The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 10 of 2017

B E T W E E N:

CURTIS SWAN

Appellant

- v -

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Smellie, JA

Appearances: Craig Attridge, C. Craig Attridge Barrister & Attorney, for the Appellant on Sentence;
Curtis Swan, the Appellant appearing in person on Conviction
Alan Richards and Takiyah Simpson, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **8 June 2018**
Date of Judgment: **22 June 2018**

JUDGMENT

SMELLIE JA

Introduction

1. The Appellant was tried and convicted on indictment for the offence of conspiracy to import cocaine (Count 1) and two counts of money laundering (Counts 2 and 3). The verdicts were returned by the jury on 18 May 2017 and on 14 June 2017, the Appellant was sentenced to 21

years' imprisonment on Count 1 and to 3 years' imprisonment on each of Counts 2 and 3, with the sentences ordered to run concurrently.

2. On 8 June 2017, his appeal against conviction and sentence was heard and judgment reserved. This is the judgment.

3. While Mr Attridge argued the appeal against sentence, the Appellant represented himself on the appeal against conviction. This came about on his decision to represent himself after it was determined that Mr Attridge would not appear on the appeal against conviction.

4. The Appellant did however, seek an adjournment of the appeal on the very morning of the hearing, stating that his family had advised him to be represented and had engaged an attorney to represent him.

5. As that attorney when contacted by the Court was unaware of any such engagement and as the matter now pending for a year had already been adjourned from the March session to allow the Appellant to secure different representation (both the attorney who represented him at trial Ms Aura Cassidy and Mr Attridge having been disengaged for the appeal against conviction), a further adjournment was refused.

6. There were however, formal grounds of appeal against conviction which had been filed on the Appellant's behalf by Miss Cassidy and, on his own behalf the Appellant submitted manuscript notes to the Court which appeared to reflect the issues raised in those grounds of appeal. The Appellant was of course, also allowed to address the Court in person on the hearing of the appeal.

7. In essence, his complaints (when considered in the context of the formal grounds of appeal) may be summarized as follows; that:

(i) the trial judge failed to direct the jury properly on specific issues in the case, in particular how to deal with circumstantial evidence and conspiracy and that as a conspiracy must involve at least two people, it was wrong that other parties to the conspiracy were not before the court;

(ii) the trial judge's summing up to the jury was unbalanced in favour of the prosecution and unfair and that there were apparent from the transcripts "flagrant unbalanced and unfair accounts of the summary;"

(iii) the jury was placed under undue pressure and stress due to the "inhumane and unhygienic conditions (no working bathrooms, no air condition)" both during the trial and their final deliberations ; and

(iv) additionally (and as expressly raised in the formal grounds) that the jury was placed under undue pressure and stress due to being sent out for deliberations "so late in the day".

8. In his oral presentation, the Appellant also protested his innocence, in terms which he acknowledged he had expressed to the jury and which, by their verdicts, they must have rejected.

9. He asserted that the person responsible for the box containing the cocaine which had been imported (to be explained in some detail below) was his named co-conspirator and now fugitive Aaron Johnston[1], that he had agreed to collect the box which is the subject of Count 1 at

[1] There is an outstanding warrant for Johnston's arrest.

Johnston's request, not knowing that there were controlled drugs in it and had been driven to the FedEx Facility and back to the home which he and his wife shared with Johnston, by Johnston in Johnston's car. That later, when the police arrived and found the box, along with other incriminating material (also to be explained below), the box with its contents were in Johnston's closet and he had had nothing further to do with them having returned home from the FedEx office. He did not know, at any time before the police seized it at the house that the box contained controlled drugs.

10. As will become apparent from the summary of the circumstances of the case and of the evidence given at trial which follows, it is hardly surprising that the jury rejected the Appellant's account.

The circumstances of the case

11. On 20 May 2015, a Federal Express (FedEx) International Priority box with tracking # 807327732006 was sent by a consignor, one "Jose Alvarez" from Panama City, Panama addressed to Dorothy Pacheco # 17 Seagull Lane, Pembroke, Bermuda. Telephone # 441-517-3416 was listed as the contact number.

12. The box was labelled "VASES HIGH VALUE" with a declared value of $365.00.

13. While the box was in transit at the FedEx International Hub, in Memphis, Tennessee, USA, a drug detection dog alerted US Customs Officers to the presence of narcotics. Upon inspection the box was found to contain three glass vases with a large quantity of shredded paper apparently utilized as packing material. A strong odour of cocaine emanated from the shredded paper and so it was "field tested" then and

there at the Hub. The test returned positive for the presence of cocaine which had apparently been soaked into the shredded paper.

14. As a result the shipment was seized and a joint international investigation between United States Homeland Security (HSI) and the Bermuda Police Service was commenced, leading to what is termed an "International Controlled Delivery" (ICD).

15. To facilitate the ICD, the vases and the shredded paper were sent to HSI Agents in New Jersey, USA who finally prepared the box and contents for the ICD.

16. The cocaine soaked shredded paper was secured by them in three evidence bags and labelled as follows:

> *"XO424190 containing 4.135 kilos of shredded paper soaked in cocaine*
>
> *X0424191 containing 3.91 kilos of shredded paper soaked in cocaine*
>
> *X0424192 containing 3.1 kilos of shredded paper soaked in cocaine."*

17. On Tuesday 26 May 2015, the consignment (minus the evidence bags of cocaine soaked shredded paper) was sent to Bermuda and upon arrival, placed into circulation at the Bermuda FedEx Courier Facility at #3 Mills Road Creek, Pembroke (the "FedEx Facility").

18. The three evidence bags were later delivered to the Bermuda Police Service acting under the authority of an import certificate on 18 November 2015 and still later were handed over to the Government Forensic Laboratory where, on various dates up to 15 May 2016, the

contents were examined and analysed by Nadine Kirkos, a Government Analyst. The results of her analysis will be considered below.

19. On Wednesday 27 May 2015 persons purporting to be the importers of the box with tracking # 807327732006 made enquiries about the consignment and the next day, Thursday 28 May, officers from the Bermuda Police determined to allow the box to be collected.

20. At around 11:40 am the Appellant and Aaron Johnston arrived at the FedEx Facility in a car registered in the name of Johnston's father and driven by Johnston. The Appellant entered the FedEx Facility and presented a typed letter purporting to be authorization by Dorothy Pacheco for the delivery of the consignment to him. He paid the required customs duty of $53.29, signed the FedEx release form and took possession of the box. He proceeded to the car driven by Johnston and together they departed the FedEx Facility.

21. The two did not go home directly. Instead, they first stopped at the Bermuda Paint Company located at Watlington Road , Devonshire, where the Appellant (in Johnston's presence) purchased four gallon bottles of ammonia hydroxide, not in his own name but in the name of the Royal Gazette, where he and Johnston had for a number of years up until then, been employed.

22. Their movements having been observed by the officers of the Bermuda Police, shortly upon their arrival there, the premises occupied by Johnston, the Appellant and the Appellant's wife at #10 Warwick Park Road, were searched under authority of the PACE[2].

[2] Police and Criminal Evidence Act 2006.

23. Among the items recovered were the FedEx consignment box #807327732006, a number of cell phones (at least one later identified by telephonic records as assigned to the Appellant), a gallon bottle of ammonia hydroxide, a wallet containing various banking cards issued to the Appellant, four glass vases found in a closet wrapped in foam from the inside of one of which was found strands of shredded paper which, when later examined and analysed by a Government Analyst , was found to contain cocaine hydrochloride. These vases and these shreds of paper were not from box #807327732006 (the shredded paper from which had been removed and secured in the three evidence bags pursuant to the ICD as explained above) and therefore became potent circumstantial evidence in the trial, of at least one earlier unlawful conspiracy to import and of the actual importation of cocaine.

24. The Appellant and Johnston were arrested and taken to the Hamilton Police station and processed into custody.

25. During audio/DVD recorded interviews, the Appellant eventually admitted to attending at the FedEx Facility and collecting box #807327732006. He stated that he took full responsibility for his actions. When specifically asked by the interviewing officer if he would take responsibility for the package even if the drugs were not his, he replied: *"What you want me to say? You want a bullet in me?"*

26. These responses came to be contrasted later with his inconsistent evidence at the trial (and the jury was properly directed to consider the inconsistencies) where he stated[3] that while he took responsibility for box #807327732006, he was in the business of importing and selling vases. That "someone" gives him the vases to sell and that he does not pay for

[3] As reported at page 90 of the transcript of summation to the jury.

them. That he gets a call once in a while and "boom", the box is here. He does not know who calls him. That he keeps the vases at #10 Warwick Park and had not seen any drugs at his residence. He had not yet opened box #807327732006 and that unless he was presented with something to say that drugs were in the box, he had not seen any drugs and that there were no drugs in the box.

27. As an aside, Johnston for his part in interview, made "no comment" responses to the questions which were put to him.

28. Enquiries at the Bermuda Paint Company by the Police confirmed that the two had attended there and purchased the bottles of ammonia hydroxide purportedly on behalf of the Royal Gazette newspaper.

29. At trial, Mr Jamie Cann, the Production Manager at the Royal Gazette, testified that the Appellant had worked for that newspaper for about 11 years. He was shown the receipt given to the Appellant at the Bermuda Paint Company from the purchase of the four bottles of ammonia hydroxide and confirmed that as his superior, he had given the Appellant no instructions to purchase those supplies for the newspaper, and such was not a part of the Appellant's responsibilities.

30. That these bottles of ammonia had, in fact, not been purchased under the Royal Gazette's account. Further, in examination in chief, this witness confirmed that cell phone number 595-0057 had been issued to the Appellant by the Royal Gazette as cell phones are issued to all managers and supervisors.

31. This cell phone figured very prominently in the telephonic activity which was analysed and presented on the prosecution's case, as discussed further below.

32. In cross-examination, Mr Cann acknowledged that from time to time the Appellant had done odd jobs for him, on a personal basis, in respect of maintenance and he would pay the Appellant for those jobs.

33. Mrs Dorothy Pacheco of #17 Seagull Lane, Pembroke testified at trial. She said that on 28 May 2015 she resided at that address with her husband. That she remembered receiving a call in May 2015 from FedEx about vases addressed to her address. The name on the FedEx Airway Bill was hers but the contact number given – 517-3416- was not hers. She did not know who that number belonged to. She does not know who Jose Alvares is and she had never received a package from him before. She had never received a package from Panama before.

34. Most to the point at the trial, she testified that she did not know the Appellant and knows no one named "Curtis Swan." She did not write the purported authorization letter[4] for collection of the FedEx consignment, nor did she instruct anyone to write it for her. She had not placed her signature on the document and did not give it to Curtis Swan.

35. About this issue, the Appellant is reported at page 90 of the transcript of summation to the jury, as having simply said that he did not know anybody living at # 17 Seagull Lane, that being Dorothy Pacheco's residence.

The results of analysis of the shredded paper from box # 807327732006

36. While there was debate at the hearing of the appeal on sentence whether the weight of cocaine recovered from the shredded paper by Ms Kirkos

[4] Presented to the jury as Exhibit 4.

and reported in her certificate of analysis represents cocaine hydrochloride (the water soluble power form) or free base (crack) cocaine (an issue to be addressed below[5]) ; her evidence presented to the jury was that the three evidence bags delivered to the Laboratory by the Bermuda Police with the numbers listed above, contained respectively, 830.4 grams, 897.3 grams and 870.5 grams of crack cocaine. This was the form in which it was extracted by her from the shredded paper by a process of precipitation which she described as follows (as reported from the trial Judge's summation at page 72 of the transcript):

> *"Specifically, she said, she soaked the paper in a weak 5 per cent solution of hydrochloric acid so that any substance in the paper would go into the acid solution. She then added ammonia hydroxide, ie; liquid ammonia, causing a solid substance to precipitate from the solutions. She explained that essentially the liquid became a solid. She analysed this solid and found it to contain white cocaine free base, which is commonly known as 'crack'"*

37. The trial judge went on to explain to the jury that Ms Kirkos weighed the crack and found that (in each evidence bag) had been contained the amounts in the respective weights set out above, a total of 2598.2 grams of crack cocaine[6].

38. At page 73 of the transcript, the judge is recorded as having further explained to the jury, Ms Kirkos's further evidence, that in order for the cocaine to have been soaked in the paper, it had to have been in the water soluble form of cocaine hydrochloride, the form also in which it is

[5] When considering the appeal against sentence.
[6] The third quantity, 870.5 grams does not appear at page 72 of the transcript but SCC Mr Richards explained that this was an oversight on the part of the judge, as the evidence about it was certainly given by Ms Kirkos.

consumed by snorting. That, as crack cocaine has a low melting point and is not water soluble, it is commonly consumed by smoking.

39. Also at pages 73-74, the judge reviewed with the jury, Ms Kirkos's evidence that Exhibit 17, a bottle of ammonia recovered from the home of the Appellant by the police, did indeed contain ammonia hydroxide of the kind used by her in the precipitation process and commonly found in clandestine labs of individuals involved in the manufacturing of cocaine freebase and methamphetamine base.

Telephonic activity between the cell phones of the Appellant and numbers overseas.

40. Mr Hugo Benziger, the Senior Intelligence Analyst of the Bermuda Police Service prepared and testified to a telephone analysis of the activity of cell phone 595-0057 – that issued to the Appellant by the Royal Gazette, as well as that of three other phones. (Recovered from #10 Warwick Park). This he was able to do by reference to records given by the service providers Digicel and CellOne.

41. He prepared a Call Frequency Table which became Crown's Exhibit 28 at the trial, as well as an overall Schedule of Telephone Activity, which became Exhibit 29.

42. In summary, Mr Benziger's evidence revealed that the Appellant's cell phone # 595-0057 had been in contact during the period 1 February 2014 and 30 May 2015, with a phone number 50760805675 attributed to Panama, on 36 occasions, 35 phone calls and I text message. On three other occasions between I February 2014 and 30 May 2015, the Appellant's phone number 595-0057 had been in touch with another number – 50760166209- attributed to Panama.

43. Cell phone number 517-3416- that given to FedEx as contact for the consignment of box # 807327732006 – was registered to one Ian Spurling, a contracted worker on Island but who, at the time of the importation, was no longer residing in Bermuda.

44. Nonetheless, cell phone number 517-3416 figured prominently in the investigation.

45. The telephone data analysis showed that between 1 February 2014 and 30 May 2015, it had been in contact with #50760166209 (attributed to Panama) on 25 occasions, with 25 phone calls and in contact with 295-3854 (the FedEx Facility) on 8 occasions, with 8 phone calls. There were also seven contacts the other way around from FedEx Facility number 295-3854 to cell phone number 517- 3416.

46. More directly of relevance to the case against the Appellant; the cell phone number 517-3416 was shown to be also in contact with his cell phone number 595-0057 on 10 occasions (10 phone calls) between 1 February 2014 and 30 May 2015.

Analysis of the Appellant's financial activities

47. Evidence was given at trial of the Appellant's financial activities based on the testimony of witnesses from his employer the Royal Gazette and from three banks where he held accounts – HSBC Bermuda, Bank of Butterfield (two accounts into one of which his salary was paid) and Clarien Bank.

48. The Appellant had been employed at the Royal Gazette for ten years as a Distribution Manager for the night shift. In 2015 he was earning an annual net salary of BMD$28,029.00 which was paid monthly directly

into his Bank of Butterfield a/c #0601275050200. This had amounted, over the three years leading up to his arrest, in net salary of just under BMD$90,000.00

49. The evidence at trial[7] revealed however, that over the same three year period BMD$151,003.92 had been deposited into the Appellant's other three accounts (Clarien Bank a/c #6000056663, Bank of Butterfield a/c#0601275050013 and HSBC a/c# 002-176014-011).

50. And that, from these three accounts, in a pattern of deposits and almost immediate (within a day or two) withdrawals of amounts which closely matched the amounts of the deposits, ATM withdrawals were transacted overseas in Panama, Trinidad and Tobago and Guyana. These in a total amount of USD$92,724.93, with by far the greatest portion – USD$72,852.36 – having been withdrawn in Panama. During the same three year period, USD$19,077.27 was withdrawn in Trinidad and USD$795.30 in Guyana.

51. Thus, from these three accounts, there had been total withdrawals of BMD$132,433.48[8] while there is no recorded history of the Appellant himself having travelled to or from Panama during the three year period covered by the analysis of his bank accounts.

52. The withdrawals overseas were transacted by way of debit cards issued on each of the Appellant's accounts and which had been issued in his name on multiple occasions, the result of his reports of cards having been lost or stolen. On each report a "block" was placed on the

[7] Summarised for the jury at pp 91-117 of the transcript.
[8] All as shown in a Schedule presented to the jury at trial and handed up to this Court by Mr Richards at the hearing of the appeal.

lost/stolen card and of course, new PIN numbers, essential for their use, issued to the Appellant for the replacement cards.

53. For instance, and most strikingly, on the two Bank of Butterfield account numbers ending 0200 and 0013, seven different debit cards had been issued between the dates of their respective openings (27 February 2009 and 6 December 2012) and 1 November 2014 when the last card was issued.

54. Three of those cards had been used on account number ending 0200 for local transactions (that account into which the Appellant's salary was paid), the other four were used for many of the overseas transactions which almost exclusively among these two accounts, took place on account number ending 0013.

55. The Clarien Bank account number 600056663 was opened on 7 December 2012, only one day after Bank of Butterfield account number 0013 was opened.

56. On the Clarien Bank account (apart from the first three transactions which were local purchases) all other activity on the two cards which were issued, had been transacted from ATM machines in the three overseas countries.

57. Evidence from Derrika Mallory of Clarien Bank, revealed that while most of the deposits to this account were made by the Appellant himself, deposits were also recorded as made "on a couple of occasions" by Aaron Johnston.

58. The HSBC account number ending 4011 was also opened on 7 December 2012, the same day as the Clarien Bank account and one day after the Bank of Butterfield account number ending 0013. Its records showed the same pattern of activity – deposits followed by overseas withdrawals in near matching amounts over the course of only a day or two following the deposits – as appeared on the other bank accounts. And, as appears at pages 110 and 111 of the transcript, the evidence revealed that the pattern of transactions on the various accounts occurred on similar days of the week.

59. Evidence from Mr Corrie Cross of HSBC revealed that on an occasion in March 2013, the card holder was recorded as having called the bank to inform that he would be travelling to Trinidad and that on the next day there was a transaction on the card in Trinidad. That on an occasion in June 2013, another in July 2013 and still another in August 2013, blocks were placed on the card but soon after removed at the instance of the card holder. On the occasion in August 2013, only three days after the block was imposed, the card was being used in Panama and the card holder called the bank to have the block removed.

60. As the judge directed the jury at page 114 of the transcripts, the only reasonable inference to draw and that contended for by the prosecution, was that it was the Appellant who must have called the bank in relation to the blocks on the card, because he it was who had to give answers known only to him to certain security questions required to have the blocks removed.

61. None of the banks, despite the many instances of blocks being imposed and removed, had any record of the Appellant ever having reported a concern of fraud or unauthorized electronic incursion or “scamming”, upon any of his accounts.

62. This was nonetheless, what the Appellant asserted to the jury and earlier in his interview with the police (and indeed before this Court in his address upon his appeal). In short, he alleged that the transactions from overseas on his various accounts must have been the activity of scammers.

63. More specifically, as regards his HSBC account, he said[9] he had opened this account for his daughter who is in school and as an Eid gift. He expected $30,000 to be in that account. However, that he had given the bank card to Aaron Johnston (whom he trusted completely) with the PIN number on the back with instructions that if anything happened to him, Johnston should deliver over the card to his wife and children.

64. He also asserted that the sums of money deposited to his various accounts, vastly in excess of his known income, had been obtained through "my hustles," assertively invoking the time honoured tradition of hard working Bermudian men taking on extra work to ensure the financial security of their families. Apart from Mr Cann of the Royal Gazette having confirmed his casual engagement of the Appellant , no further specifics were however, offered to the jury apart from an assertion by the Appellant that he typically raised around $250 from his hustles. Nor did he offer any explanation – other than his reference to scamming - why the great majority of the monies deposited, said by him to have been placed into these accounts as savings for his family, had been transacted out to or by persons overseas, with the patterns of quick regularity revealed by the evidence. While at page 153 of the transcript, he is reported as having told the jury that he had moved monies from one bank account to another, this could only have been an attempt to

[9] As reported at page 140 of the transcript of summation.

explain simply the movements of money, not the reason for the overseas transactions.

65. He is reported (at page 154) to have acknowledged that he had made no report to the police or the banks of being defrauded or that anyone stole money from his accounts. As far as he was concerned, he had been putting money into his accounts and it should still be there. He was not aware of anyone taking money out of his accounts either here or overseas, either in Panama or any other foreign country.

The grounds of appeal and directions to the jury

66. Against the background of the foregoing summary of the evidence, the Appellant's grounds of appeal may be considered and readily addressed.

67. They begin with the alleged inadequacy or unfairness in the directions given to the jury by the trial Judge.

68. Improper direction on circumstantial evidence: the case, both as regards the offence of conspiracy to import cocaine and the money laundering offences was indeed heavily premised upon circumstantial evidence – evidence which was reminded to the jury by the trial judge in his extensive summation –the import of which was as summarized above in this judgment. Further in this regard, at pages 20 to 23 of the transcript, the learned trial judge gave ample and clear directions to the jury on their proper assessment and treatment of the circumstances upon which they could properly return a verdict of guilt in respect of each count. This was immediately followed at pages 23 to 25 by the classic directions on the standard and burden of proof resting throughout the case upon the prosecution to discharge.

69. When all the circumstances were taken into account as the jury was advised by the learned trial judge to do[10], there was very ample evidence upon which the jury were entitled to conclude that the Appellant had committed the offences for which he was indicted.

70. As to the ground of complaint about the absence from the trial of other alleged co-conspirators, this too could have provided no basis for interfering with the verdict. It is long settled law that an accused may be convicted for conspiring with other persons known or unknown and whether or not alleged co-conspirators are before the court on the same indictment. Archbold provides at paragraph 33-47, that:

> *"Where the evidence discloses that the accused conspired with other persons who are not before the court, this should be averred in the indictment. If they cannot be identified, it is sufficient to describe them as "persons unknown". Sometimes, the evidence may be unclear as to which identifiable persons were involved. In such circumstances, there can be no objection either to "other persons unknown", or to "other persons". However, where during the course of the trial the uncertainty is resolved by evidence which is capable of founding the assertion that an identifiable person not before the court was a conspirator with the accused, then the indictment should be amended accordingly."*[11]

71. 2. Trial judge's summation being unbalanced and unfair: this complaint is simply unsustainable from an examination of the transcript of the trial judge's summation to the jury. In must be noted that neither in the formal grounds of appeal, in the manuscript notes handed up by the

[10] See for instance, at pages 158 to 159 of the transcript of summation.
[11] Archbold: Criminal pleading, Evidence and Practice 2018 Ed

Appellant nor in his oral representations to this Court, was any specific instance of unfairness in the summation identified or cited.

72. 3. Undue pressure upon the jury, either from the physical conditions at court or from being sent out too late for their deliberations: there is no assertion that any juror complained or any record of any complaint about the conditions at court. It appears (from his manuscript notes handed up to this Court) that the Appellant here seeks to seize upon certain remarks made by the learned trial judge to the jury in expression of appreciation for their service, at the very conclusion of the trial[12]:

> *"It's been a long trial, a lot of documentation, a lot of evidence, and we're sure that you conducted yourselves with aplomb in the deliberating room. Some of us have gotten a bit greyer over the last four weeks, or five weeks, but thank you very much, with all the terrible conditions that you have here, the flies, the coldness, you know, the Artic temperatures, the uncomfortable nature of the chairs. We feel for you. We understand. And we're thankful. And I think I'm speaking on behalf of myself, Ms Millington, Mr Richards, Ms Simpson and Ms Cassidy, and I am sure the Defendant as well. So thank you very much, and I do not think you're required any further for Jury duty. No. But I think it was a good way for you to end…"* (at which the transcript shows that there was "**applause"** from the jury).

73. It is now notoriously public knowledge that the physical conditions at court are far from ideal.

74. However, nothing from the record of this trial rises anywhere near to the level of convincing this Court that the jury's deliberations were in any way compromised or hampered by the physical conditions at court so as

[12] From page 183 to 184 of the transcript of summation.

to bring into question the fairness of the Appellant's trial. The exchanges between the judge and jury, underscored by hyperbole, were clearly passed simply in a moment of levity.

75. The Appellant was himself witness to the events which indicated the assiduous and steadfast approach taken by the jury to their deliberations over the course of some six hours. And, as is apparent from the record which shows the Judge having to bring them in for the majority directions at 5:38 pm, the jury deliberated for a further 15 minutes before returning their verdict despite the supposed lateness of the hour.

76. Nor therefore, is there anything to suggest that the jury's deliberations were in any way hampered by the "lateness" either of the time of their retirement or of their subsequent deliberations which ended just before six o'clock in the evening – by itself a wholly unexceptionable and unremarkable turn of events.

77. The Appellant's final ground of appeal is to the effect that his conviction was rendered unsafe because it was, on his understanding, the verdict of "only 6 or 8" members of the jury when he was entitled to be tried by at least 12.

78. The short answer to this complaint is that the law – as set out at sections 522, 522A, and 536 of the Criminal Code - in a case like this at Bar, permits a majority verdict of at least 8 when the numbers have been reduced from 12 (begun in this case with 14 including 2 alternates) to 10, as they were here by illness or other cause over the course of the

relatively long trial.[13] Here the verdict was in fact founded upon the agreement of 9 of those 10 jurors.

Appeal against sentence.

79. As mentioned above, here the Appellant had the benefit of representation on his appeal by Mr Attridge.

80. He argued a single cogent but in the end unsustainable, ground of appeal.

81. It was that the sentence of the Appellant rendered on the basis that he had been involved in a conspiracy for the importation of 2598.2 grams of crack cocaine (with a street value of $811,900) was wrong in principle because the substance actually imported was not crack cocaine but cocaine hydrochloride which when measured in that powder water soluble form, was found by the Analyst to be of the significantly smaller quantity of 2007.16 grams (with a street value of $462,500)[14].

82. This resulted said Mr Attridge, in the Appellant being meted the sentence of 21 years' imprisonment, which when compared to earlier cases involving comparable amounts of cocaine hydrochloride and referable street values, was manifestly excessive.

[13] Commenced on 19 April 2017 and concluded by return of verdict on 18 May 2017, with sentencing later on 14 June 2017.

[14] There is indeed a certificate from the analyst tendered in evidence on which she certifies the weight of the drugs in the powdered form found on the shredded paper as being 2007.16 grams and which Mr Richards explained had been calculated arithmetically by reference to the weigh of the shredded paper before and after the cocaine hydrochloride was removed by the process of precipitation.

83. He cited among others, the recent judgments of this Court in *Ricardo Stewart v R*[15], *Everett Bean and Randolph Simmons v R*[16] and *Tyrone Brown v R*[17] .

84. In *Stewart***,** the sentence imposed for the offence of attempted importation of 3963.3 grams of cocaine hydrochloride (with a street value between $424,500 and $737,000)[18] was 15 years' imprisonment. This Court did however, then while affirming the sentence, also express the view (per Zacca P. at [27]), that a sentence of 18 years would have been imposed had the Crown appealed against the inappropriate discount of 3 years which the trial judge had allowed by reference merely to the unexceptional "family circumstances" of the accused by way of mitigation.

85. This sentence of 18 years, said Mr Attridge, was at highest the appropriate precedent for the sentence of the Appellant, given the lesser amount of drugs involved in his offence (if taken as he proposed at 2007.16 grams of cocaine hydrochloride with a maximum street value in " 3700 halves" of $462,500)[19]

86. Mr Attridge also relied upon *Bean and Simmons* where sentences of 12 years (Simmons) and 15 years (Bean) were imposed for conspiracy to import 2410 grams of cocaine hydrochloride (with a street value estimated *in arguendo* by Mr Attridge at $258,000 to $550,000).

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[15] [2012] Bda LR 18
[16] [2014] Bda LR 30
[17] Criminal Appeal No 9 of 2016, judgment delivered on 12 May 2017.
[18] Depending, according to Mr Attridge from his experience at the Criminal Bar, on whether the cocaine hydrochloride is sold in grams or in "halves" (ie: in amounts measuring 1/2 of a gram) – as the latter method yields a potentially much higher street value.
[19] As gleaned from the evidence of DC Hayden Small of the Bermuda Police reported at page 80 of the transcript of summation.

87. And finally[20], Mr Attridge referenced the learned trial judge's reliance upon *Tyrone Brown* in arriving at the sentence imposed below. Here it was that Mr Attridge submits that the learned judge, even while applying the correct approach (as directed by this Court in *Tyrone Brown*), to first identifying the basic sentence then applying the fifty percent uplift mandated by section 27B of the Misuse of Drugs Act[21], ("the Act"), fell into error by regarding the drugs involved as 2598.2 grams of crack cocaine (with the much higher street value of $811,900) rather than as 2007.16 grams of cocaine hydrochloride (with the lower street value of $462,000).

88. And so, had he regarded the drugs as cocaine hydrochloride, he would have started with a lower basic sentence of no more than 12 years and applying the mandatory uplift of fifty per cent, would have arrived at no more than 18 years.

89. Mr Attridge also submitted that the learned trial judge should have been invited by the Crown to have regard to the Sentencing Council's Guidelines for England and Wales on drug offences, on the same basis that the Crown had invited him to have regard to them when sentencing the Appellant for the money laundering offences.

90. Had the learned trial Judge been so assisted, he would have concluded that the Appellant, whom he rightly regarded in his sentencing remarks

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[20] Reference was also made to Janis Zegelis v R [2014] Bda LR 28 in which the appellant was sentenced to 25 years' imprisonment for the unlawful importation of 164.13 kilograms of cocaine and a 9mm Beretta semi-automatic pistol, a case which because of its vastly different circumstances offers little guidance for the disposition of the present case.

[21] For offences involving controlled drugs listed in Schedule 5 to the Act, including cocaine in any form.

as to placed on "the middle rungs of the conspiracy ladder", should be assimilated under the Guidelines to an offender with "a significant role" falling between "Category 1" and "Category 2" under the Guidelines and so attracting a sentence of 10-12 years, to be then regarded as the basic sentence. Application of the mandatory uplift would again have resulted in a sentence between 15 years, at most, 18 years. This, Mr Attridge also submitted, should generally be the method by which the basic sentences are arrived at in Bermuda before the application of the mandatory fifty per cent uplift[22].

91. For a number of reasons, these are not acceptable criticisms in the circumstances of this case.

92. In the first place, as regards the learned trial judge's treatment of the drugs as crack cocaine rather than cocaine hydrochloride for the purposes of sentencing, he was clearly correct to take that approach in light of section 1(4) of the Act which directs that "the street value of a controlled drug shall be the value for which evidence is accepted by the court as the maximum value the controlled drug can be sold for in Bermuda".

93. The alarming reality as the evidence in this case discloses, is that the drugs recovered by the Analyst after precipitation in the form of and in the greater quantity of crack cocaine, fetches much the higher of the two values.

[22] Mr Attridge went on to explain that the distinction in the Sentencing Council's Guidelines between Class A, B and C Drugs which leads to ranges of sentences which are 80- 100% higher, for example , for Class A Drugs than Class B Drugs, is akin to Section 27B of the Bermuda Act which mandates the uplift of 50% on the basic sentence for offences involving drugs listed in Schedule 5 to the Act.

94. It is that reality and the incentive for drug trafficking which it fosters, that the Act seeks to deter. And this, at any rate in the case of cocaine, is a matter of common sense. As Mr Richards submitted, given the relative ease with which cocaine hydrochlorine is known to be converted to crack cocaine the reasonable inference will typically be, unless dispelled by other circumstances, that it is intended to be sold in that form. That inference is unavoidable in this case where the Appellant's intention was clearly revealed by his purchase of ammonia hydroxide immediately after collecting the consignment box.

95. Whether the Act is successful in this policy which it directs by way of the definition and application of "street value" for arriving at the uplift mandated by section 27B of the Act – a matter which Mr Attridge also invites this Court to doubt – is not for this Court to pass upon but always a matter for the Legislature to consider.

96. As to the adoption of the Sentencing Council's Guidelines should for arriving at the basic sentence, here too the argument is off the mark.

97. There is settled precedent on this point. As Mr Attridge was reminded during the hearing and as was approved in *Tyrone Brown*, in *Cox v R*[23] Mantell J.A. said that it was (already) well recognized that in cases of commercial importation of crack cocaine the starting point following a trial was unlikely to be less than 12 years.

98. Here, the starting point taken by the learned trial judge was 14 years.

99. He cannot be faulted for having done so.

[23] [2005] Bda L.R 47.

100. Here, as Mr Richards submitted, it is pertinent to note from the evidence of telephone contact between the Appellant and Panama (the country of origin of the consignment), and the withdrawal of funds there through his bank accounts, that his involvement extended well beyond (attempting to) collect the drugs at this end and purchasing the ammonia for the extraction process.

101. This was, moreover, a highly sophisticated and persistent enterprise, with clear evidence from which it could be inferred that there had been at least one earlier successful importation. And whilst the learned Judge accepted that the Appellant could not be placed at the very apex of the conspiracy[24] his role, as the Judge also accepted, was clearly very significant, and went beyond being that of a foot-soldier.

102. For reasons such as these, the basic sentence of 14 years (3 years more than the 11 years which this Court indicated it would not have criticized in *Tyrone Brown* where the accused was regard as a one-time importer of a significantly smaller quantity of the drug) cannot be criticized as the basic sentence in this case.

103. The uplift of 7 years, being mandated by the Act, followed unavoidably to result in the final sentence of 21 years for the offence of conspiracy to import cocaine.

104. No complaint is made about the sentences of 3 years for each of the money laundering offences, ordered to run concurrently.

105. That is hardly surprising, given the central involvement of the Appellant in the laundering of the proceeds through his bank accounts. It appears

[24] A conclusion which is perhaps also justified by his expression of fear of being shot for saying too much, in his responses to the police interviews.

that the Judge in the absence of local precedents at the Appellate level, was, as already mentioned, invited by the Crown to have regard to the approach adopted in the Sentencing Council's Guidelines for these offences. It would not be appropriate, in the absence of full arguments on the issue, to comment on that approach now other than to observe that in cases such as the present, where there is clear evidence of sophisticated and persistent money laundering of the proceeds of at least one earlier offence of drug trafficking, consecutive sentences for the money laundering offence will be appropriate.

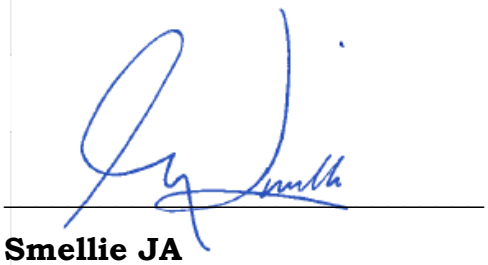
106. For all the foregoing reasons, the appeals against conviction and sentence must be refused and the conviction and sentences affirmed.

BELL JA

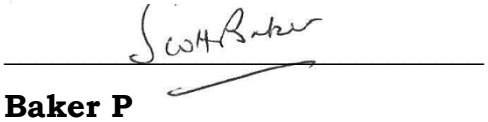
107. I have had the benefit of reading My Lord's judgment in draft and agree.

BAKER P

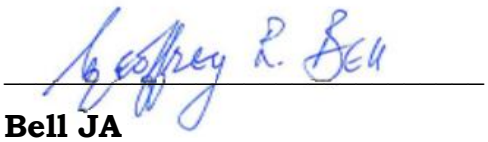
108. I also agree.



Smellie JA



Baker P



Bell JA