady Justice Hallett* in giving the Court of Appeal decision, *Attorney General’s References (Nos. 15, 16 and 17 of 2012) (David Lewis and Others) [2013] 1 Cr. App. R. (S.) 52* commented on the new Guideline and stated at *paragraph 18*:

“The focus for sentencing in drugs offences remains the same: it is on culpability and harm and massive importations of drugs have the potential to cause immense harm.”

(f) *Appellant’s submissions: Mark Jack and pre-sentence report*

[23] Counsel for the appellant relied on the decision of this Court subsequent to *Prescod* in *Mark Jack v. R., Criminal Appeal No. 9 of 2008, unreported decision of 30 January 2009*. *Jack*, a 28 year old national of St. Vincent, was

caught by the police “swimming ashore some weed” from a boat off Cummins Beach, St. Philip. He pleaded guilty on 14 April 2008 to importing, possession of and trafficking in 221.1 kilograms (x 2.204 = 487 pounds) of cannabis on 17 January 2002; there is also a reference to 560 pounds being loaded onto the boat in St. Vincent. He also pleaded guilty to being in possession of a shotgun and ammunition. He was sentenced by *Goodridge J* to 8 years’ imprisonment for trafficking but reprimanded and discharged for importation and possession. He was sentenced to 4 years’ imprisonment to run concurrently for possession of a firearm and for possession of ammunition (possession of a firearm and ammunition required a mandatory sentence of 7 years). The sole ground of appeal was that the 8 year sentence for trafficking was excessive.

- [24] This Court (*Sir David Simmons CJ, Peter Williams* and *Moore JJA*) dismissed the appeal and confirmed the sentence on the basis that: (i) the starting point was 15 years, *paragraph [15]*; (ii) the aggravating factors were: a substantial quantity of cannabis, a high degree of sophistication, possession of a shotgun and a criminal record (two offences, possession of cannabis and entering Barbados by sea other than at a port of entry), *paragraph [16]*; (iii) the mitigating factors were: co-operation with the police and a guilty plea,

paragraph [17]. The Court also factored in an unspecified “discount” on the sentence to take into account the 6 years spent in custody. However, no specific discount was given for each factor. The Court held that the 8 year sentence was “proportionate to the seriousness of the offences” (*paragraph [22]*). Mr. Boardi submitted that if 8 years were proportionate in the circumstances of *Jack*, the appellant’s sentence must be less than 8 years even when account is taken of the guilty plea in *Jack* and the fact that in the instant case there was no guilty plea.

[25] No pre-sentence report was obtained by the judge or this Court. Mr. Boardi submitted that if this Court was minded not to quash the convictions, it should obtain a pre-sentence report in compliance with *section 37(4)* of the *Penal System Reform Act, Cap. 139*. *Section 37(1)* states that a court shall obtain and consider a pre-sentence report before imposing a custodial sentence, except *section 37(2)* applies where the offence is triable only on indictment. The mode of prosecution of the offences of importation, possession and trafficking (*Fourth Schedule* of the *Drug Act*) is summary or on indictment. However, a custodial sentence is not invalidated by the failure to obtain a pre-sentence report: *section 37(4)*. It follows that the provision is not mandatory but directory.

- [26] This matter was discussed in the decision given by *Peter Williams CJ (Ag)* in *Damian Omar Cummins v. Commissioner of Police, Magisterial Appeal No. 6 of 2011, unreported decision of 3 May 2012*. It was stated at *paragraph [4]* that it is in this Court's discretion whether to impose or confirm a sentence without first obtaining a pre-sentence report. Further, it was left to the good sense of the Magistrate to decide whether a pre-sentence report was required based on the facts and circumstances of that case. With regard to an offender who is mentally disordered, the court shall obtain and consider a medical report (*section 38(1)*) but the requirement does not apply if, "in the circumstances of the case", the court is of opinion that it is unnecessary to obtain a medical report. There is no such statutory discretion given to this Court in relation specifically to a pre-sentence report. However, the Caribbean Court of Justice has stated in *R. v. Gittens (2010) 75 WIR 126* at *[17]* that the Court of Appeal need not obtain and consider a pre-sentence report if in the circumstances of the case this is unnecessary. It is quite clear therefore that a pre-sentence report though highly desirable to assist in arriving at a proportionate sentence is not obligatory in every case.
- [27] This is not a case in which there was a dearth of information about the appellant before the Court. The judge expressly took into account the

favourable evidence of the appellant's character witnesses, the appellant's "relatively young" age (39 at the time of sentence) and the detailed information that the appellant gave about himself and his family circumstances in mitigation of sentence. Mr. Watts, prosecution counsel at the trial, commended one of the character witnesses for the information that he gave to the court about the appellant. In all the circumstances, we considered that in view of the information before the Court it was not necessary to obtain a pre-sentence report.

(g) *Discussion*

[28] The judge stated that he had to follow the *Prescod* guidelines. However, there is a lack of transparency based on the guidelines of the manner in which the sentences of 14 and 10 years were arrived at. Sentencing is becoming more structured and defendants as well as other persons and institutions affected (including this Court) are entitled to know precisely the method by which the sentence was determined. This Court is therefore required to review afresh the appropriate sentences in the light of (i) the *Prescod* guideline judgment, (ii) the *Penal System Reform Act, Cap. 139*, (iii) the commentary on the said *Act* by the Caribbean Court of Justice in the judgment of *R. v. Gittens (2010) 75 WIR 126*, and (iv) the submissions of counsel.

[29] *Prescod* at *paragraph [22]* cited above set out the offence categories. The categories relevant to this appeal are at guidelines (3) and (4); possession and trafficking in cannabis. In both cases the starting point is 12 years in contested cases where “the amount exceeds 100 lbs” and “for trafficking larger amounts” than 100 lbs but the amount of the excess is not stated. The category range is also not stated but it can be assumed that the range for importation is the maximum imprisonment for the offence which is 20 years and for trafficking, imprisonment for life. No distinction is made in the starting points between importation, possession and trafficking. The guidelines do not state when it is appropriate to impose a fine. A view has been expressed that the inter-island shipment of narcotic drugs invariably involves quantities far in excess in 100 lbs whereas the guidelines do not indicate the increases in sentence that should be imposed to reflect weights over 100 lbs: see *paragraph 9* of *Jack*. There are no guidelines in respect of summary trials in the Magistrate’s Courts. However, in defence of the guidelines in *Prescod*, it may be said that they have served as a useful guide though they need to be reviewed and revised to take account of recent developments in this area of the law.

[30] In relation to guideline (5) of *Prescod*, the appellant does not benefit from a plea of guilty. He initially made an oral admission of guilt but thereafter maintained his innocence even in his mitigation of sentence. There was no evidence of remorse for the offences. In relation to guideline (6) of *Prescod*, the appellant had nine previous convictions for drug offences between 1996 and 2008. The judge took into account that a defendant is not generally to be sentenced on his past record; a matter that has been discussed by this Court in *DPP's Reference No 2 of 2010, R. v. Richard Hurley, unreported decision of 8 July 2011* at *paragraph [73] to [82]*. Contrary to the ground of appeal that the sentence was based largely on the appellant's previous convictions, the judge said to the appellant, "the Court is not sentencing you for your previous convictions". In relation to guideline (7) of *Prescod*, the appellant gave no account of the role he played in relation to the transportation of the cannabis except that he made an oral admission to the police that he collected it from Pile Bay. The drugs were in his sole possession and control when he was caught. He was convicted of trafficking, which is defined as encompassing a wide range of activities in connection with drug dealing as set out in *section 18* of the *Drug Act*. The appellant's links to the original source of the cannabis or the precise function he performed are not in

evidence. However, from the available evidence it seems that the appellant's culpability or the role he played in the operation was significant.

[31] At *paragraph [21]* above the aggravating and mitigating factors stated in *Prescod* are set out. Serious aggravating factors were the quantity or weight of the drugs, the level of sophistication and the fact that the appellant did not co-operate with the police. The previous convictions for drug offences have been referred to. Mitigating factors were the age of the appellant and the fact that there was no violence or use of a firearm in the commission of the offence. The Court must also take into account the need for the rehabilitation of the offender. Balancing the aggravating and mitigating factors, there were serious aggravating factors with virtually no significant mitigating factors.

[32] The instant case is distinguishable from *Prescod*; in that case there was no conviction for trafficking, the quantity of cannabis was less (280 pounds against 451 in this case) and *Prescod* pleaded guilty. The instant case does have similarities to *Jack*; in both cases there was a conviction for trafficking and the quantity of cannabis was similar (487 pounds in *Jack* and 451 pounds in the instant case). However, unlike the appellant, both *Prescod* and *Jack* pleaded guilty, which entitled them to a substantial discount on sentence. Nevertheless, two factors were common both to *Jack's* case and to the instant

case; the unacceptable length of time spent on remand and the delay in hearing the case.

- [33] The Privy Council considered the proper approach on an appeal against sentence in *Sabapathee v. Director of Public Prosecutions (Mauritius)* [2014] UKPC 19, [2015] 1 LRC 148 at *paragraph [18]*. Although the case concerned an alleged inadequate sentence, the two principles stated are also applicable in this case, as follows:

“When it is considering an appeal against sentence ...the question for an appellate court...was whether the sentence was wrong in law or plainly too [high], making full allowance for the [fact that] the sentencing court has a wide area of judgment. An appellate court must also take full allowance for the fact that by the nature of things generally speaking a sentencing court has advantages in its feel for the case and its ability to assess all the relevant facts and circumstances, including the effect on any victim and the attitude of the offender, which are not shared to the same extent by a court subsequently reviewing its decision on the written record.”

- [34] Due regard has been taken of the advantage that the judge had in hearing the evidence and submissions and observing the defendant at the trial. I am satisfied that the notional sentences imposed by the judge of 14 years for trafficking and 10 years for importation reflected the total circumstances of the case and took into account the aggravating and mitigating factors identified in *Prescod*. The sentences were commensurate with the offences

committed. However, additional factors have to be taken into account in determining the sentence that this Court should impose.

(h) Credit for time spent on remand

[35] The decision of the Caribbean Court of Justice (CCJ) in *R. v. da Costa Hall*, (2011) 77 WIR 66 at *paragraph [17]* stated that the prima facie rule was full credit for time served in pre-sentence custody. This decision had not yet been given when the judge sentenced the appellant. This Court has nevertheless applied the principle of *da Costa Hall* to appeals in which the sentence of the trial judge pre-dated that decision: see *Elvis Erwin Alexander v. R., Criminal Appeal No. 14 of 2007, unreported decision of 13 June 2014* at *paragraph [72]*. The CCJ held in its recent decision of *Burton v. R., Nurse v. R.*, 84 WIR 84 that this Court in declining to follow its earlier decisions which applied “the clear principles adumbrated in *da Costa Hall*” and in holding that the principles did not have “retroactive” effect “proceeded on a wrong premise”: *paragraph [23]*. The CCJ further held that this Court ought to have corrected the wrong of giving no credit for the time spent of remand. In *Burton* and *Nurse* the appellants spent 4 years and three months on remand (*paragraph [35]*) but the judge stated that he gave no credit for the first two years in custody. In the circumstances, the CCJ allowed the appeals, set aside the

judgment of this Court and varied the sentences of *Burton* and *Nurse* by deducting the said two years from the notional sentences.

[36] In the instant case the judge did “take into consideration a period of 16½ months spent on remand pending the trial”, but he did not state a specific credit to be given. In cases decided before *da Costa Hall* trial judges treated the time spent on remand as a factor in mitigation whereas the prisoner had been *prima facie* entitled to have that time deducted from the sentence imposed: *Burton* and *Nurse* at *paragraph [34]*. In most cases it will be convenient and just, in spite of the fact that the time spent on remand has been taken into account but without a stated specified credit, to nevertheless give the appellant full credit for the time spent on remand. On a review of the sentence and the time spent on remand I consider that in the light of the total period of incarceration to which the appellant would be subject, it would be just to give him full credit for the time spent on remand.

[37] No evidence was given at the sentencing hearing of the exact time that the appellant spent on remand but it was more than the 16½ months stated by the judge. The appellant spent two periods on remand in prison according to the information given to us by the prison authorities: first, from 12 March 2003 to 3 June 2004 and secondly, from 21 February 2008 to 15 July 2009, the date

of sentence. The first period was 1 year (366 days, 2004 was a leap year) and 84 days and the second period was 1 year (366 days, 2008 was a leap year) and 145 days, making a total of 2 years (732 days) and 229 days to which the appellant is entitled to be credited for the said periods in custody.

[38] A Practice Direction is urgently needed to ensure that the correct procedure for the implementation of the *da Costa Hall* principle of granting full credit for the time spent in pre-trial custody is followed uniformly and consistently. Already the CCJ has had to give two decisions implementing the principle in circumstances where this Court failed to do so: *Burton and Nurse* and *Clarence Sealy v. R. [2016] CCJ 1 (AJ), judgment given on 29 January 2016.*

(i) *Unconstitutional Delay*

[39] A Court of Appeal cannot properly ignore or minimize the significance of delay which is generally obvious from the record of appeal. Even if the issue is not raised by counsel, the Court of its own motion has an obligation to investigate the matter and where appropriate to grant redress. The judges are the guardians of the Constitution and they must give redress to litigants who suffer breaches of their constitutional rights. A breach of an appellant's constitutional right to have the proceedings concluded, including the delivery

of the decision or judgment within a reasonable time, has been discussed by the Privy Council under the heading “unconstitutional delay” in *Sabapathee v. Director of Public Prosecutions (Mauritius)* [2014] UKPC 19, [2015] 1 LRC 148 at *paragraph* [22] to [27]. Unconstitutional delay in giving a decision or judgment may be indicative of the inability of the judicial officer to discharge one of the essential functions of judicial office.

[40] The appropriate redress for delay and the State’s absolute constitutional obligation to ensure that hearings take place within a reasonable time have been extensively discussed by *Peter Williams JA* in *Elvis Alexander* at *paragraph* [79] to [120]. In spite of the separation of powers, it is the responsibility of the Executive to ensure that the Judiciary functions in such a manner that it does not breach the citizen’s constitutional rights.

[41] The defendant was unrepresented by counsel but the record reveals that he was anxious to have his case heard and disposed of. *Worrell J* is to be commended for the obvious courtesy and patience that he extended to the unrepresented defendant. However, the downside was that the hearing of the trial took 10 days over a period of more than a month.

[42] Mr. Boardi did raise the issue of systemic delay in his written submissions in support of a reduction in sentence. He submitted that the systemic delay in

the instant case demanded a greater reduction in sentence than the reduction of two years made in *Prescod*. The date of the offence in the instant case was 18 December 2001 but the defendant was not arrested until 10 March 2003; he seems to have been in hiding for over a year. The case first came on for trial on 14 April 2008 (five years after arrest) but was adjourned on numerous occasions prior to the commencement of the trial over a year later on 10 June 2009 (six years after arrest). There was no explanation in the record for the inordinate delay. Such protracted hearings are not conducive to the elimination of backlogs in the system or to the timely disposal of current cases.

[43] A further delay of 8 years has occurred between the date of sentence on the said 15 July 2009 and the date of disposal of this appeal, accounted for chiefly by the time between the conclusion of the hearing of the appeal and the delivery of this decision. It is the responsibility of the presiding judge in the appeal to ensure that a timely decision is given. *Peter Williams JA* stated in *Elvis Alexander* at *paragraph [80]* as follows:

“In the High Court the judge generally has the sole responsibility after the conclusion of the hearing for the timely delivery of a decision without undue delay. However, in this Court where three judges hear an appeal the practice has been for the presiding judge to write the leading judgment or to assign the judge who is to write the same. There is a shared obligation with the presiding judge bearing the ultimate responsibility to ensure that the decision is given

within the reasonable time guarantee. It is especially important for this Court to establish and maintain a culture of timely delivery of judgments that can be emulated by the lower courts.”

- [44] Moreover, unconstitutional delay limits the remedies available to the Court in disposing of an appeal. For example, it will not generally be appropriate to order a retrial where there has been such delay. It may also not be appropriate to order the imposition of a custodial sentence where the convicted person had been on bail for an unreasonably long time awaiting trial.
- [45] Frustration and anguish resulting from significant delay can constitute unconstitutional inhuman and degrading treatment. When the convicted person has been in custody for a long time without a decision in his case he will inevitably apply to be released from prison on bail as happened in this case. Such an application for bail should be heard where possible by the full panel that heard the appeal and not by only the presiding judge of the appeal.
- [46] Significant delay also creates anomalies and unfairness in the judicial system. It is therefore particularly disturbing when unconstitutional delay has been at the level of the Court of Appeal, which should be an exemplary Court, not only for the High Court and the Magistrates’ Courts but also for the numerous Tribunals which are expected to dispense justice in a timely manner.

[47] This Court should follow the procedure suggested for the prompt delivery of judgments as set out by *Peter Williams JA* in *Elvis Alexander* at *paragraph [107]* as follows:

“Each case will depend on its own circumstances but a good practice worthy of consideration would be for the judge at the conclusion of the hearing to indicate to the parties the time frame within which a judgment can be expected. If the judge fails to meet the indicated time, (s)he should then provide the parties with an explanation for the failure and indicate a new time frame. This Court should take the lead in implementing such a culture.”

[48] The time taken in this case from arrest to disposal of the appeal has been more than 15 years.

[49] A long period of delay also occurred in *Jack*. He was on remand in prison for over 6 years between the date of the offence (17 January 2002) and the date of sentence (14 April 2008); he was granted bail but as a national of St. Vincent and the Grenadines he was unable to obtain a surety. Referring to the reasonable time guarantee of the *Constitution*, *Sir David Simmons CJ* stated at *paragraph [19]* that:

“[I]t is quite unacceptable that the appellant should have been on remand in prison for 6 calendar years before trial. A person charged for a crime may have done wrong; he nevertheless has constitutional rights.”

The Court of Appeal decision was given on 30 January 2009; 7 years therefore elapsed between arrest and disposal by this Court.

[50] In the instant case the appellant could not be found for over a year after the incident. It is not unreasonable to assume from what he told the police that he was avoiding the police because he erroneously believed that he could not have been charged if a year and a day had elapsed since the offence. The conduct of a defendant is an important consideration in assessing the responsibility for the delay: see *Boolell v. State of Mauritius* [2006] UKPC 46 (16 October 2006); (Note) [2012] 1 WLR 3718 at paragraph 33. As stated by the Privy Council in *Celine v. State of Mauritius* [2012] 1 WLR 3707 at paragraph 21, “the choice of an appropriate sentence is highly dependent on the view that one takes of the particular circumstances of an individual case”. The Privy Council in another case from Mauritius, *Elaheebocus v. The State of Mauritius* (2009) 4 LRC 783 at paragraph [23] in which Lord Brown of Eaton-under-Heywood stated:

“[T]heir Lordships on balance think it right to mark the undoubted constitutional breach in this case by making a modest reduction in the sentence to be served.”

The sentence was reduced from 4 to 3½ years.

[51] A total period of more than 15 years (from arrest to disposal) constitutes a breach of the appellant's constitutional right. The delay has been far too long; it warrants constitutional redress by way of a significant reduction in sentence. Counsel for the appellant submitted that the delay in this case was longer than that in *Prescod*, which was the reason for reducing the sentence in that case by two years. He submitted that "the circumstances of the appellant's matter demand a greater reduction in sentence". In the very special circumstances of this case I would reduce the sentences by 3 years to take account of the unconstitutional delay.

V. DISPOSAL

[52] I would therefore dismiss the appeal against the convictions but allow the appeal against the sentences to the extent indicated above: (i) a reduction of sentence of 3 years for breach of the reasonable time guarantee and (ii) a credit of 2 years and 229 days (subject to any correction) for the time spent on remand in prison. The "primary rule" (*da Costa Hall* at *paragraph [18]*) is to give full credit for time spent on remand even where more than one offence is involved; it will therefore be appropriate to credit both sentences with the said time. It follows that both the 14 year and 10 year sentences imposed by the judge are reduced by the said 3 years to 11 and 7 years and further reduced by

the said credit of 2 years and 229 days. The sentences imposed by this Court are therefore 8 years and 136 days for trafficking and 4 years and 136 days for possession. They are ordered to run concurrently from the date of the imposition of the original sentences on 15 July 2009.

[53] The appellant would have already served his sentence for possession and, subject to clarification from the Prison, may have also served his sentence for trafficking. An inevitable consequence of the systemic delay in this jurisdiction will be that convicted persons will sometimes have served their sentences before their appeals have been finally decided. An obligation is therefore placed on this Court to take into account any eligibility of the appellant for remission of sentence on the ground of his industry and good conduct. The CCJ was informed by prosecuting counsel in the recent appeal from this jurisdiction, *Clarence Sealy*, that Sealy was entitled to full remission. There is no evidence in this appeal as to the appellant's entitlement. However, in view of all the circumstances including the need to avoid further delay in the matter and the fact that the appellant may have served or nearly served his entire sentence, the fairest means of disposing of this appeal would be to release the appellant at the close of today's hearing. I would therefore declare that the appellant be deemed to have already served

his sentences and order that his term of imprisonment shall expire by the conclusion of the hearing.

[54] There is an obvious need for this Court to give directions on the procedure to be followed and the manner in which remission of sentence is to be taken into account in the sentencing process. This need is especially important in circumstances in which an appellant may be entitled to be released having served his sentence taking into account his remission (as happened in *Clarence Sealy*).

[55] It should be added that the sentencing court should state clearly the sentence imposed on the defendant and how it has been arrived at. A sentence that is not properly articulated is of no value as a precedent and provides no guidance for future cases. It is not satisfactory for the court merely to state that the defendant is sentenced to “time spent” or to “time served” and released from custody. The Bahamas Court of Appeal in *The Attorney General v. Larry Raymond Jones and Others, SCCrApp. No. 12 of 2007, decision dated 23 October 2008*, held that the sentence of “time served” passed on the defendant was a sentence not known to the law in the Bahamas; it was not based on statute or common law. In that case Jones had been convicted of murder and sentenced to death in accordance with the existing law. The Privy Council

held that the mandatory death sentence was unconstitutional and referred the matter to the High Court for the defendant to be re-sentenced. The defendant before his release had served 20 calendar years which were stated to be equivalent to approximately 30 “jail” years under the Prison Rules. The judge sentenced the defendant to “time served” and released him from prison. The Court of Appeal quashed the sentence of “time served” and substituted a sentence of 30 years in prison. The Court held that the judge in deciding that the defendant should be released must have meant that his sentence was one of 30 years with effect from the date of conviction taking into account the time he spent in custody and the Prison Rules. The judge therefore should have imposed a sentence of 30 years thereby entitling the defendant to be released from prison.

VI. POSTSCRIPT – JUDICIAL GUIDELINES ON SENTENCING

[56] Statements that seek to play down the importance and significance of guideline judgments on sentencing and to attribute an enhanced discretion to the judge in sentencing are misconceived and legally incorrect. Sentencing guidelines are designed to provide a clear and logical framework for the determination of the appropriate sentence. They provide a structured

approach to offence seriousness, culpability and harm. They also provide a benchmark for consistency in sentencing in respect of similar offences.

[57] There is statutory recognition of general sentencing guidelines as provided in *section 41* of the *Penal System Reform Act, Cap. 139*. This Court has been commended by the CCJ for producing guideline judgments. In *da Costa Hall* at *paragraph [1]*, the CCJ stated:

“The legislature of Barbados in passing the Penal Reform Act, Cap 139 has done much to modernise the sentencing process by making it certain, transparent and consistent. **The Court of Appeal of Barbados has also made its contribution** towards clarity in the sentencing phase of trial **in several judgments laying down sentencing guidelines for the benefit of judges, lawyers and the public at large.**”
(Emphasis added.)

The CCJ decision was given on 15 April 2011.

[58] The CCJ acknowledged the exercise of judicial discretion in the sentencing process but stressed the legal significance of guidelines. *Anderson J* delivering the judgment in *Burton* and *Nurse* stated at *paragraphs [13], [14]* and *[15]*:

“We agree that the exercise of judicial discretion is and must remain at the heart of the sentencing process...As has been said repeatedly, the guidelines are only guidelines and not meant to be applied slavishly to every case. They provide assistance to the sentencing judge not rules from which departure is prohibited. No guidelines can ever cover the

totality of circumstances in which criminal ingenuity and recklessness may be expressed...But this is much different from saying that the guidelines lack legal significance or may be disregarded without reason. The guidelines distil important aspects of sentencing principles. **When pronounced by the Court of Appeal they constitute rules of practice.** Lower courts must have regard to the guidelines. **The sacrosanct nature of the discretion of the sentencing judge is preserved** in two ways. Firstly, the guidelines indicate a range of sentences that may be appropriate for particular categories of offences and **it is for the sentencing judge to decide where on the continuum of the tariff the specific sentence ought to be placed** having regard to the peculiarities of the circumstances of the offence and the offender. Secondly, **it is perfectly appropriate for the sentencing judge to not follow the guidelines in a particular case if he or she concludes that their application would not result in the appropriate sentence.** Public confidence in the criminal justice system must be maintained by the imposition of suitable penalties taking into consideration the penological objectives of protection of the public, deterrence, and rehabilitation of the offender, and it is for the sentencing judge in his discretion to make the call as to the sentence that will come closest to achieving those objectives. **However, if the sentencing judge decides to depart from the guidelines established by the superior court then he or she should explain his or her reasons for doing so.**" (Emphasis added.)

- [59] Modern sentencing practice in Commonwealth countries requires the judge to exercise judgment which is constrained by the sources of sentencing law: namely, the statutory provisions, sentencing guidelines, judicial decisions and to a lesser extent the writings of academics: see *paragraph 1.5 of Sentencing and Criminal Justice, Fifth Edition (2010) by Professor Andrew Ashworth.*

There is clear and strong academic recognition of the importance and significance of guideline judgments in sentencing as explained by *Professor*

Ashworth at 1.5.2:

“Apart from the increase of legislation on sentencing, the other major development in recent years – **and the other major constraint on sentencing decisions** – has been the **growth of guidelines**...The essence of guidelines is to provide different ranges of sentence for different levels of seriousness of each type of offence, and, within each range, to indicate a common starting point. The aim of the technique is to structure judicial discretion – not to take it away, but to provide a framework within which the court can locate the particular offence with which it is dealing, and then reflect the facts of that case (notably, the **aggravating and mitigating factors**) by placing it **appropriately within or outside the relevant range**. There are sound constitutional reasons for introducing such a framework. Sentencing decisions are of great significance to the public (insofar as they convey the degree of censure of the offender for the offence(s)), to victims, and to the offenders themselves. They may involve considerable deprivations of liberty, restrictions on liberty, or deprivation of money or other assets. It is therefore absolutely right that the rule of law should apply to them as far as possible: **although passing sentence will always require an element of judgment, that judgment should be exercised within a framework of principles and guidelines set out in advance, so that court decisions are consistent in their approach and the outcomes reasonably predictable.**” (Emphasis added.)

[60] This Court has done significant work in promulgating guideline judgments.

However, no guideline judgments have been given recently. This lacuna has resulted in the hearing of too many unnecessary appeals against sentence

thereby wasting the Court's time. For example, there is no guideline judgment on sexual offences. Furthermore, existing guideline judgments are not meant to be cast in stone for ever; they should be brought up to date to take account of new developments and circumstances. It is widely acknowledged that the guideline judgment on manslaughter (*Pierre Lorde (2006) 73 WIR 28*) needs to be reviewed and revised rather than to be criticised.

[61] The CCJ suggested that “any revision of the guidelines should ideally be undertaken by the Court of Appeal in the first instance, bearing in mind the requirements and exigencies of the prevailing circumstances and after full argument with possible input from the Bar and possibly from other stakeholders in Barbados”: see *Burton and Nurse at paragraph [19]*.

[62] Guideline judgments will be especially important in the event that plea bargaining is adopted as one of the means of eliminating delay and consequently reducing the serious backlog in the criminal justice system. Plea bargaining will generally require the judge to give an indication of the probable sentence where such has been sought by the accused. In those circumstances guideline judgments will become even more valuable. This Court should therefore not abdicate its responsibility to provide guideline

judgments where none exist and to review and revise the existing guideline judgments.

JUSTICE OF APPEAL

GIBSON CJ:

[63] I have had the opportunity of reading the judgment of my learned brother **Peter Williams JA** and am in agreement with both his reasoning and proposed disposition. The Court's apologises for the length of time it has taken to deliver this judgment.

CHIEF JUSTICE

GOODRIDGE JA (AG)

[64] I have had the advantage of reading in advance the judgment prepared by my learned brother **Williams JA**. I agree with his opinion as to the disposition of this appeal and there is nothing further which I can usefully add.

JUSTICE OF APPEAL (AG)