BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CRIMINAL DIVISION

Criminal Appeals No. 6, 9, 10 of 2009 & No. 2 of 2010

BETWEEN

ROHAN SHASTRI RAMBARRAN
GAVIN WAYNE GREEN
LEMME MICHAEL CAMPBELL
SOMWATTIE PERSAUD **Appellants**

AND

THE QUEEN **Respondent**

Before the Hon. Sir Marston C.D. Gibson K.A., Chief Justice; the Hon. Sandra P. Mason and the Hon. Andrew D. Burgess, Justices of Appeal

2014: September 22 and 23; December 2 to 5;
2015: March 13 and 24;
2016: March 15, 16, 18 and 22;
2019: August 28

Sir Richard Cheltenham K.A., QC, and Ms. Shelly-Ann Seecharan for Appellant Rambarran
Mr. Arthur Holder, Mr. Kendrid Sargeant with Mr. Shane Thompson and Ms. Danielle Mottley for Appellant Campbell
Mr. Marlon Gordon with Safiya Moore for the Appellants Persaud and Green
Mr. Charles Leacock QC Director of Public Prosecutions; Mr. Anthony Blackman and Ms. Krystal Delaney for the Crown.

DECISION

GIBSON CJ:

Introduction

[1] This case deserves the description "legendary" for several reasons. The first is that it was the longest trial in recent memory, and perhaps in the entire history of trials in this country, to occupy the High Court of Barbados. The trial took some 14 weeks, resulting in 10 Volumes of Trial Transcript of some 4,656 pages; a Summation Volume of 545 pages; and a Mitigation and Sentencing Volume of 136 pages, for a total of 5,337 pages of trial transcript.

[2] Six persons, all Guyanese nationals, were arrested, tried and convicted of serious drug offences. Two of them, a husband and wife named Christopher and Diane Bacchus ("Bacchus"), testified at trial and implicated both themselves and their co-accuseds. The Bacchuses never appealed. They have since been released from prison, along with two of the appellants, Somwattie Persaud and Gavin Wayne Green. Ms. Persaud was released before the hearing of the appeal by the former Governor-General acting on the prerogative of mercy, leaving only two remaining incarcerated appellants, Rohan Rambarran ("Rambarran") and Lemme Campbell ("Campbell"). This appeal therefore mainly concerns them.

[3] There are several issues which we will address on appeal, including, (i) the admissibility of the confession statements; (ii) the claimed violation of the rule in *Browne v Dunn* (1893) 6 R.67, (H.L.) as a result of the testimony of co-accused Christopher Bacchus; (iii) the evidence relating to the testing of the vegetable matter and the white powder; and (iv) the sentence imposed. For the reasons which follow, we find that the trial and convictions were unassailable and that there was ample evidence of the guilt of all the accuseds. However, as will become clear, in the exercise of our power to review and vary the sentence imposed on Rambarran and Campbell, we allow the appeal against sentence and vary the sentences as indicated below. We should note, as well, that the facts relating to the points on appeal will be set out when dealing with those points.

Background

[4] Despite the length of the trial in the High Court and the many witnesses, the salient facts can be shortly stated. On 29 November 2005, a container of wood was off-loaded by three of the accuseds, namely Lemme Campbell, Gavin Wayne Green and Christopher Bacchus ("Bacchus") at a construction site in Rowans St. George. The wood was part of a consignment in a container legitimately ordered by a contractor, Mr. Forde. Some of the wood remained in the container but, at the direction of co-accused Bacchus, some was loaded

onto a truck and subsequently transported to the home occupied by Bacchus and his wife, co-accused Diane Bacchus ("Diane Bacchus" or "Mrs. Bacchus").

[5] The police executed a search warrant at the Bacchus' residence and found that the wood, comprising 16 hollowed-out logs, contained a powdery substance suspected to be cocaine, and vegetable matter suspected to be cannabis. In total, 134 packages were found in the hollow logs: 65 of them contained vegetable matter later shown to be cannabis, and 69 contained the powder which was later shown to be cocaine. The search also revealed two suitcases. One suitcase contained 18 packages of vegetable matter shown to be cannabis while the second one contained 44 packages of the white powder shown to be cocaine. The weight of the drugs was 91.3 kilos of cannabis and 119.4 kilos of cocaine for a total of 210.7 kilos or 464.5 lbs.

[6] Bacchus, his wife Diane, Campbell, his wife, Persaud, and Green, were arrested at the Bacchus' residence. Acting on information gleaned from appellant Campbell, Rambarran was arrested at the Hilton Hotel where he had been staying. All the accused were taken to the Oistins Police Station where they were interviewed. On 23 February 2009, appellants Rambarran, Campbell and their four co-accuseds were arraigned on the six drug offences abovementioned. They all pleaded not guilty. Samples of the cannabis and

cocaine were taken and submitted to the Forensic Sciences Centre for analysis and a Certificate of Analysis containing the results was served on the appellants thereafter.

[7] After a trial lasting, as noted above, some 14 weeks, on 4 June 2009, Rambarran and Campbell were each convicted of the following offences, all committed on 29 November 2005, namely:

(1) Importation of 91.3 kilograms of cannabis contrary to **Section 4 (3)** of the **Drug Abuse (Prevention and Control) Act Cap. 131 (Cap.131);** Importation of 119.4 kilograms of cocaine contrary to **Section 4 (3**) of **Cap. 131,** on 29 November 2005;

(2) Possession of the 91.3 kilograms of cannabis contrary to **Section 6 (2)** of **Cap. 131**;

(3) Possession of the 119.4 kilograms of cocaine contrary to **Section 6 (2)** of **Cap. 131**;

(4) Drug Trafficking contrary to **Section 18(4)** of **Cap. 131**, namely that he had in his possession a trafficable quantity of cannabis; and

(5) Drug Trafficking contrary to **Section 18(4)** of the **Cap. 131,** in that he possessed a trafficable quantity of cocaine.

[8] On 11 December 2009, the accuseds were sentenced as follows:

- Rohan Rambarran:

1) 15 years for importation of cannabis;
2) 20 years for importation of cocaine;

3) 15 years for possession of cannabis;
4) 20 years for possession of cocaine;
5) 25 years for trafficking in cannabis; and
6) 30 years for trafficking in cocaine.

- Lemme Campbell was sentenced to:

1) 15 years for importation of cannabis;
2) 20 years for importation of cocaine
3) 15 years for possession of cannabis;
4) 20 years for possession of cocaine;
5) 20 years for trafficking in cannabis; and
6) 25 years for trafficking in cocaine.

- Gavin Green and Somwattie Persaud were sentenced to lesser terms (10 years) and, as indicated above, have since been released.

The Instant Appeal

[9] At the outset we wish to state for the record a number of things. The appellants largely have the same or significantly similar grounds of appeal and they agreed that, where appropriate, their arguments would be subsumed under those of Rambarran whose were the most extensive. So while we will concentrate our attention on the contentions of Rambarran, our discussion and analysis applies, with appropriate changes, to appellant Campbell as well.

[10] Rambarran originally filed some 19 grounds of appeal. We propose to deal with those grounds relating to the conviction first and, thereafter, the grounds relating to the sentence.

Grounds 1 and 2:

The Oral and Written Admissions, Voluntariness and the Constitution

[11] In relation to this head, both Rambarran and Campbell complained that the oral statements which they allegedly made were not procured from them voluntarily, that they were beaten, and their constitutional rights violated.

[12] For his part, Rambarran complained that Sgt. Ellis who had arrested them along with other officers of the Royal Barbados Police Force, had given him an abridged, truncated and distorted version of his right to counsel within the meaning of **section 13** of the **Constitution**. He complained that in ruling that there was a proper and sufficient communication of the right, the trial Judge erred in law. The Crown maintained, in response, that Rambarran was notified of his right to an attorney in a language capable of being understood by him; that he was informed of his right without delay and further that he was so informed before being taken into custody. Appellant Campbell also complained that the orals, which were taken from him were not voluntarily taken, that he was beaten, and that his constitutional rights to an attorney were violated.

[13] During the course of the trial, the trial judge conducted a *voir dire* with regard to the allegations of each appellant. In the case of Campbell, Station Sergeant Cecil Watson testified that he was with other officers who arrested the appellant Campbell, his wife Somwattie Persaud, Bacchus, his wife Diane Bacchus and Gavin Green at the residence of the Bacchuses in Bayville, where the drugs were found.

[14] On the *voir dire*, Sgt. Watson testified to the circumstances of the arrest of Campbell and the orals, which he recorded in his notebook. On being taken into custody, Campbell stated to the officers, "I ain't de boss man, officer. I is only de second man." Sgt. Watson cautioned Campbell and transported him and the other accuseds to Oistins Police Station. He recalled that appellant Campbell, on being advised of his right to an attorney-at-law, replied: "I don't want a lawyer right now I going to talk to you." Watson stated that, when he told Campbell of the number of packages of cocaine and cannabis, which were found, and asked if he had anything to say about them, Campbell responded: "Officer, I only ship dem drugs here. I don't distribute." Sgt. Watson recalled that Campbell, however, had refused to sign the notebook.

[15] Sgt. Watson testified, as well, that when he asked whether Campbell wished to make a written statement, Campbell said, "Yes, officer." When he was invited to write the statement, Campbell responded, "You write I am going to

talk to you." The sergeant took a blank form, filled out the headings, then wrote the preamble to the recorded statement, which Campbell read over and signed. He also wrote the rights to an attorney-at-law, which Campbell read and signed. Campbell then dictated a statement to the sergeant, which on completion, Campbell read aloud to himself. Sgt. Watson testified that there were three errors, which he, Sgt. Watson, had made which were crossed out and Campbell initialed the corrections.

[16] Sgt. Watson was subjected to vigorous cross-examination by Campbell who, initially, represented himself and then later, by Mr. Arthur Holder, who was retained during the *voir dire*. Watson denied that Campbell had been subjected to "police licks", but admitted that he, Watson, had been the subject of a disciplinary proceeding to which he had pleaded guilty to the offence of stating a falsehood. PC Drakes also testified in similar vein to Sgt. Watson in relation to the treatment of Campbell.

[17] Campbell gave sworn testimony on the *voir dire*. He stated that he never gave any orals, was never advised of his right to an attorney, and that he was beaten and forced to sign the written statement. He stated that he had vomited and asked for a doctor but that he and the doctor never spoke, and he had absolutely no conversation with the doctor who spoke only to the sergeant on

duty. Campbell testified that the doctor, acting on the conversation with the sergeant, prescribed medicine for him which he took.

[18] The trial judge ruled that, after considering all the evidence adduced on *voir dire*, the prosecution had established that there had been no breach of Campbell's constitutional rights and that he had been informed of his rights. The trial judge also ruled that she would permit Sgt. Watson to give evidence of the oral statements and the written statement would be admitted into evidence. It should be noted that, on the application of counsel for Rambarran, the written statement was redacted to excise both Rambarran's given name, his nickname "Short Man" and the names of other co-defendants. In place of the names, alphabetical letters were substituted.

[19] Sgt. Watson then read Campbell's statement into evidence, as follows:

> "About two weeks ago a man who I know in Guyana as 'Z' that them does call 'Y' meet me in a shop in Georgetown and tell me that he got some material, I mean drugs but that is the slang we does use in Guyana. He tell me he got it to send to Barbados and he want me to ship it in wood for him. He tell me that he going give me a percentage when it reach Barbados. I know a man in Barbados name Mr. Forde who wanted me to ship wood for him. I decide I would ship the drugs along with the wood for Mr. Forde. The same week 'Z' meet me on the wharf in Guyana with the drugs already in silverbali wood. I make all the arrangements and ship it to Barbados in Mr. Forde shipment. I sent the documents to Mr. Forde by Liat Quick Pak. I fly to Barbados to meet the shipment. When I arrive in Barbados, I meet with my friend 'F' [Bacchus] who know all about the drugs with boss 'Z'. 'F' carry me by Mr. Forde office Monday and Forde tell me that the wood in Barbados in St. George. Last

> night 'F' tell me he went in St. George and see the wood. About 11 o'clock this morning 'F' carry me in St. George where the wood was on a flat rack. 'F' tell me he going get a truck and go back for the wood with the drugs for 'Z'. Later this evening I went in St, George with 'Z' and make sure the wood get loaded on the truck. The truck was going to take it to 'F' house in the Bayland. I then went back to 'F' house where we take the drugs out of the silverbali wood and put it in two suitcases. The drugs were cocaine and marijuana. 'Z' does sell marijuana to men in Barbados and he does deal with the cocaine he self. I don't distribute. I only ship the drugs to Barbados. That's all.
>
> Signed: Lemme Campbell"

[20] Sgt. Watson testified that in all there were 196 packages, 109 of which were suspected to be cocaine with 87 suspected to be cannabis, all in two suitcases, which contained both the packages and the wooden logs.

[21] As regards Rambarran, Sgt. Errol Ellis testified on the *voir dire* to the admissibility of statements made by Rambarran. He stated that, on 30 November 2005 at about 6:00 p.m., he went to the residence of Christopher Bacchus accompanied by Sgt. Watson, Sgt. Ottley, PC Kirk Alleyne and other officers. On arrival at the residence, he heard a rumbling sound coming from the inside of the house. Sgt. Watson forced open the door and saw Bacchus coming from the back of the house. He then read to Bacchus the search warrant, which he had with him and served Bacchus with a copy. Shortly afterwards, Campbell, Diane Bacchus and Somwattie Persaud also came from the back of the house. A few minutes later, he saw PC Joseph holding a man

later identified as Gavin Green and he directed PC Joseph to the back of the house where the others were located.

[22] At about 7:20 p.m., Sgt. Watson had a conversation with Sgt. Ellis as a result of which, Sgt. Ellis, accompanied by PC Alleyne and PC Shepherd went to the Hilton Hotel. After speaking with the duty manager, they went up to room 460 where he saw Rambarran. Sgt. Ellis told Rambarran that they were police in plain clothes and were assisting in investigations regarding a search warrant, which had been executed at the residence of Christopher Bacchus. He also told Rambarran that, from the investigations, he suspected that Rambarran had been involved with the suspected cannabis and cocaine. He then cautioned Rambarran and placed him under arrest.

[23] Sgt. Ellis told Rambarran that he had a right to consult with an attorney-at-law. Rambarran did not reply. After they had arrived at Oistins Police Station, Sgt. Ellis repeated to Rambarran that he had been brought to the station in connection with the suspected drugs and that he had the right to have an attorney-at-law present, and that Rambarran made an oral statement, which he recorded in his notebook. Rambarran's attorney objected to the orals on the ground that the oral statements were never made and that it was an issue of fact. The trial judge ruled that Sgt. Ellis could continue his testimony. However, before the trial of the general issue could resume, Rambarran's

counsel clarified that his basis for objecting to the orals was an alleged violation of **section 13(2)** of the **Constitution**, and *voir dire* began.

[24] Prior to the taking of the testimony on the *voir dire*, the statements of appellant Rambarran, which referred to other co-defendants were redacted as occurred with appellant Campbell and in place of names letters were substituted. Sgt. Ellis recalled that, when he told Rambarran at Oistins Police Station that he was entitled to an attorney-at-law, Rambarran replied, "I talking to you. I ain't want none." When he told Rambarran that he was assisting in investigations where a search warrant had been executed at the residence of Bacchus and a quantity of suspected cannabis and cocaine found, Rambarran replied "All I do is ask 'A' to ship some marijuana and cocaine up here for me.' In the presence of PC Alleyne, Sgt. Ellis asked Rambarran if he wanted to give a written statement, to which he replied, "Alright, I know I do wrong." Sgt. Ellis further told Rambarran that he could write the statement himself or have someone write it for him. Rambarran responded, "You write what I say."

[25] Sgt. Ellis testified that he got a blank statement form and filled in the headings and the caption, which he read to Rambarran, inviting him to sign it. Rambarran did so. Rambarran then made a statement, which Sgt. Ellis recorded on the form and continued on a second page. On completion, he read it back to the appellant who did not correct, alter or add anything to the

statement. He signed his name on page 1 at the bottom and at the end of the statement. Sgt. Ellis testified that he then read and dictated a certificate for a recorded statement from a pamphlet of the Judges' Rules and invited Rambarran to sign it. Again, Rambarran did so. Sgt. Ellis and PC Alleyne then signed their names as well.

[26] Sgt. Ellis testified that no threats, force or violence were used, neither were promises nor inducements held out to obtain the statement from Rambarran. Counsel for Rambarran then objected that the statement was not voluntary, had been composed by the police and was in violation of ***section 13*** of the ***Constitution***.

[27] Sgt. Ellis was also vigorously cross-examined. He stated that only three of them went to Rambarran's room at the Hilton Hotel. He denied that when Rambarran denied knowing why they were there, they replied, "you will soon know why we are here when we start beating." He said that Rambarran never asked "Wait, you mean you just beat people so'? They took all his belongings from the room, including his passport, and asked him to put on clothes since he was wearing only a white shirt and a short pants. He was asked whether he understood the right to counsel in the **Constitution** and indicated that it existed "[s]o that the accused person can be represented, properly represented so he wouldn't incriminate himself." He stated that if the appellant had said

that he wanted an attorney, he would have gotten one for him but, as Sgt. Ellis repeated many times, Rambarran said that he did not want any attorney.

[28] Sgt. Ellis denied that he distorted or did not fully put to Rambarran his rights under the Constitution. He conceded that he did not ask Rambarran to initial any of the orals in his notebook. He termed it an "inadvertent omission" and denied that it was "a deliberate attempt to deny the accused his right."

[29] Sgt. Ellis denied that, on taking Rambarran to an area known as the recreation room, he made Rambarran sit on a steel chair without hand rests and that another officer, Inspector Bovell, approached him from behind, put a rag in his mouth and a bag over his head. He denied beating Rambarran in the stomach while another officer was holding his hands behind the chair. He denied going away for 30 minutes and returning with the written statement telling him to sign it; or that Rambarran said that he could not sign a statement which he did not write or further, that he told Rambarran "Come let me tek you to the canefield…Plenty like you in the canefield" "Ma'am, that never took place", Sgt. Ellis stated.

[30] Sgt. Ellis was aware that Rambarran had been seen by a Dr. Ross Herbert at the station the following day. He was asked, and agreed, that some years ago, he had been criminally charged with beating a Coney Island employee who was in good spirits the Friday night but by the next day, he was in surgery

fighting for his life and that he had been suspended. He stated that he did not know that he was a defendant in a civil case concerning the infliction of violence on a suspect, and he denied that he was "a notorious beater in the Royal Barbados Police Force" or that every man who came under his hands complained of violence.

[31] Sgt. Ellis was impeached with his testimony that, while one of Rambarran's orals stated that he had asked "A" to ship some cocaine and marijuana to Barbados for him, the written statement which he alleged that Rambarran asked him to write only referred to "weed." As to why Rambarran was taken a second time, alone, to see the logs, Sgt. Ellis responded that he was dealing with Rambarran on the trafficking charge and that, while "the first time was to just open the logs", the second time was to initial the logs. He stated that Rambarran never said he wanted a telephone call. He denied that each and every oral he had given was a deliberate lie. PC Kirk Alleyne testified in similar vein to, and corroborated, the testimony of Sgt. Ellis.

[32] Appellant Rambarran testified on the *voir dire*. He stated that he was a mining operator in Guyana and had come to Barbados to get replacement keys for his car from BS&T in Warrens. On the night of 30 November 2005, he heard a knock on the door of his room at the Hilton Hotel and when he opened the door, three or four guys rushed in. One of them, Sgt. Ellis, told him "you

know why we here", but he said that he did not know. He was told to put on his clothes, pack his bag and afterwards they handcuffed him, put him in a car, and took him to the Bayland. According to Rambarran, they brought a man whom he did not know then but who, he later learned, was co-defendant Gavin Green, and handcuffed his hands to Green's. They then took them to Oistins Police Station.

[33] After they arrived at Oistins, Sgt. Ellis asked him about drugs but he told the sergeant that he knew nothing about drugs. He was not told about the drugs discovered at Bayville and he stated that "[a]t no point in time they ever told me of no right to counsel." He was placed in a steel chair which had no arm rests and when he again denied knowledge of any drugs, a man, whom he later learned was Inspector Bovell, approached him from behind and forced a rag in his mouth. According to Rambarran, the man then placed a bag over his head, pulled his hands back, and he began to feel "licks in [his] stomach." His stomach hurt and he began to feel faint like he was falling off the chair. He said that he couldn't breathe and he was crying.

[34] Rambarran stated that Sgt. Ellis took the bag off his head, left and returned 30 minutes later with a statement, which he asked Rambarran to sign. When he replied that he could not sign a statement which he had not given, he said that the sergeant told him, "you playing the fool, man. 'Come let's take you to the

canefield. No one know you are here. You would be just another one like the rest of them. Plenty like you in the canefield." He testified that he was scared that he would never see his kids again, and so he signed the statement, and copied off the words at the bottom of it.

[35] Rambarran testified that, the next day, he told one of the outsiders in the room that he was not feeling well, the police beat him the night before and he would like to see a doctor. He denied saying to the police, when shown the packages containing the cocaine and cannabis, that "Them is the drug that we send up here." He never made that oral or any other, and he never asked anyone to ship drugs here for him. He also never signed the police notebook. He also stated that Sgt. Ellis never cautioned him. When asked if he ever got to see a doctor at the Q.E.H., Rambarran said "no."

[36] On cross-examination, he said that he used to come to Barbados about five or six times a year. He acknowledged that he had signed the statement and had written the certificate at the end of it. He did not know anything about any right to a lawyer. He also conceded that the room at the Hilton had been booked in the name of a friend, Clarence Alleyne, but he explained that he did that sometimes during peak season when the room rates for foreigners were high and his friend could get the local rate. When the fare was low, he did not

need to do that. Rambarran said that he didn't see a problem with staying at a hotel under someone else's name.

[37] He denied that he had fully cooperated with the police at Oistins and said that they were being untruthful. He said that he did not know co-accused Campbell personally but had seen him around Georgetown. He said that he had never seen either Christopher or Diane Bacchus or Somwattie Persaud until they were all in custody, and had only spoken to Campbell for the first time when they were in custody. He had met Green when they were in the car on the way to Oistins. He had no knowledge that Campbell had sent a shipment of wood up to Barbados. He did not know how many officers beat him and could not state whether the beating was short or long.

[38] Asked about the line in the statement that "I went back up and tell the boss what happened", he said that the line was fabricated on seeing his passport. "I is my own boss", he stated. He was asked whether he knew a Roger Khan and, at first he said "no" but, on being asked again, he responded "[f]rom seeing around Georgetown, otherwise, no.'' However, when asked "[d]o you know where [Khan] is now?", Rambarran responded "I should think in America", and on being asked further whether Khan was a visitor in America, Rambarran answered "[n]o. . .[h]e is in custody," pending trial for drugs. He denied that Khan was his boss and stated that he did not have a boss." He

denied that he was being untruthful or dishonest, and repeated he was beaten. He denied that he knew the other accuseds or that he was told of his right to an attorney. When asked about 13 dates on which he was alleged to have visited Barbados, his answer to 10 of the dates was "I don't recall" but he recalled three of the dates.

[39] Dr. Ross Herbert was called to testify on behalf of Rambarran. He recalled seeing Rambarran on 1 December 2005 at Oistins Police Station. Rambarran had stated that he had been punched in the stomach and complained of pain in the abdomen although he denied that he had vomited blood. On examination, he said, Rambarran was in no cardio-pulmonary distress although, on examination of his abdomen, he had tenderness in the area around the navel. There were no masses or skin changes, and the doctor's assessment was blunt trauma to the abdomen. He prescribed Cataflam, an analgesic or painkiller.

[40] Asked whether the blunt trauma would be consistent with violence or assault to the stomach, Dr. Herbert would say only "[t]hat is a possibility." But he added that he found no guarding, meaning a tensing of the abdominal muscles trying to protect against damage which is deeper. As to "bagging", Dr. Herbert said that if one could not breathe, it would manifest itself as stenosis, meaning a purplish hue in the mucous membranes of the eyes, fingers, tongue, lips, palm of the hand and soles of the feet as opposed to the

healthy pink colour which would be normal. It would also make the heart and the breathing go faster which ultimately could cause a patient to faint or pass out. Loss of contact with time was a possibility as well as being overcome by fear.

[41] On cross-examination, Dr. Herbert recalled that he spoke to Rambarran and that Rambarran spoke to him. Rambarran gave him the history that he had been punched in the stomach. He stated that his diagnosis was based on the history, which Rambarran gave to him and he noted that Rambarran had tenderness but no guarding or rebound. There were also no skin changes, meaning that there was no swelling or bruising, and there were no lacerations. Dr. Herbert explained that "rebound" occurred when you palpate the skin and, when you remove your hand, the patient has more pain than when your hand was on the abdomen. That is usually indicative of a rupture. Regarding the alleged "bagging", the doctor said that there was no indication of any stenosis. Asked whether "he could have been malingering", Dr. Herbert responded that "[b]ased on history, based on findings, that is also a possibility."

[42] On re-examination, Dr. Herbert agreed that one would not be able to find every aspect of pathology, and he had seen cases where people who had no reason to lie had told him that they had been struck "and sometimes you don't find every single thing." He stated that he was satisfied, based on what the

patient said, that there had been pain and that is why he prescribed Cataflam. As for the bagging and stenosis, he agreed that with the passage of 24 hours, the stenosis would be resolved and so the fact that he had not seen the stenosis did not mean that the experience had not been felt.

[43] At the close of the case on the *voir dire*, the trial judge heard argument from both Sir Richard and Mr. Gordon for Rambarran, as well as, the DPP and Mr. Blackman of the DPP's Department. Rambarran's counsel contended that there had been a breach of **section 13(2)** of the **Constitution** which enshrined the right to counsel taking into account that Rambarran had been arrested at 8:00 o'clock on the night of Independence, a public holiday and had not been told that he could, and had not been permitted to, contact an attorney of his choice. Further they contended that the written statement had been signed as a result of a beating, which Rambarran was subjected to. They asked the court to exercise its discretion under **sections 77** and **115** of the **Evidence Act Cap. 121** not to admit evidence of either the oral or written statements. The DPP countered by noting the testimony of Sgt. Ellis, PC Alleyne and Dr. Herbert. They contended that there was no evidence that the admission was coerced and that the fact that the officers admitted that Rambarran never initialed Sgt. Ellis' notebook could be cured by a warning under **section 137** of **Cap. 121.**

The Ruling on the Voir Dire

[44] The trial judge ruled that both the oral and written statements would be admitted into evidence. The judge stated:

> I have had the opportunity of assessing the evidence of the police officers; Sergeant Ellis and Constable Alleyne, the evidence of Mr. Rohan Rambarran and Dr. Ross Herbert. It is my finding having seen all of the witnesses on the witness stand and considered their demeanour, that the evidence given by the police officers is credible and I am satisfied that the accused Mr. Rohan Rambarran was advised of his constitutional right under Section 13 of our Constitution in a timely manner. And therefore the question of whether the oral statements were made, that question is my view having regard to my finding that his constitutional right was not breached is a fact for the jury and that in those circumstances I will permit the officer to give the evidence with respect to the oral statements given by the accused.
>
> With respect to the written statement and the oral statement which was allegedly given on 1st December 2005, again on reviewing the testimony in-chief, cross-examination and re-examination, having regard also to the medical evidence it is my finding on the totality of the evidence before me that the evidence led by the prosecution is credible as to the circumstances in which the written statement was obtained and that oral statement was given. It is also my finding that there were voluntarily given and that on the evidence there was no breach of the right of the accused under Section 13 of the Constitution.
>
> In the exercise of my discretion therefore I will also admit the written statement into evidence and permit evidence to be given by the officer with respect to the oral statement made on the 1st December 2005.

[45] The oral statements have already been alluded to. Rambarran's written and signed statement, so far as pertinent, was as follows:

> 'About four weeks ago, I met with 'A' [Campbell] in Guyana and he tell me that he got some weed to send down to Barbados. I had some too and I decided that I would send my drugs with his. He tell me that he was sending the drugs down in some board. 'A' does ship board down to Barbados all the time and he is who tell me that it would work. I left and some to Barbados after he tell me that he ship the drugs. When I get here the drugs wasn't here so I went back. The people in Guyana that 'A' does work for keep asking me about them drugs so I came back and I looked for he to find out what happened. I find he and he tell me that he missed the boat. I went back up and I tell the boss what happened. I come back yesterday afternoon and I checked in at the Hilton. 'A' called me on cell phone and we talk. He come to my hotel and he picked me up. We went by some wood in St. George. He showed me the wood and he tell me that he was going to give me my drugs later. We left and when we get back in St. George the truck was leaving with the wood that had in the drugs. We picked the fellows who did loading wood and we went long. Sgd. Rohan Rambarran.
> I have read the above statement and I have been told that I can correct or alter or add anything I wish. The statement is true. I have made it of my own free will. Sgd. Rohan Rambarran. Sgt. 1100 Ellis. PC 1420 Alleyne.'

Discussion

[46] The starting point in our discussion must be **Section 13(2)** of **The Constitution of Barbados** which provides as follows:

> "Any person who is arrested or detained shall be informed, as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal

> advisor of his own choice, being a person entitled to practice in Barbados as an Attorney-at-Law, and to hold private communication with him; …"

[47] It is clear that an individual possesses two separate and distinct rights under this constitutional provision. The first is a right to be informed of the reasons for his arrest or detention and, secondly, the right to retain and instruct an attorney-at-law, more commonly called the right to counsel. An arresting officer, in our view, has an affirmative duty to inform an accused person or accused persons both of the reason why they are being taken into custody and that they can retain an attorney-at-law of their choosing; and further to commit no action which has the effect of impeding access to the said attorney-at-law.

[48] The appellant's complaint in this matter is not that he was not told of his right to counsel but that the typically called right to counsel was not properly or sufficiently communicated to him. This court must therefore examine when the right to counsel was communicated and if it was, whether the communication was sufficient.

[49] We have set out the evidence fairly extensively for reasons which will soon appear. The record shows that Sgt. Ellis told Rambarran, on entering the hotel room to execute the search warrant, that he had a right to an attorney and that he could speak to an attorney at any time. The further evidence is that Rambarran was taken to Oistins Police Station where he was again notified of

his right to retain an attorney of his choice. Inherent in his complaint is the suggestion, however, that there is a specific, canonical, set of words which must be spoken in communicating to accused persons the right to counsel. We disagree.

[50] There is no set form of language which must be used to convey to a suspect on arrest her or his right to an attorney. Moreover, this Court has already dealt with a similar argument in **Cumberbatch v R, Crim App No. 40/1996**. There, counsel (coincidentally, current counsel for Rambarran) complained that the notification by the police officer of the right to counsel was "inadequate", "formalistic and empty" because appellant Cumberbatch "should have been, and was not, told, why the right existed." **Sir Dennis Williams CJ** stated:

> We are unable to agree with counsel. The relevant part of Section 13(2) required that any person who is arrested or detained be permitted at his or her own expense to retain and instruct without delay a legal advisor of his or her own choice. The obligation imposed is quite specific - to permit the person arrested or detained to retain and instruct a legal advisor without delay.

[51] In the absence of evidence to the contrary, we cannot accede to the appellant's suggestion that the trial judge was in error in denying this contention. Moreover, the fact that the appellant was arrested on the night of a public holiday does not gainsay the implicit finding, credited by the trial judge, that

Rambarran had told Sgt. Ellis in terms that he did not wish an attorney and would speak with Sgt. Ellis.

[52] Finally, we agree with the Crown that there was compliance with the observations of Davis JA in *AG v Whiteman (1990) 39 WIR 397, 407*, a decision of the Court of Appeal of Trinidad and Tobago, where his Lordship stated:

> '[T]he interests of justice may be best served if police officers were to note or require an accused person to note on any statement taken from him, the fact that that person had been informed of his right to retain a legal adviser and to hold communication with him at any stage of the investigation, emphasising the fact that this is so even when the accused is in custody. In my view, this may enable the evidential burden which is on the prosecution to be discharged much more effectively, and will go a long way in assisting the court and jury in determining the question they may have to determine, namely was the statement a voluntary one.'

[53] On the written statement is a certificate signed by Rambarran acknowledging that he was informed of his right to an attorney. Accordingly, for all these reasons, we find no merit in this ground of appeal.

[54] Rambarran further contends that the trial judge, in her finding on the admissibility of the oral and written statements, failed to give weight to the combined effect of the following:

a) The breach of ***Section 13 (2)*** of the ***Barbados Constitution***;

b) The resultant impact on the fairness of the trial;

c) The evidence led in relation to the voluntariness of the alleged written statement, including the evidence of Dr. Ross Herbert and the last of the orals; and

d) The additional breaches of ***Section 136*** of the ***Evidence Act*** **Cap 121** as it related to the orals; and

e) The fact that the evidence of Messrs. Ellis and Alleyne, reasonably assessed, demonstrated that the breaches of the ***Evidence Act*** were deliberate.

[55] We have already dealt above with the claimed constitutional breach. Our law is now based on statute and, particularly, **Sections 70** and **71** of the **Evidence Act, Cap 121 (Cap. 121)**.

Section 70 provides:

> "Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admissions, towards some other person or by threat of conduct of that kind, or by any promise made to the person who made the admission to any other person."

Section 71 provides:

> "71 (1) This section applies only to criminal proceedings and only in relation to evidence of a confession made by an accused.

> (2) Evidence of a confession is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected.
>
> (3) For the purposes of subsection (2), evidence that the confession is true or untrue is not relevant.
>
> (4) For the purposes of subsection (2), the matters that the court shall take into account include:
>
> (a) any relevant condition or characteristic of the person who made the confession, including the age, personality and education of the person and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the confession is made in response to questioning
>
> (i) the nature of the questions and the manner in which they were put, and
>
> (ii) the nature of any threat, promise or representation made to the person questioned.

[56] In a recent commentary on the topic, Stephen Odgers SC at [EA.84.60], p. 618 of his text *Uniform Evidence Law* (13th Edn., Thompson Reuters, 2018) observes that section 84 of the Australian Commonwealth Evidence Act, from which our **section 70** is derived, "replaces the common law voluntariness rule." However, in *R v JF* (2009) 237 FLR 142; [2009] ACTSC 104, at para [33], Refshauge J observed that some Australian judges continue to use the term "voluntariness" notwithstanding the legislation (see, Odgers, op. cit. at p. 620, citing *Higgins v R*, [2007] NSWCCA 56, per Hoeben J; see, further, *Cross on Evidence*, 9th Australian Edn., paras [33630-33675; 35615], which

still discusses "voluntariness", considering it current in Australian law, again despite the language of the Australian Acts).

[57] What the judge is required to determine on the *voir dire*, under the statutory provisions, is not merely whether the confession or admission was voluntary in the *Ibrahim* sense but whether the *circumstances* in which the admission or confession was made rendered it likely or unlikely that the truth was adversely affected. Those circumstances include whether the confessions was "influenced" by "violent, oppressive, inhuman or degrading conduct" on the part of the questioner, as set out in **section 70**. In *R v Ye Zhang* [2000] NSWSC 1109 at para [44], Simpson J in the Supreme Court of New South Wales observed that the section

> "… does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of the police is one of the factors (or more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible."

[58] The judge in a criminal trial where the exclusion of an admission or confession is sought must also have regard to the **Section 71(4)(a)** considerations of the questioned accused *including* "any relevant condition or characteristic of the person who made the confession, including the age, personality and education

of the person and any mental, intellectual or physical disability to which the person is or appears to be subject."

[59] Moreover, the obligation on the trial judge on *voir dire*, as trier of the facts, was made clear in the Privy Council decision in ***Seeraj Ajodha v R***, [1981] 2 All ER 193. There, Lord Bridge of Harwich, delivering the advice of the Board exposed the anomaly that, during a *voir dire* hearing to determine the admissibility of a confession statement, the judge, usually the arbiter of the law, becomes also the fact-finder. His Lordship stated, at p. 201 a-c,:

> It has to be remembered that the rule requiring the judge to be satisfied that an incriminating statement by the accused was given voluntarily before deciding that it is admissible in evidence is anomalous in that it puts the judge in a position where he must make his own findings of fact and thus creates an inevitable overlap between the fact-finding functions of the judge and jury. In a simple case, where the sole issue is whether the statement, admittedly made by the accused, was voluntary or not, it is a commonplace that the judge first decides the issue himself, having heard evidence of the *voir dire*, normally in the absence of the jury.

[60] The question for this Court then is whether the trial judge in the instant case, properly performed all these functions and made the correct decisions as a matter of fact. Rambarran's contention is, essentially, that the judge erred in principle because she did not have regard to the fact that there was no

evidentiary material upon which she could base her findings of fact and, ultimately, her decision. We disagree.

[61] This Court, albeit in civil and not criminal cases (and for present purposes, we can discern no difference between civil and criminal cases as regards a trial judge's approach to fact-finding), has recently "advert[ed] to the principles which govern the appellate court's function on an appeal against a trial judge's findings of fact" (**David Brooks v Alistair Morris, As Executor of the Estate of Henry Newitt, Deceased**, Cv. App. No. 17 of 2009, at para [24], *per* **Burgess JA**). Outlining the "well traversed principles" outlining this Court's very limited jurisdiction in reviewing the exercise by a trial judge or, for that matter, by a jury, of the fact-finding power, **Burgess JA** (as he then was) cited this Court's prior decision in **E. Pihl and Sons A/S (Denmark) v Brondum A/S, Cv. App No. 24 of 2012** at para [21] which drew the distinction "between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts." "An appellate court will only interfere with [the process of finding primary facts involving assessing the credibility of witnesses] where there was no evidence at all or only a scintilla of evidence to support the finding" (**David Brooks v Alistair Morris**, *supra*, at para [25]).

[62] However, referring to the judgment of Byron CJ, as he then was, in *Grenada Electricity Services Ltd v Isaac Peters, Grenada Civil Appeal No. 10 of 2002*, and its own prior decision in **Walsh v Ward (Civil Appeal No. 20 of 2005)**, this Court further noted "that an appellate court will generally regard itself as being in as good a position to draw inferences from or to evaluate facts as the trial judge." In this case, the trial judge's decision on the *voir dire* involved the finding of facts rather than the evaluation of, or inferences to be drawn from, facts already found.

[63] The trial judge in this case reviewed the evidence with granular and meticulous care. Indeed, when the fact scenarios set out above in paras [17] and [43] above are viewed through the prism of this Court's limited jurisdiction when reviewing decisions of fact of a trial judge, we are satisfied that the trial judge properly reviewed all the evidence adduced on the *voir dire*, and reached conclusions which are unassailable. That evidence included, on the *voir dire* relating to Rambarran, the admission by Sgt. Ellis on cross-examination that he had been the subject of an investigation regarding the beating of a prior suspect.

[64] The evidence also included the evidence of Dr. Ross Herbert which showed, in our view, no more than that his prescribing of medication for Rambarran was predicated on his complaint of stomach pain, ("the history") and on no

independent indicia whatever of violence. There is, accordingly, no basis for review of the trial judge's *voir dire* decision admitting both the oral and written confessions into evidence since there was more than a scintilla of evidence upon which her decision was predicated. Rather, there was ample evidence justifying her decision.

[65] The same conclusion obtains for appellant Campbell who testified to being beaten but who candidly stated that he himself never spoke to the doctor who had prescribed medication for him, but admitted that the prescription was based simply on the doctor's conversation with the sergeant on duty at the time. Moreover, as with Sgt. Ellis in the case of Rambarran, the trial judge heard the searching cross examination of Sgt. Watson establishing that he had been disciplined for stating a falsehood in a prior matter as well as his candid admission that Campbell's written confession had contained three errors made by Sgt. Watson and that they had been corrected and the corrections initialed by Campbell. Nonetheless the trial judge concluded that the confessions were credible and admitted them into evidence.

[66] For all these reasons we conclude that these grounds of appeal must fail.

Ground 4 – The Certificate of Analysis

[67] The appellants contended that the trial judge should not have admitted the certificate of analysis given her ruling not to admit the samples. They contend

further that there was no basis in law or in fact for receiving any further evidence from Ms. Skeete and by doing so, the trial judge introduced a major disconnect into the trial which was likely to confuse the jury and render the trail unsafe. The appellant stated that the certificate of analysis was *prima facie* evidence that a substance was a controlled drug (**Section 41 Drug Abuse (Prevention and Control) Act Cap 131**. They contend however that **section 132 (c)** and **(d)** of the **Evidence Act Cap. 121** which was passed later than **Cap. 131** and dealing specifically with the handling and admission of samples of seized substances and certificates of analysis produced based on those samples, is the applicable provision.

[68] The Crown maintained that the appellant's view was wholly erroneous. The DPP argued that the samples were independent of the certificate and that the samples in this case were not excluded because of any scientific issue with respect to what the vegetable matter was. The samples were excluded because one of the procedural requirements of **section 132** of **Cap. 121** was not followed, that is, that a justice of the peace had not, as required, signed the container containing the sample. The samples, counsel maintained, were excluded on that procedural basis and not on the basis of identity and characteristics of the substances. We agree.

[69] **Section 132 C (1)** of **Cap. 121** provides:

> "A sample…
>
> a) of a controlled drug within the meaning of section 3(1) of the *Drug Abuse (Prevention and Control)* Act; or
>
> b) of any other substance which has been seized by a police officer for the purposes of criminal investigation,
>
> shall subject to Section 132 D, be admitted as evidence in a criminal trial if the requirements of this section have been complied with in relation to the sample."

[70] **Section 132 D** provides:

> "In any criminal proceedings in which it is desired to use a sample in evidence by virtue of section 132 C, the originals of a certificate rendered under subsection and of a report made under subsection (5), of that section relating to the sample shall, without further proof, be *prima facie* evidence of the matters respectively stated in the certificate and the report; and the report shall, without further proof, be *prima facie*, evidence of the authorization of the authorised analyst".

[71] The trial judge in our view quite rightly refused to admit the samples due to what the Crown describes as a procedural matter. Simply put, one of the necessary signatures, namely that of a justice of the peace, had not been placed on the samples. The crux of the appellants' contention is that, if the samples were excluded, then the certificate deriving from them should also have been excluded. It is the appellants' view that the samples constituted the foundation

of the certificate of analysis and once the foundation collapsed by the ruling that the samples were inadmissible, it followed that the certificate fell away.

[72] We disagree. The certificate was *prima facie* evidence only of the nature of the drugs and no evidence was adduced to contradict it. However, since the samples were not available, there was a successful application at a later stage to view and receive the bulk into evidence. The Crown maintains, quite rightly, that the sampling procedure was merely an alternative method to dealing with the bulk. **Section 132 C** of **Cap. 121** provides for the retention of evidence in criminal proceedings and once samples were taken, allowed for the ability to destroy the bulk. But, as the respondent points out, again quite rightly, the bulk was available and the jury saw the bulk. Moreover, the process involving taking samples from the bulk was not flawed and therefore, there was a connection between the samples and the bulk. The certificate spoke to what the bulk was and was *prima facie* evidence that all the white powder was cocaine and the vegetable matter was cannabis.

[73] We also do not agree that there was no connection between the certificate of analysis and the bulk. The samples had to come from somewhere and in this instance the samples came from the bulk. There has been no imputation by the appellant that the samples were taken via a scientific method that was improper and thus that the certificate could not possibly be evidence of the

bulk. The purpose of the certificate of analysis is, we repeat, to identify the nature and quality of the bulk and it has a direct relationship to the bulk.

[74] Indeed, we go further. It does not follow from the fact that the samples are rendered inadmissible by procedural breach that the certificate, which certifies only the nature and quality of the substances in the samples should also be inadmissible. The certificate is *prima facie* evidence and something more than procedural failure as to the samples is required to rebut the *prima facie* validity of the certificate. Finally, if, as in the case at bar, the certificate of analysis is directly related to the bulk, then the certificate can only be impugned where it can be shown either that there was a mistake in the bulk used or that the method of analysis was wrong. For all these reasons, this contention must fail.

Grounds 5, 9 and 14 – The Bulk

[75] Under this head, the appellant has three complaints. First, Rambarran maintained that if the sample taken from the bulk was to be representative thereof, then

a) the bulk had to be demonstrated to be homogenous;

b) the sample had to be randomly taken; and

c) an appropriate number of samples had to be taken in accordance with governing protocols.

[76] He maintained further that the trial judge erred in not pointing this out to the jury and identifying that the representativeness of the samples or lack thereof as one of the issues in the case on which the prosecution's case could fail, particularly in light of the inconsistencies and contradictory evidence by Sgt. Hope and Ms. Marsha Skeete.

[77] Secondly, that the trial judge erred in law when she read *in extenso* the evidence of Ms. Skeete and failed to analyse the evidence with all its contradictions, concessions, inconsistencies and conflicts for the benefit of the jury. Further, that the learned trial judge failed to explain to the jury the meaning of 'an expert' and correctly explain the approach to the evidence of Marsha Skeete. This failure was an error of law on the part of the learned trial judge, which rendered the verdict unsafe.

[78] Thirdly, on the grounds indicated below the *prima facie* character of the Certificate of Analysis was vigorously challenged on:

a) The non-accreditation of the Forensic Science Centre

b) The doubtful professional integrity of the analyst herself resulting from

    i) Peer-reviewing her own work

    ii) Her inability to explain the movement of suspected substances as reflected in the movement log on 28th February 2006; and

iii) Her inconsistent responses in attempting to explain why there was a repeat of the Ultraviolet (UV) and Thin Layer Chromatography (TLC) tests on the said 28th February 2006

c) The methodologies employed in carrying out the tests and the departures from accepted protocols, and

d) The conclusions and findings arrived at by Marsha Skeete, specifically in relation to the charges of trafficking, possession and importation of cannabis.

The argument continues that it was incumbent on the learned trial judge to assist the jury by analysing the evidence of challenge to the certificate, which she erred in law by failing to do.

[79] The appellant took issue with the sampling and testing process, which he said were seriously flawed to the point where the results were unreliable. It was submitted that Ms. Skeete in her evidence in chief expressed the opinion that the substances were as alleged in her certificate of analysis. Under extensive cross-examination she brought into serious question her knowledge of the area, the integrity of the lab and the reliability and acceptability of the techniques and systems of analysis employed in testing the substances. There was confusion arising from the evidence of Sgt. Hope and Ms. Skeete as to how the samples were taken. She conceded that the composite sampling

technique could lead to contamination and that the accepted method of random sampling, namely, the black bag method was not used. In deviating from accepted sampling protocol, the portions of substances chosen for sampling were not representative of the bulk. This was a vital aspect of the appellant's case explored in the cross-examination but not so put to the jury.

[80] The failure, he submitted, to comply with the required scientific protocols was fatal to the representativeness and reliability of the sampling procedure. Ms. Skeete did not conceal and provided no authority for departing from the protocols and conceded that if the sampling procedure was flawed, then it had major implications for the reliability of the testing process.

[81] The appellant therefore submitted, "that what was required was a careful analysis of the testimony led at the trial…" (*R v King and Yarde (1960) 2 WIR 431*) and further that:

> "having regard to the length of the trial… it was important that the judge's summing up should not only clearly direct the jury on matters of law, but assist them by an impartial summary of the evidence so as to refresh their memories and relate the evidence to the issues of fact and law".

[82] He submitted further "…in a marginal case as this the evidence needed to be scrutinized and not simply rehearsed, if a verdict founded on it was to be safe . . ." (*Taibo v R (1996) 48 WIR 74*). Rambarran contended that, despite the trial judge explaining that the Crown was relying on Ms. Skeete's evidence to

prove an essential ingredient of the case, the summation on this issue was fundamentally flawed. He maintained that the correct approach to evaluating expert witnesses was set out in *Davie v Magistrates of Edinburgh (1953) SC 34 at 40* where Lord Cooper stated:

> "their duty is to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

[83] The trial judge in his view should thus have explained to the jury that if they did not accept Ms. Skeete's conclusions about the identity of the substances, there was no other basis on which they could find the seized substances were controlled drugs. We disagree.

[84] We note, first, that Rambarran's position that the entire bulk had to be tested to show homogeneity was impractical and illogical. The authorities simply do not support that proposition. In *R v Outar et al Criminal Appeal No 28 of 1987 decided 31st July 1987*, White JA opined in the Jamaican Court of Appeal as follows:

> '[S]uffice it to say that the procedure adopted of taking samples from the individual packages was eminently a practical way of testing the contents of the 70 packages. Otherwise it would entail a detailed check of every particle of the contents of each package, which would be an enormous and time consuming task."

[85] More poignant, perhaps, are the dicta of Gonsalves-Sabola CJ (Ag) in the Supreme Court of the Bahamas in *Battle et al v Commissioner of Police BS 1990 SC 61* where his Lordship stated:

> I deal first with the submission that although the sample that the analyst extracted for examination from each of the six packets was found to be cocaine, it was only part of the contents of that packet. It was argued the prosecution had thus failed to prove that the rider of the contents of each packet was cocaine. I reject the submission out of hand. If random samples taken from the concealed packets proved positive for cocaine, although in abstract logic it was physically possible for the remaining contents to be, for example, talcum powder or say, wheaten flower, in a practical world such fortuity does not enter the minds of ordinary reasonable men when drawing inferences from proved facts.
>
> The man on the South Beach jitney, like his counterpart on the Clapham omnibus, would forfeit all claim to being reasonable, were he to draw any inference other than that the six packages contained cocaine. Be it always remembered that the standard of proof to be attained is beyond a reasonable doubt, not a fanciful doubt.
>
> To what other conclusion could the Magistrate reasonably have come in the absence of any evidence whatsoever raising some question as to whether there was correspondence of bulk with sample? Courts of law should not recognize as valid argument, tenuous refinements which stretch logic into the realms of unreality. Magistrates, like judges, must consistently decline to justify the assimilation of the law to idiocy which, in Oliver Twist, made Mr. Bumble disrespectfully suggest.'

[86] The Crown further submitted, in our view quite rightly, that Ms. Skeete had testified that *all* of the packages were tested rather than the percentage of the bulk required by the UN Protocol to be tested which was a minimum standard. It could therefore not have been prejudicial to the appellants that a greater

number of samples were taken as logically this would be more representative of the bulk. The trial judge thus did not have to direct the jury on the number of samples to be taken or on the randomness of sampling as all of the packages were sampled.

[87] As regards the jargon used by Ms. Skeete, the respondent submitted further that it was important for the jury to understand the scientific jargon used and the testing procedures used by Ms. Skeete and that a precís of the evidence would certainly have resulted in judicial error. Given the nature of Ms. Skeete's evidence the trial judge was justified in reminding the jury of this in the way that she did. During the course of the summation, the judge told the jury how they should approach inconsistencies and discrepancies in the evidence.

[88] We note as well that the learned trial judge highlighted a number of discrepancies and inconsistencies and she did not need to go further than that. Counsel referred us to ***Archer v R*** **Criminal Appeal No. 26 of 2005 decided 8 July 2011**, where **Moore JA** observed in this Court that:

> "We are of the view that having given the general direction on discrepancies and inconsistencies and having given examples of discrepancies in the evidence of two police witnesses, the judge adequately carried out his function. There is no requirement for the judge to highlight every discrepancy for the jury. They have heard the evidence and must be credited with some measure of ability and common sense."

[89] The appellant criticized the trial judge for her alleged failure to explain to the jury the purpose of expert evidence. The Crown agreed that the trial judge, in addition to the standard direction, should also direct the jury so that they understand the purpose of the expert evidence by clearly identifying it and the issue that the expert sought to address. We agree.

[90] In this Court's decision in **Sargeant v R Criminal Appeal No. 2 of 2006 decided 29th November 2006**, it was noted that in addition to the standard directions on expert evidence, the trial judge should also "direct the members of the jury so that they understand the purpose of the expert evidence by clearly identifying it and the issue that the expert seeks to address."

[91] In **Sargeant**, this Court identified what it regarded as the standard jury direction "that [the expert evidence] is permitted in a criminal trial to provide the jury with information and opinion, which is within the witnesses' expertise but which is likely to be outside the jury's experience and knowledge; that the jury is entitled and would no doubt wish to have regard to the opinion expressed by the expert when coming to its own conclusion about that aspect of the case but does not have to accept the evidence of the expert; and that the expert evidence generally relates only to part of the case, all of the evidence of which must be considered before reaching a verdict."

[92] So what did the trial judge say to the jury about the purpose of the expert evidence? At p. 23, lines 3-13 of the Summation Volume, she directed the jury as follows:

> "In this case the prosecution called Ms. Marsha Skeete, Forensic Scientist as an expert witness. The law allows an appropriately qualified expert to state his or her opinion on a matter calling for the expertise, which he or she possesses. Expert evidence is admissible on matters relating to science, skill or trade beyond the knowledge of the ordinary person in respect of the specific field of training or expertise. Having heard the qualifications training and expertise of Ms. Marsha Skeete, the Court was satisfied that she was competent to give evidence on the matters related to her particular area of expertise, and therefore ruled that she be treated as an expert witness.
> A witness called as an expert is entitled to express an opinion of his or her findings on the matters that are put to him or her and you are entitled to have regard to that evidence and to the opinion expressed by that witness when coming to your own conclusions about this aspect of the case. You should bear in mind that if having given the matter careful consideration, you do not accept the evidence of the expert, you do not have to act upon it. It is for you to decide whose evidence and whose opinions to accept, if any".

[93] It is clear that the trial judge's directions to the jury hued closely to the directives of this Court in **Sargeant.** There is, accordingly, no basis for complaint.

[94] Indeed, we have taken time to examine the submissions of both parties on the issues relating to Ms. Skeete. The simple evidence before the court was that Ms. Skeete visually examined the bulk to confirm homogeneity and all of the packages were sampled. There were 109 packages of cocaine and 87

packages of marijuana that were visually examined and grouped based on contents and external characteristics. Samples were taken from *all* of the packages and the appellant has not contended that the packages contained any other substance. In our view having tested all of the packages, it logically follows that samples would be representative of the bulk. However, as the appellants noted Ms. Skeete conceded that she did not use the accepted method of random sampling. She conceded further that if the sampling procedure was flawed, there were major implications for the reliability of the testing process. However, to repeat, she did not test a random sampling. She tested all the packages.

[95] Sir Richard complains that the trial Judge did not tell the jury what the consequence of the conflicts, concessions, inconsistencies and contradictions in Ms. Skeete's evidence were and that the trial judge thus failed to direct the jury on a material issue which went to the heart of the prosecution's case, that is the identification of the seized substances with certainty. It was, he contends, a serious misdirection sufficient to nullify the conviction.

[96] We can find no substance in this contention. *A contra*, it is clear that, on this ground as with the expert evidence claim above, the trial judge's directions to the jury about Marsha Skeete's evidence were in compliance with the

directives in ***Sargeant.*** At pp. 157-159 of the Summation Volume, the trial judge directed the jury as follows:

> "[I]t is important for you to do a careful review of the evidence of those witnesses that I have referred to, Ms. Marsha Skeete in particular, you will ask yourselves, perhaps the following questions: did she come across to you as a truthful witness? Was she shaken under cross-examination? Did she appear to be confused or forgetful? What is the reason for the inconsistencies in her evidence? Was she trying to evade the truth? Did you find her to be a liar? Has her credibility been destroyed so that you cannot rely on her testimony? These are the important questions, which you will ask yourselves as you conduct a review of her evidence.
>
> You must therefore consider whether her evidence in totality, evidence-in-chief and under cross-examination, whether her evidence would cast any reasonable doubt on the proceedings, did she follow in arriving at her findings or on her integrity, because Mr. Foreman and your members you have to determine whether the prosecution has satisfied you to the extent that you feel sure that the vegetable matter was a controlled drug cannabis and that the white powder was cocaine, also a controlled drug before it is open to you to convict any of the accused on any of the counts in this indictment. If you are not satisfied that you feel sure that you can rely on the evidence of Ms. Skeete that the packages contained cannabis or cocaine, or you are in reasonable doubt about it, then of course you will find the accused not guilty. It would also mean if you find that Ms. Skeete, for example was deliberately lying, it means that you will have to reject her evidence in totality and then her Certificate of Analysis would be of little or no evidentiary value to you and there would be no scientific evidence before you of the identity of the substances, as I said which is an essential ingredient of the charges before you.
>
> So therefore Mr. Foreman and members, if there is any doubt, reasonable doubt, as to whether the prosecution has satisfied you on this point, you can go no further because the prosecution would not have discharged its burden on the essential element in

> each count and you would have to return a verdict of not guilty on all the counts.
> Remember, Mr. Foreman and your members that the onus is on the prosecution to prove the guilt of the accused. It is not on the accused to prove his innocence. So you will bare all those matters in mind when you come to evaluate the evidence of these witnesses as it relates to the substances which were found in the packages which were found in the logs and suitcases at No. 30 Bay Gardens. Please bare (sic) that in mind and also bare (sic) in mind the direction which I gave you on discrepancies and inconsistencies."

[97] In our view, the trial judge properly placed the evidence before the jury for them to come to their own conclusions. The jury was present for the three-day cross examination of Ms. Skeete and would have heard her evidence in full and drawn their own conclusions as to the reliability of her evidence. It forms no part of the trial judge's function to instruct juries as to how they are to determine their facts and which facts they should consider more than others. It is however required for trial judges to present the evidence in a fair manner and let the jury decide.

[98] We can find no fault in the judge's direction. Accordingly, grounds 5, 9 and 14 must fail.

Ground 6

[99] The appellants complained under this head that the judge committed a major irregularity when she allowed the jury to view the untested bulk in that the viewing and admission of the bulk represented a material deviation from the

case which the appellant expected to answer based on the evidence led at the preliminary enquiry and the prosecutor's opening address. This was to take the defence by surprise and to allow the prosecution to change its case mid-stream.

[100] The Crown responded that there was no material deviation from the case, which always concerned the bulk. The sampling process under **section 132C** of **Cap. 121** was an alternative way of adducing evidence before the court in drug related offences but it did not preclude evidence being led about the bulk. Further **section 45** of the ***Act*** held that all relevant evidence should be admitted in the proceedings. The bulk was relevant evidence as it was the subject matter of the charges.

[101] We respond only briefly. The contention is misconceived. The sampling process in **section 132C** of **Cap. 121** was intended as an alternative, not a replacement method for presenting drug offences. The whole idea was that in cases where the bulk was, literally, too bulky to bring into court, the samples, received under UN guidelines and prepared for court following the procedural guidelines of the Act, including certain relevant signatures, would suffice.

[102] Nothing in **Cap. 121** precludes the presentation of the bulk before the jury and the bulk was very relevant evidence within the meaning of **section 42** of **Cap. 121** since that bulk formed the basis of the charges, which the appellants were

called upon to answer. The bulk could not be admitted in secret and the normal procedure would be for the jury to see the bulk when it was marked for identification and before it was admitted into evidence.

[103] Having ruled that the samples were inadmissible because of the violation of the procedural provisions of the Evidence Act, the only admissible evidence of the drugs before the trial judge was the bulk which the jury was entitled to see both while it was marked for identification and then after it had been marked into evidence.

[104] We find no merit in this ground of appeal.

Ground 10 – The Meaning of "Cannabis"

[105] The appellant's complaint under this ground is that the trial judge erred on a question of law when she misclassified and mis-defined for the jury the meaning of 'cannabis' under the **Drug Abuse (Prevention and Control) Act Cap. 131** as it related to the case. The appellant's argument is that the Crown failed to prove that the vegetable matter was Indian hemp as the certificate of analysis merely stated that the vegetable matter was 'of the genus cannabis' and not specifically Indian hemp.

[106] We find that there is no merit in this ground.

[107] There has been a lot of discussion in this matter as to the definition of cannabis but it is to the definition in the statutes that the court must turn. The appellant

has relied on the definition in ***Part 1*** of the ***Schedule*** to **Cap.131**, which provides a "List of Narcotic Drugs Under Control", ***section 1*** of which states that "the following substances and products… Cannabis (Indian Hemp) and Cannabis Resin lists prohibited substances and which lists 'cannabis (Indian Hemp) and Cannabis resin (Resin of Indian hemp)."

[108] However, ***section 2*** of **Cap.131**, the definition section, states that

> "'Cannabis' means *any* plant of the genus Cannabis from which the resin has not been separated and includes *any* part of the plant by whatever name it may be designated."

The ***section*** goes on to state, "'cannabis resin' means the separated resin, whether crude or purified, obtained from *any plant of the genus Cannabis*." (Emphasis added)

[109] There is a little history to this definition in ***section 2*** of the ***DA (PC) A,*** which was enacted in 1990. In a 1974 decision of the Divisional Court (***Williams and Hanschell JJ***) in ***Anthony v Commissioner of Police (No. 96/1973***, the appellant was convicted by a magistrate of the unlawful possession of a quantity of Indian hemp. The then statute, the Dangerous Drugs Act 1936 No. 3, contained the following definition:

> "Indian hemp means the dried flowering of fruiting tops, leaves or stalks of the pistillate plant known as Cannabis sativa L from which the resin has not been extracted, under whatever name they may be designated in commerce."

[110] The Court noted that:

> "[f]rom the evidence it appears that there are three plants of the species Cannabis sativa L -- the pistillate, the staminate and a third which is a hybrid anomaly. . .
> The Crown must establish, beyond reasonable doubt that the vegetable matter was from the pistillate plant Cannabis sativa L. This follows from the restrictive nature of the definition as it stands at present. All parts of staminate plant are excluded – there is not the slightest doubt about this. It seems that on accepted principles of construction that all parts of the hybrid or as it is termed by the experts, the monoecious plant are likewise excluded by the definition. Though the monoecious plant appears to be a rare specimen, it does not absolve the court hearing the charge from considering on a totality of the evidence whether the prosecution has discharged the onus of showing that the vegetable matter was from the pistillate plant."

The Court held, on the evidence that the burden of proving that the vegetable matter was from the pistillate plant had not been discharged and so the appeal was allowed.

[111] In response to the "restrictive nature of the definition", the Act was amended and ***section 2*** of the current ***Act*** states, as noted before, that "cannabis" means "any plant of the genus Cannabis" and "any part of the plant by whatever name it may be designated." The question then is, as a matter of statutory construction, can the generality of "any plant" or "any part" be restricted by the phrase "Indian hemp" contained in Part 1 of the Schedule?

[112] It is, of course, well settled that when construing a statute, the entire statutory language, including that contained in the schedules, must be looked at in an effort to ascertain the intention of Parliament. "[I]t is firmly established that

an Act or other instrument must be read as a whole" (*Bennion on Statutory Interpretation: A Code (5th Edition)* Comment on Code 355, p. 1156).

[113] Bennion cites the dicta of Lord Walker of Gestingthorpe in **Customs and Excise Comrs v Zielinski Baker & Partners [2004] UKHL 7, [2004] 2 All ER 141 at [38]** that "a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole." In more picturesque language, Justice Oliver Wendell Holmes observed, "You let whatever galvanic current may come from the rest of the instrument run through the particular sentence." (See, "*The Theory of Legal Interpretation*" (1898-99) 12 Harv LR 417, cited in Bennion, *op. cit.*) Bennion concludes that "[r]eading a text as a whole may reveal that one part rules out a suggested legal meaning of another part" (citing, as an example, **Lawson v Serco Ltd [2004] EWCA Civ 12, [2004] 2 All ER 200 at [17])**.

[114] More specifically in relation to the schedules to statutes, Bennion notes, at p. 722, that "[w]hether material is out in a section or a Schedule is usually a mere matter of convenience. Little significance should therefore be attached to it." And in the *locus classicus* of Attorney General v Lamplough (1878) 3 Ex. D. 214, 229, Brett LJ (as he then was; later Lord Esher MR) stated:

> "A Schedule in an Act is a mere question of drafting, a mere question of words. The Schedule is as much a part of the statute, and is as much an enactment, as any other part."

[115] When both the statute is read as a whole, it is pellucid that the language of **section 2** and that of **the Schedule** of **the Act** are meant to be read together. At its base, the contention of counsel seems to suggest that there is a conflict between the statute's definition section and its schedule. But we can discern no such conflict. We conclude that any plant of the genus Cannabis includes the Cannabis (Indian Hemp) mentioned in the schedule and any resin derived from such a plant. Accordingly, this ground fails.

Ground 11 – The Presumption of Knowledge

[116] This ground has two limbs; firstly that the learned trial judge misdirected the jury when she failed to explain to them that they could not rely on the presumption of knowledge set out in ***section 42*** of **Cap. 131** unless and until they were satisfied that the prosecution had proved, by scientific means, that the substances were controlled drugs within the meaning of the law and in relation to the offences before the Court.

[117] The second limb of his argument is that the trial judge misled the jury in law in stating that the presumption of knowledge set out in **section 42** of **Cap. 131** if raised would be rebutted if they accepted that the accused had not made the statements attributed to him without further directing them that even if they found that these statements were freely given they were not proof of the identity of the substances in question.

[118] The appellant's contention is that **section 42** makes it apparent that the presumptions do not relate to whether or not a substance is in fact a controlled drug. The presumptions are relevant to the accused's knowledge only and become operable only after the prosecution has established beyond a reasonable doubt that the substance is in fact a controlled drug. They submit further that even if the jury accepted that the appellant's confession was given voluntarily it was not evidence of the identity of the substances and it was incumbent on the trial judge to explain that to the jury.

[119] The respondent submitted that the Act was clear that before the presumption could arise, it had to be shown that the substance was a controlled drug and given the express language of the Act, the trial judge was not required to go beyond the section and give any further explanation.

[120] We are of the view that **section 42** sets out a number of presumptions of possession and knowledge. Under subsection 1(a) for example the onus is on the prosecution firstly to show that the appellant imported something and that what was imported contained a controlled drug. If the contrary is not proved, then it is presumed that he knew that the 'thing' contained the drug. It is to the evidence that we must turn once again.

[121] An examination of the record shows that the trial judge stated at page 28 of the Summation Volume, as follows

> "Mr. Foreman and members of the jury… the prosecution must prove to your satisfaction that each of the accused had the controlled drug in their possession or under their control… that each accused knew that they had the controlled drug physically in their possession or custody or under his or her control, and that the narcotic drug is a controlled drug listed in part 1 of the first schedule to the Act and that they all acted together…"

[122] The trial Judge also said at page 24 of the Summation Volume:

> "now the accused… are charged with importation of a controlled drug, cannabis and cocaine respectively. These charges rest on the evidence of the police officers and the forensic scientist. If you accept the evidence of the officers, … that the accused made the oral statements and gave the written statements and you are so satisfied that the two accused imported these packages, then Section 42 … operates to raise a presumption that the accused knew that those packages contained cannabis and cocaine."

[123] We can find no fault in the direction given by the trial judge at this point and accordingly find no merit in this ground. In both their oral and written statements, the appellants acknowledged that they were aware that the packages contained drugs.

Ground 12 – Circumstantial Evidence

[124] This ground relates to circumstantial evidence and is twofold. The appellant complained that the judge directed the jury that the case against him was based on circumstantial evidence but that her summation was incomplete, in that, she failed to point out that in such a case all the inferences drawn from the proven facts must be reasonable and be consistent with guilt only.

Additionally, the trial judge erred in law when she failed to analyse the strands of evidence on which the Crown relied and point out that they were all consistent with the innocent explanations given by the appellant on oath, many of which were unchallenged.

[125] The appellant's first criticism is that the trial judge had a responsibility to correctly define circumstantial evidence. The definition provided by the trial judge was deficient, confusing and unhelpful, he argues. It did not in his view meet up with the standard of definition set by **Pollock CB** in ***Exall*** **(1866) 4 F & F 922 at p 929** where his Lordship stated thus

> "… it may be in circumstantial evidence a combination of circumstances, no one of which could raise a reasonable conviction, or more than a mere suspicion, but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit."

[126] The appellant's further criticism is that the trial judge did not advise the jury as to what process of reasoning they had to employ in order to rely on circumstantial evidence as proof of guilt. He submitted that the trial judge should have first advised them to find facts from which inferences could be drawn in relation to the existence or non-existence of facts in issue and secondly, that the evidence was cumulative and by geometrical progression eliminating possibilities. He maintained that the trial judge told the jury that it was powerful evidence which had to be examined with care but failed to tell

them that by its very nature it was always inconclusive however credible the source.

[127] On this ground we are of the view that the holding of the court in ***Henry v The State*** **(1986) 40 WIR 312** encapsulates the appropriate response to this ground. The Court held:

> "… we are of the opinion that despite the fact that the trial Judge did not explain to the jury the meaning of circumstantial evidence or what were the possible inferences to be drawn, not only were his directions thereon clear and intelligible but he was at pains throughout to make it quite clear to the jury upon whom the onus and standard of proof lay in this respect. It is clear from a reading of the judge's summation on this issue that he had made it abundantly clear to the jury that they could not find guilt in the appellant unless they were prepared to draw inferences adverse to the appellant beyond all reasonable doubt. That in our view, was sufficient for the purposes of the case".

[128] We think it prudent to reproduce the directions given by the trial Judge in light of ***Henry.*** At page 486 - 487 of the record, the trial judge stated as follows:

> "… it is often the case that direct evidence of a crime is not available and the prosecution relies on circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the accused which they say when taken together, will lead to the sure conclusion that it was the accused who committed the crime. It is not evidence to provide an answer to all the questions raised in a case. You may think that it would be an unusual case indeed in which a jury can say "we now know everything there is to know about this case" but the evidence must lead you to the sure conclusion that the charge which the accused faces is proved against him.
> … circumstantial evidence can be powerful evidence but it is important that you examine it with care and consider whether the

> evidence upon which the prosecution relies in proof of its case is reliable or whether it does prove guilt. Furthermore before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case.
> Finally you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation…."

[129] We consider that the direction given by the trial judge was sufficient in all the circumstances and we can see no merit in this ground of appeal.

Ground 13

[130] The ground under this head is that "the learned trial judge failed to point out to the jury that the prosecution's case against the appellant with respect to the charges of possession and trafficking was materially different from that of the other co-accused and to assist them with the meaning and application of the concept of possession in relation to the appellant. In this respect, her summation of the prosecution's case against the appellant was inadequate in law.

[131] On a review of the record, we are fortified in concluding that this ground must fail. In her summation, the record clearly shows that the trial judge explained 1) what the prosecution had to prove to ground a charge of possession (she explained what 'possession' and 'controlled drug' were to the jury); 2) that the trial judge explained what the group was charged with collectively and

then further explained the case for each person to the jury; 3) she pointed out the issues for each accused person to the jury (refer to page 526 – 531) and 4) in particular the trial judge stressed for the jury what the prosecution had to prove and failing that directed them that they could not find the accused man guilty. The trial judge therefore adequately addressed the differences in the prosecution's cases against each accused.

Ground 8 - The Testimony of Co-Accused Bacchus and The Rule in Brown v Dunne

[132] Appellant Rambarran contends that the learned judge violated a cardinal rule of trial procedure when she permitted co-accused Bacchus to give testimony which contradicted the testimony previously given by him (Rambarran) when Bacchus' attorney had failed to cross-examine Rambarran and to put to him the facts which Bacchus sought to establish in his testimony. He argued that it was unfair to permit Bacchus to give contrary evidence of facts, which had never been put to him (Rambarran) in cross-examination. For the reasons which follow, we determine that no unfairness was done to Rambarran during the trial by permitting Bacchus to so testify.

[133] Rambarran's contention is predicated on the rule in *Browne v Dunn* (1894) 6 R 67, described in *Odgers Uniform Law of Evidence* 13th Edition at para

[EA.46.60] as "the common law rule of fairness." As stated by Lord Herschell LC at (1894) 6 R 67, 70:

> "I have always understood that if you intend to impeach a witness, you are bound while he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional conduct of a case, but is essential to fair play and fair dealing with witnesses."

Concurring with the Lord Chancellor, Lord Halsbury observed, at pp. 78-79, that "nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

[134] In *MWJ v The Queen*, (2005) 80 ALJR 329, a decision of the High Court of Australia, Gummow, Kirby and Callinan JJ stated at para [38]:

> The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that party's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness's credit.

(See, *Granston v AG*, JM 2009 SC 74, per Sykes J, as he then was, citing *Allied Pastoral Holding Pty v Comr of Taxation* [1983] 1 NSWLR 1, 23).

[135] The Crown responds that Rambarran had fair notice that his evidence was being challenged and contends that, while counsel for Bacchus, Ms. Pile, did not cross-examine Rambarran, he was cross-examined vigorously by the then DPP, Mr. Charles Leacock QC. Leacock was the only one who cross-examined him.

[136] For the reasons which follow, we find that the judge had given adequate curative instructions and, moreover, Rambarran never availed himself of the provisions of the Evidence Act which permits recall of witnesses in such circumstances. There was no unfairness done to appellant Rambarran.

[137] The issue arose at trial in the following way: Rambarran gave sworn testimony on Thursday 23 April, 2009 (see Vol. VIII of the Trial record at pp. 3722-3818). The crux of Rambarran's testimony was that he had first met his co-accuseds at Oistin's Police Station where they were taken after their arrest. He stated that he owned and conducted a gold and diamond mining operation in Guyana. He had come to Barbados because he had lost the keys to his car, a Mini Cooper, and he had ordered another set of keys from BS&T Motors. He had stayed at the Hilton Hotel and picked up the keys on 30 November

2005, Independence Day. He said that he had never gone to Rowans, St. George, nor to Bay Gardens.

[138] Later that night, he heard a knocking on the door of his hotel room and when he opened the door, three or four persons, later identified as police in plain clothes, rushed into the room. They handcuffed him, put him in an unmarked car and took him to the Bayland where they arrested a man whose name, he later learned, was Gavin Green, and they handcuffed his hand to Green's. The police then took him and Green to Oistin's Police Station where, Rambarran testified, he first saw the other co-accuseds, including Bacchus. The only one familiar to him was Lemme Campbell whom he had known by seeing him around Georgetown but they had never spoken.

[139] Rambarran was vigorously cross-examined by then DPP, the late Charles Leacock QC. He conceded that he travelled frequently to and from Barbados, the other Caribbean islands, the United States and Europe. He agreed that he had travelled to Barbados about five times in 2005 before November 2005, and that he had given the Barbados immigration authorities several addresses in Guyana.

[140] Rambarran denied that he was the "main boss" in the shipment of drugs to Barbados. "I is my own boss for my mining operation," he responded. As to the signed statement admitting to complicity in the drug operation, he repeated

his testimony on the *voir dire* that the police had written the statement and had forced him to sign it. He stated that he was not friendly with Lemme Campbell and repeated that the first time he had seen any of the other accuseds was at Oistin's Police Station.

[141] Co-accuseds Green and Campbell gave unsworn statements from the dock denying complicity in the offences. However, Bacchus gave sworn testimony. He stated that in 2005, he resided with his wife, co-accused Diane Bacchus, at Bay Gardens, Beckles Road, St. Michael where they had resided since 1996 when they first came to Barbados. He had known co-accused Campbell, and recalled that, on 29 November 2005, he and his wife had gone to the airport to pick up Somwattie Persaud, Campbell's wife. On arrival at their home, Bacchus recalled that Campbell told him that he had brought in a container of lumber and asked Bacchus to take Green and some other fellows to Rowans Park, St. George to collect the lumber. He did so.

[142] Bacchus testified that while they were returning home, Campbell called him on his phone and asked him to meet him (Campbell) by a Chinese Restaurant on Roebuck Street. On arrival there, he saw Campbell there with another man whom he introduced to him and his wife as Rohan Rambarran, "Short Man", a friend doing business in Barbados.

[143] At that point, Rambarran's counsel, Sir Richard Cheltenham QC objected to Bacchus' testimony. He contended that Rambarran had stated that he did not know Bacchus or any of the other co-accuseds. He stated that no one had asked Rambarran any questions. Sir Richard referred to the rule in *Browne v Dunn*, discussed in Blackstone's Criminal Practice 2001 along with cases there cited, for the proposition that, not having cross-examined Rambarran on the issue of when he had met Bacchus, counsel for Bacchus could not be allowed to lead evidence from Bacchus that he had met Rambarran earlier in the day before they were, as Rambarran stated, under arrest at Oistin's Police Station. He contended that

> it is for the Court to ask the jury to disregard it, treat it as though they have never heard it; it was never said, and that at a later stage when it comes to the summation to the jury, the Court would be obliged to return to the issue and again instruct the jury to banish it from their mind. It is patently unfair. The man exposed himself for anybody to challenge him, nobody challenged him. And now that he has left the stand, we are getting this suggestion.

[144] Counsel for Bacchus, Ms. Vonda Pile, argued that it was the jury's duty to determine whom they believed. She further contended that Rambarran's counsel had "the opportunity and the avenue to recall" Rambarran refute anything, which she had not asked him or anything her client had testified to.

[145] We begin our analysis by noting that, regrettably, neither side mentioned, either to the trial judge or to us, two very relevant statutory provisions,

namely, ***sections 43*** and ***145*** of the ***Evidence Act*** **Cap 121** of the **Laws of Barbados** which provide:

> 43. Where a party adduces evidence
> (a) *that contradicts evidence already given in examination-in-chief by a witness called by some other party*; or
> (b) about a matter as to which a witness who has already been called by some other party was able to give evidence in examination-in-chief,
> and the evidence has been admitted, *the court may, if the first-mentioned party did not cross-examine the witness about the matter to which the evidence relates, give leave to the party who called the witness to re-call the witness* to be questioned about the matter.
> . . .
> 145. (1) Where, by virtue of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
> (2) In determining whether to give the leave, permission or direction, the maters which the court shall take into account include
> (a) the extent to which to do so would be likely to add unduly to, or to shorten the length of the hearing;
> (b) the extent to which to do so would be unfair to a party or to a witness;
> (c) the importance of the evidence in relation to which the leave or permission is sought;
> (d) the nature of the proceeding; and
> (e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence."
> (Emphasis added).

[146] These sections derive from, and are in *pari materia* with, sections 46 and 192 of the 1995 Evidence Act of the Commonwealth of Australia. The Australian commentators observe that the Commonwealth section 46 (our section 43) "overlaps with the common law rule of fairness usually referred to as the rule in *Browne v Dunn*" but that "[t]here is no doubt that the common law rule applies in criminal proceedings albeit with some modification in respect of alleged breaches of the rule by the defence." Odgers *Uniform Evidence Law* 13th Edn (2018), paras [EA.46.60]; [EA 46.120]; see, also *Cross on Evidence*, 9th Australian Edn (2013), paras [17435] to [17460].

[147] However, before moving on to discuss the common law, we cannot avoid the conclusion that Rambarran's attorneys did not seek to recall him to testify as permitted under ***section 43*** of the Act on such terms as the trial judge may have deemed fair within under ***section 145*** of the ***Evidence Act.*** For this reason, if no other, he cannot now complain when he failed to take advantage of the statutory permission to be recalled to clarify his testimony.

[148] Apart from the statutory point above, we must also look at this matter as a whole and determine whether the conduct of the trial, under the common law rules, was in fact unfair to Rambarran, bearing in mind the words of Newton J in *Bulstrode v Trimble* [1970] VR 840 (19 May 1970); [1970] VicRP 104 who stated:

> "…the mere fact that one party has succeeded upon an issue of fact without giving to witnesses for the other party, who gave evidence against him on that issue, an opportunity in cross examination of explaining their evidence, will certainly not always be a reason for setting the decision aside on appeal; all the circumstances must be taken into account so as to see whether the conduct of the trial was in fact unfair to the appellant".

[149] The only case which our independent researches show the rule in *Browne v Dunn* being applied as between co-defendants is *R v Fenlon and Others,* (1980) 71 Cr App R 307 by the UK Court of Appeal (Lord Lane CJ, Park and Anthony Lincoln JJ), which, again regrettably, was not cited to the learned trial judge nor, indeed, to us during argument. In that case, the appellant (Fenlon; hereinafter "F") and two applicants for leave (two brothers named Neal; hereinafter "N") were convicted of rape. The victim had been picked up by them at a public house after which they and four other men had gone with her to the flat of the parents of one of the men. F appealed on three main grounds, which were adopted by the N brothers.

[150] The ground which implicates the rule in *Brown v Dunn* is best expressed in the following quotation from the judgment of the Lord Lane CJ (at pp. 312 - 313) which we set out *in extenso*:

> The next ground upon which Mr. Goldberg relies is as follows: "Immediately after Fenlon had finished his evidence-in-chief (he being the first defendant on the indictment) the learned judge ruled that it was the duty of the five succeeding defending counsel to cross-examine Fenlon by putting to him the cases of

their clients wherever these might differ from Fenlon's evidence. It is submitted that this was wrong in law, and that it was no part of the duty of co-defending counsel to highlight in this way conflicts between their clients and Fenlon, and thus to do the job of Crown counsel ."

We are told (and there is no reason to doubt it) that there seems to have been in the past a difference of approach between judges to this particular matter. We have been referred to a decision of the House of Lords, albeit in a civil case, *Browne v. Dunn (1893) 6 R. 67*, the material parts of the headnote in which read: "If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or (*per* Lord Morris) the story is of an incredible and romancing character." . . .

Mr. Goldberg submits that that is a rule, which applies to counsel prosecuting on behalf of the Crown. It is his clear duty, he concedes, to put to witnesses the version of events for which he contends, so that they can answer it. But he further submits that it is not the duty of one defendant to put to another defendant his version of events where it differs from the version given by that other defendant.

We can see no distinction in principle between the one situation and the other. The basis of the rule, as Lord Herschell pointed out, is to give a witness of whom it is going to be said or suggested that he was not telling the truth an opportunity of explaining and if necessary of advancing further facts in confirmation of the evidence which he has given. There seems

> to be no reason why there should be any different rule relating to defendants between themselves from that applying to the prosecution vis-à-vis the defendant or the defence vis-à-vis the prosecution. It is the duty of counsel who intends to suggest that a witness is not telling the truth to make it clear to the witness in cross-examination that he challenges his veracity and to give the witness an opportunity of replying. It need not be done in minute detail, but it is the duty of counsel to make it plain to the witness, albeit he may be a co-defendant, that his evidence is not accepted and in what respects it is not accepted.
>
> . . .
>
> The result, so far as that ground of appeal is concerned, is that the learned judge was right to draw the attention of counsel to their duty in those respects: and he rightly pointed out to them that in the absence of such cross-examination it would be his duty *to comment to the jury on the fact that one defendant's case had not been put to another, even though the two cases were diametrically opposed*.
>
> (Emphasis added)

[151] We note, for now, emanating from the italicized portion of the quote from Lord Lane CJ, namely that the trial judge in *Fenlon* saw it as his duty merely to comment to the jury on the violation of the rule, and not to excise the testimony from the record nor to ask the jury to disregard it. We shall return to this point when we examine the trial judge's summation to the jury on this issue.

[152] The Australian cases dealing with alleged violations of the rule in *Browne v Dunn* offer guidance as to how such breaches of the rule should be approached. The approach is, in large measure, the cautionary one of the trial

judge in *Fenlon*. *R v Manunta* (1989) 54 SASR 17, a decision of the Supreme Court of South Australia cited to us by the Crown, concerned a trial in which the defendant had failed to cross-examine police witnesses and then had called a witness whose testimony contradicted that of the police witnesses. The trial judge, in summation, had told the jury that "[y]ou are entitled, for example, to ask yourselves, ladies and gentlemen, could these be matters of recent invention concocted by the defendant and his witness in an attempt to cast doubt on the evidence of the police officers without giving to the police officers the opportunity to contradict those propositions?"

[153] King CJ, while considering that the trial judge could not be criticised for leaving this issue to the jury, noted the need for caution. His Honor stated:

> "I have been concerned about the prominence which the learned judge gave to these matters in his summation. It is legitimate, of course, to draw appropriate conclusions from counsel's failure to put in cross-examination some matter to which his client or some witness subsequently depose. It is a process of reasoning, however, which is fraught with peril and should therefore be used only with much caution and circumspection. There may be many explanations of the omission which do not reflect upon the credibility of the witnesses. Counsel may have misunderstood his instructions. The witnesses may not have been fully cooperative in providing statements. Forensic pressures may have resulted in looseness or inexactitude in the framing of questions. The matter might simply have been overlooked. I think that where the possibility of drawing an adverse inference is left to the jury, the jury should be assisted, generally speaking, by some reference to the sort of factors which I have mentioned. Jurors are not familiar with the course of trial or preparation for trial and such considerations may not enter spontaneously into

> their minds. Whether such matters should be brought to the attention of the jury and the manner in which that should be done are matters for decision by the trial judge in the atmosphere of the trial. I must say that the points raised with the jury based upon the failure to cross-examine do not seem to me to possess mush weight. They were explained to the jury, however, quite fairly and their weight was a matter for the jury. I do not think that any error has been demonstrated.

The appeal was dismissed.

[154] There is additional guidance, which derives from the Australian cases applying *Browne v Dunn* which stated that the court must look at this matter as a whole and determine whether the conduct of the trial was in fact unfair. We note the persuasive words of **Newton J** in ***Bulstrode v Trimble*** **[1970] VR 840 (19 May 1970); [1970] Vic Rep 104** that:

> "…the mere fact that one party has succeeded upon an issue of fact without giving to witnesses for the other party, who gave evidence against him on that issue, an opportunity in cross examination of explaining their evidence, will certainly not always be a reason for setting the decision aside on appeal; all the circumstances must be taken into account so as to see whether the conduct of the trial was in fact unfair to the appellant".

[155] There was no unfairness to appellant Rambarran. Our conclusion is further bolstered by several other considerations. First, one remedy noted in *Cross on Evidence, 9th Australian Edition*, is for the trial judge to give a strong curative instruction to the jury. It is clear on the trial record that the learned trial judge did just that. During the summation, the learned trial judge stated:

> "Christopher Bacchus gave evidence in this trial which tended to show that his co-accused were involved in some way in the commission of the offences which you are trying. I must warn you that you must examine that evidence with particular care, for the accused Christopher Bacchus saying what he did may have been more concerned about protecting himself than about speaking the truth. Bear that in mind when deciding whether you can believe what the accused Christopher Bacchus told you about his co-accused."

[156] Secondly, the trial judge gave another warning at a further point in her summation, which spoke directly to the technical violation of the rule in *Browne v Dunn*. At pp. 521-522 of the Volume of the Transcript labeled "Summation", the trial judge stated:

> "Further, the accused Rambarran elected to give his evidence from the witness stand in his defence, but it was never suggested to him in cross-examination that he had known the accused Christopher Bacchus prior to 30 November 2005, that he was in the Chinese Restaurant with him on that date, or that he was taken by accused Christopher Bacchus to places looking for tiles or that the accused Christopher Bacchus came to his room at the Hilton Hotel. So you must bear that warning in mind when deciding whether you can believe what the accused Christopher Bacchus has told you about the accused Rohan Rambarran."

[157] We conclude that these directions and warnings comported with **Section 137(1)(d)** and **(2)** of the **Evidence Act**. On the whole therefore, this segment of the trial was fair to Rambarran, and the ground therefore fails.

Ground 7 – The No Case Submission

[158] Under this head the appellant submitted that the learned judge erred in rejecting the no-case submission which, he contends, raised issues of law, for

instance, whether the prosecution had established that the suspected vegetable matter was cannabis within the meaning of the law, and whether the prosecution had met the standard of proof required by law in relation to the identification of both the white powder and vegetable matter.

[159] The Crown responded that the trial judge correctly applied ***R v Galbraith*** **73 Cr. App. R 124 CA.** In ***Galbraith*** the Court of Appeal per Lord Lane CJ set out a number of criteria when answering the question under this head. He stated thus:

> 1) If there is no evidence that the crime alleged had been committed by the defendant there is no difficulty, the judge will stop the case.
>
> 2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence (a) where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

[160] At the point of the no case submission, the trial judge had already heard, among others, the Rambarran's testimony on the *voir dire*, two of the arresting and interviewing police officers and the forensic scientist. A number of issues

like the credibility of the forensic scientist were live and it is clear that the matter fell with the second limb of ***Galbraith.***

[161] This ground of appeal has no merit.

Grounds 15 and 16 – Verdict Unsafe and Unsatisfactory

[162] Under these grounds the appellants maintained that in all the circumstances, the verdict of the jury should be set aside as unsafe and unsatisfactory (Ground 15) and further that the decision was against the weight of evidence (Ground 16).

[163] Given this court's decision under Ground 8, we are of the view that the fairness of the appellant's trial was not impacted by the breach of the rule in ***Browne v Dunn*** *(supra*), and therefore the convictions were both safe and satisfactory. There was no lurking doubt.

[164] Accordingly and in light of these findings, this contention fails and the appeals against conviction are dismissed.

The Appeals Against Sentence

(Lemme Campbell and Rohan Rambarran)

[165] Six Guyanese nationals were charged and convicted of the offences before the court. Only two co-accuseds however, remain incarcerated at this time, namely Lemme Campbell and Rohan Rambarran.

[166] It will be helpful to set out the remarks made by the trial judge before imposing the sentence on both appellants Campbell and Rambarran. At p. 127 of the Volume entitled "Mitigation and Sentencing", the trial judge began by making the following general comments to all the defendants:

> "Now you have been convicted of offences, concerning cannabis and cocaine, and the illegal narcotic trade has the potential to wreak havoc in our society, that Parliament of Barbados has enacted stiff penalties for those who are convicted of such offences.
> Importation of large quantities of drugs can only lead to increased drug use among our citizens especially our most vulnerable, that is, our young people, the destruction of the fabric of our society and the creation of myriad, social and economic problems for all who reside here. Persons such as yourselves must expect that if you are caught, you will feel the full weight of the law."

[167] As to appellant Campbell, the trial judge stated, at pp. 127-128:

> "Now, Mr. Lemme Campbell, you were found guilty of importation, possession and trafficking of 91.3 kg of cannabis and the importation, possession and trafficking of 119.4 kg of cocaine. The facts indicate that you played a major role in the execution of these offences, and there as a high degree of sophistication employed in getting these drugs into Barbados. The facts showed that the drugs were placed in hollowed out sections of logs which were imported.
> In seeking to arrive at the appropriate sentences for your offences, I have had regard to the decision of our Court of Appeal in the case of Walter Prescod v. R, Criminal Appeal No. 32 of 2001, which has provided guidelines for the assistance of High Court judges when dealing with these matters. I have

looked at the aggravating factors and mitigating factors. The aggravating factors include the large quantity of drugs involved. The level of sophistication used, that is, the drugs were concealed in logs and that these offences were motivated by greed.

The mitigating factors are one, the time spent on remand from 30th November 2005; the absence of violence in carrying out the offence; and three, you have no previous convictions. I have also taken the contents of the pre-sentencing report into account as well as the plea in mitigation by your counsel. Balancing all the factors I have determined Mr. Campbell, that the following sentences would meet the requirements of justice in this case:

For the importation of cannabis, you are sentenced to 15 years imprisonment.

Importation of cocaine, 20 years in prison.

Possession of cannabis, 15 years in prison.

Possession of cocaine, 20 years in prison.

Trafficking in cannabis, 20 years in prison.

Trafficking in cocaine, 25 years in prison.

The sentences will run concurrently and will take effect from today."

[168] With regard to the sentencing of Rambarran, the trial judge stated, at pp. 133-134:

Mr. Rohan Rambarran, the jury found you guilty of importation, possession and trafficking of cannabis, importation, possession and trafficking of cocaine. The facts showed the level of sophistication employed in the planning and execution of these offences. You were the principal or mastermind behind this illegal enterprise, making arrangements to ensure that the illegal drugs were shipped to Barbados. You were engaged in large scale importation of drugs which the facts show and if you had succeeded, you would have profited greatly from this. All the

> circumstances have led me to the opinion that custodial sentences are justified in your case.
> Looking at the aggravating factors in respect of your case and these were the large quantity of drugs involved, the level of sophistication used, the motivation for the offences is greed.
> The mitigating factors were the absence of violence, you have no previous convictions. The record indicates that you were on bail from 28th March 2006 until your conviction on 4th June 2009. Account has been taken of the contents of the pre-sentencing report and the plea in mitigation of your counsel. Taking all the circumstances into account, I consider that the following sentences should be imposed upon you.
>
> For the importation of cannabis, 15 years in prison.
> Importation of cocaine, 20 years.
> Possession of cannabis, 15 years.
> Possession of cocaine, 20 years.
> Trafficking in cannabis, 25 years.
> Trafficking in cocaine, 30 years in prison.
> Sentences are concurrent and will take effect from today."

[169] The sentences all ran concurrently from 11 December 2009.

[170] The sentences prompt a number of comments, all of which are the result of decisions of both this court and the CCJ which postdated the convictions and sentences in this case. We must emphasise, therefore, that we do not, indeed cannot, say that the trial judge "erred" since the rules which we now apply did not exist for the trial judge's benefit during the sentencing. Nonetheless, it is now settled law that the rules of law to be utilised in a pending case are the current rules and not those extant at the time the original determinations were

made in the case itself. It suggests an uncomfortable level of retroactivity more often seen in legislation which expressly states that as its purpose.

[171] In ***Burton and Nurse v R* [*2014*] *CCJ 6 (AJ)***, the issue arose "of the juridical effect of a judgment of [the CCJ] upon a subsequent appeal in the court below" or, as ***Anderson JCCJ*** explained, "whether the primary rule requiring full credit for time spent on remand ought to have been applied by the Court of Appeal in respect of an appeal of a sentence imposed by the sentencing judge before *Romeo Hall* [***Romeo DaCosta Hall* [2011] *CCJ 6 (AJ)***] was decided." (See, ***[2014] CCJ 6***, at ***para [1]***). At issue, then, was the question whether **Romeo Hall** could be applied retroactively, contrary to the contention of the Crown. (see, ***[2014] CCJ 6***, at ***para [22]***)

[172] Rebuffing the contention that the "rule [that] legislative changes in the law do not have retroactive effect unless specifically so provided" should apply to the retroactive application of judicial decisions", **Anderson JCCJ** continued as follows:

> [24] ...But judicial pronouncement of applicable common law principles cannot be equated to legislative changes. The orthodoxy is that judges do not make the law but merely declare what the law is. According to the declaratory theory, a new decision merely declares the law as it always existed and shows that the law had been misapprehended in any earlier decision to the contrary. Accordingly, "the overruling of a precedent, unlike the repeal of a statute, has retrospective operation because no established rule of law is thereby abolished." The retroactivity implicit in judge-made rules may

> therefore be more apparent than real. But it is not necessary to subscribe to the declaratory theory to arrive at the same conclusion; even those cases throwing doubts on the theory retain its progeny of the retrospective effect of a change made by judicial decision. In *Kleinwort Benson Ltd v Lincoln City Council* 10 Lord Browne-Wilkinson explained that notwithstanding the rejection of the underlying myth that judges merely declare rather than make the law, it remained the case that,
>
> > … once the higher court in the particular case has stated the changed law, the law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the [previous decision] was overruled.
>
> [25] We agree."

[173] It follows that, in the case at bar, the fact that the sentences were imposed upon appellants Rambarran and Campbell some two years before **Romeo Hall** was decided by the CCJ does not deprive them of the right to full credit for the time which they spent on remand prior to sentencing even though such a rule did not exist at the time of the sentencing, as is clear from the trial judge's sentencing remarks set out above at paras [177] – [178]. We will return to this when we are reviewing and calculating the sentences.

[174] But there is another rule, this time of this Court, which must be retroactively applied, and it involves the 'bundling' of offences of trafficking, importation, and possession of drugs under **Cap. 131**. In ***Munroe Fitzpatrick Haywood v***

The Queen **(**decided 29 January 2016), this Court held by majority (***Mason and Burgess JJA, Moore JA diss.***)** that this Court was bound to follow the "clear principles emanat[ing] from [its prior decision in] ***Mentor et al v R Crim App Nos. 31, 32 and 33 of 1992 (unreported) (Mentor)***. See, ***Mentor***, at para [20].

[175] The ***Mentor*** principles, briefly stated, are as follows:

(i) based on the "principles of criminal law" embedded in the language of **section 22(1)** of the **Interpretation Act, Cap 1** of **the Laws of Barbados**, an offender is not to be punished twice for the same act or omission;

(ii) that principle applies even when the offences with which the offender is charged are contained in provisions of the same Act;

(iii) that principle applies to the imposition of sentences for possession, importation and trafficking under **sections 6(2)**, **4(3)** and **18(4)** respectively of Cap. 131 on the basis that the possession and importation arose from the same incident; and

(iv) when this Court reviews the imposition of multiple sentences for the same act or omission, this Court is empowered to determine the essence of the wrongdoing, impose a sentence for the offence that merits the substantial punishment and discharge the others.

[176] The ***Mentor*** Court added that the fact that the sentences are expressed to be concurrent does not alter the basic principle. (See, para [19] of ***Haywood,*** *supra*.

[177] In light of the ***Haywood*** decision, applying the ***Mentor*** principles, each of the appellants' sentences in relation to the importation and possession of cannabis, and importation and possession of cocaine, will be discharged and the sentences in issue remaining are for the trafficking in cocaine and trafficking in cannabis.

[178] The appeal against excessive sentences is accordingly allowed for the above reasons. The court will address each appellant's sentence in turn.

Rohan Rambarran

[179] The trial judge, pre-**Teerath Persaud v R [2018] CCJ 10**, in handing down her sentence, gave clear indications as to the mitigating and aggravating factors taken into account in arriving at the sentence given. The CCJ in **Persaud** has gone a step further and set out a clear step by step process for determining a fair sentence. The formula as set out by the CCJ in **Persaud,** dictates that first a starting point for a sentence must be determined, by considering any relevant legislation, relevant guideline cases and the aggravating and mitigating factors of *the offence*. The starting point is then adjusted upwards or downwards to account for aggravating and mitigating

factors of *the offender*, which facilitates individualised sentencing as directed by the **Penal System Reform Act Cap. 139**. Following which, any discount due as a result of a guilty plea (not applicable in this matter) and a full discount of the time spent on remand are to be subtracted.

[180] The guideline case in relation to drug offences is **Walter Prescod v R, C.A. No. 32 of 2001** outlines that trafficking of more than 100 lbs of cannabis should attract a starting point of 12 years, increasing based on the quantity of the drugs involved. In relation to cocaine the court there stated that due to the devastating effects on human beings, penalties for cocaine would be more severe, highlighting that sentences may range from 13-25 years for trafficking cannabis and 25 years for trafficking cocaine.

[181] The aggravating factors of the offence listed in **Walter Prescod**, which are relevant to the matter before us are the role played by the accused in the offence, the quantity of drugs and the level of sophistication used in the enterprise. It is here noted that the appellant did not use violence in carrying out the crime, neither was there use of a firearm, which serve as mitigating factors of the offence.

[182] In the matter before us, as discussed by the trial judge in the passing of her sentence, the quantity of drugs was significant. The appellants were responsible for the trafficking of 91.3 kg or 201.28 lbs of cannabis and 119.4

kg or 263.23 lbs. of cocaine. As stated in **Walter Prescod** at para [18] "such kinds of large scale importation can have only two objectives: the proliferation of drug abuse among the young, impressionable and unsuspecting and the acquisition of vast wealth at the expense of those same young people. It is an enterprise fired by one overwhelming emotion - greed."

[183] The level of sophistication used in this particular enterprise must also be highlighted as the drugs were hidden in hewn out logs shipped to this country under the guise of a legitimate business venture. These factors were adequately assessed by the learned trial judge.

[184] The role of the appellant must be discussed however, as it is the one factor which we believe was the cause of some error on the part of the trial judge. The relevant evidence before the court, which is the disputed confessions of the appellants, and certain utterances made by the appellants while in police custody, is not conclusive as it relates to the initiator of the enterprise, as between Rambarran and Campbell, and we find that those utterances alone, without more, are insufficient to determine that Rambarran was indeed the principal and mastermind of the venture.

[185] In the entire 5,337-page trial record, the only evidence which remained before the trial judge was Campbell's statement to the police, on his arrest, that "I ain't de boss man, officer. I is only de second man." This statement does not

point to who was "de boss man" and for that reason, we are unable to agree with the remarks made by the trial judge to Rambarran that "[y]ou were the principal or mastermind behind this illegal enterprise, making arrangements to ensure that the illegal drugs were shipped to Barbados." Upon a review of both Campbell and Rambarran's statements, and the testimony of Christopher Bacchus, while the evidence points to their involvement in the offences, it does not show who the mastermind was.

[186] This Court in **Walter Prescod** indicated that "Large scale importation of massive quantities of cannabis involving some sophistication will justify sentences of long imprisonment for those playing other than a minor or subordinate role." Moreover, this court stated at para [22] "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."

[187] In light of the foregoing, since we are unable to find that Rambarran was the mastermind or central actor, the court would adjust the sentence and begin at a starting point of 20 years for the trafficking of cocaine and 15 years for the trafficking of cannabis.

[188] In relation to the offender, the relevant factor outlined in **Walter Prescod** as aggravating is the existence of previous convictions for drug offences. As there is no record of such convictions of the appellant this factor serves as a mitigating factor. The age of the appellant is also considered. Further, the jury accepted the prosecution's version of events, which suggests that Rambarran cooperated with the police.

[189] The mitigating factors as discussed above would result in the downward adjustment of the starting point. The appellant contested a trial and therefore no discount can be given for a guilty plea. The notional sentences are therefore 15 years for the trafficking of cocaine and 10 years for the trafficking of cannabis. Rambarran did serve four months on remand between 30 November 2005 and 28 March 2006, which must be deducted from the notional sentence, in accordance with **Romeo Hall v R, CCJ Appeal No CR 1 of 2010**.

[190] The sentences are therefore reduced to 14 years and 8 months for the offence of trafficking in cocaine and 9 years 8 months for the trafficking of cannabis, to run concurrently from the date of sentence the 11 December 2009.

Lemme Campbell

[191] In the case of **Teerath Persaud v R [2018] CCJ 10** the **CCJ** expounded on the impact of the parity principle in relation to an offence perpetrated by

multiple actors. In this instant matter there were six co-accused. The **CCJ** there stated, at paragraph 33, that "parity does not necessarily mean equality. Different sentences may be proper and required where the individual circumstances and level of participation in the offence are markedly different. But if no real distinction can be drawn between the accused then the parity principle will require that the sentence be the same or at least comparable."

[192] In light of the foregoing, the court finds that there are no indications that the case against appellants Rambarran and Campbell was sufficiently different in relation to their role or execution of the offence to warrant a substantial difference in sentence. It is here noted that Rambarran and Campbell's role was however different to the roles played by Mr. and Mrs. Bacchus, Gavin Greene and Somwattie Persaud, who have all been released from custody at this stage.

[193] The court finds that the same starting points of 20 years for the trafficking of cocaine, and 15 years for the trafficking of cannabis, are therefore appropriate for appellant Campbell.

[194] The relevant aggravating and mitigating factors in relation to the offender must then be applied. Similarly to appellant Rambarran, Campbell had no previous convictions for drug offences. His age is also considered. As such

the notional sentences as adjusted by this court are 15 years for trafficking in cocaine and 10 years for trafficking in cannabis.

[195] The time on remand must be deducted in full in accordance with the decision in **Romeo Hall v R, CCJ Appeal No. CR 1 of 2010**. The appellant Campbell spent a total of 4 years and 11 days on remand. His sentence is therefore adjusted to 10 years 11 months and 19 days for the trafficking of cocaine and 5 years 11 months and 19 days for the trafficking of cannabis to run from the date of his sentence on the 11December 2009.

Additional Considerations

[196] The long history of this matter involved a series of delays for varying reasons which included the inefficiencies of the justice system.

The CCJ recounted in **Vishnu Bridgelall v Hardat Hariprashad CCJ Application [2017] CCJ 8 (AJ)** that:

> Bridgelall was convicted by the Magistrate on November 23, 2007. His appeal to the Full Court was heard almost 2 years after it was filed. The judgment of the Full Court rendered him a free man. The DPP applied for leave to appeal to the Court of Appeal on December 16, 2009. Although that application was granted on July 2, 2010, that court did not determine the appeal until October 24, 2016. This was some 6 years and 10 months after the Full Court set aside the convictions and some 8 years and 11 months after Bridgelall was tried and convicted. We heard this appeal on March 16, 2017. In all, this matter has been languishing in the judicial system for almost a decade.

[197] The CCJ continued at **para [37]** that:

> We considered the reasonable time guarantee briefly in *Singh v Harrychan*, an appeal from Guyana which came before us by special leave. When we heard that appeal, almost 9 years had elapsed between the time of the incident leading to the charge and the date of the defendant's conviction. We stated then that the right afforded by Article 144(1) encompasses the appellate process and that, "in doing justice, the extent and nature of the delay on the part of public officials…ought always to be of concern to an appellate court".

[198] The CCJ then provided guidance as to the paramount consideration in determining whether there was a breach of the reasonable time guarantee. The Court stated "…it is appropriate first to consider the overall period of time that has elapsed. If, on its face, the period appears to be overly lengthy, then it would be appropriate for the court to interrogate all the relevant facts and circumstances with a view to determining whether the State has provided a satisfactory explanation or justification for any lapse of time which appears to be excessive."

[199] In the present case, the offences were committed in 2005, and on 23 February 2009, appellants Rambarran, Campbell and their four co-accuseds were arraigned on those offences. The appellants filed their appeal in 2010 and the first date of hearing was September 2014 and the final date of hearing was 22 March 2016. Approximately three and a half years have elapsed since the

delivery of this Court's decision and it had been a total of approximately nine years that this appeal was subject to the appellate process, and there is no justification for this excessive lapse of time. In these circumstances, we accept and take responsibility for the systemic failure.

[200] The question that therefore arises, is what should be the remedy afforded to the appellant whose rights have been infringed. Rambarran has served a sentence of approximately 9 years including the time spent incarcerated since the date of his sentence on 11 December 2009 and the four months he spent on remand. Campbell has served a sentence of approximately 13 years including his remand time and the time spent serving his sentence. In **Hariprashad** the **CCJ** stated that there are a range of orders which the court can make including the setting aside of a conviction to the quashing of the death sentence, however the court is "…concerned with fashioning a remedy that is effective given the unique features of the particular case."

[201] In considering the appropriate remedy which meets the justice in this case, we have sought to balance the public interest in ensuring, on the one hand, that convicted persons serve their full sentence as a consequence of their criminal acts and, on the other, that their interests in having their constitutional rights safeguarded by trial and appellate processes be secured by those entrusted to preserve and uphold those rights. We therefore conclude that the just thing to

do is to vary the sentences to "time served" and direct the release today of appellants Rambarran and Campbell.

DISPOSAL

[202] In light of the above discussion, we conclude that (i) the appeals against conviction are dismissed in their entirety; and (ii) the appeals against sentence are allowed, and the sentences varied, in our discretion, to "time served."

Chief Justice

Justice of Appeal **Justice of Appeal**