The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 18 and 18A of 2017

B E T W E E N:

KIMMISHA PERINCHIEF

Appellant/Respondent

- v -

THE QUEEN

Respondent/Appellant

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

Appearances: Susan Mulligan, Christopher's, for the Appellant/Respondent Perinchief;
Cindy Clarke and Jaleesa Simons, Office of the Director for Public Prosecutions, for the Respondent/Appellant

Date of Hearing: **14th and 15th June 2018**
Date of Decision: **22nd June 2018**

J U D G M E N T

BAKER, P

1. Kimmisha Perinchief ("the Appellant") appeals against her conviction for conspiracy to import cannabis, contrary to section 4 of the Misuse of Drugs Act 1972 and her sentence of two years' imprisonment. The trial took place in

November 2017 before Simmons J and a jury and the sentence was imposed on 19 March 2018.

The Crown's Case

2. The case against her was that she was a party to the importation of some 1.729 kilos of cannabis on the cargo marine vessel "The Somers Isles" which docked in Hamilton on 5 May 2015. Others involved were Romanito Adlawan, who pleaded guilty to that and other offences and gave evidence for the Crown and Jermaine Butterfield who was convicted of the conspiracy to import and a further count of conspiracy to supply cannabis. At about 9.15pm Adlawan emerged from "The Somers Isles" onto Front Street carrying a knapsack and the drugs. This was captured on CCTV footage. Shortly before this the Appellant and Butterfield switched vehicles in Pomander Road, the Appellant taking over Butterfield's motorcycle and Butterfield taking over the Appellant's car, which she had borrowed from a friend earlier that evening.

3. The Appellant, on the motorcycle, contacted Adlawan in the parking area indicating to him the Western end of the parking area and then rode off. The motor cycle was later found near her house with the keys still in the ignition and her DNA on them. Shortly after the Appellant rode off Butterfield arrived in the car and Adlawan got into the front passenger seat. As the car left the parking area the police stopped it. Butterfield tried to throw away US$8,000 and both men were arrested. The cannabis was in Adlawan's possession. The Appellant was arrested later. She gave evidence at her trial and denied any knowledge of conspiracy to import or supply cannabis and any knowledge of Butterfield's involvement in the drug trade. She also denied being the rider of the motorcycle in the parking area.

4. There was evidence of earlier involvement of the Appellant. On 9 March 2015 Adlawan received a pick up from someone who introduced himself as "J" who was in the company of the Appellant, who introduced herself as "Ching". There

was another pick up on 18 or 19 April when he again met the Appellant. Both these meetings were in the USA.

5. As to the importation on 5 May 2015, Adlawan had been expecting to receive the packages from the Appellant, but she had been denied entry to the United States. Instead she arranged for "J" to give him the packages. The pickup consisted of four packages and he was about to be given $8,000 when he was arrested.

6. At the trial the judge ruled that the evidence of earlier contact between the Appellant and Adlawan was admissible as background but not as overt acts of the conspiracy.

Admission of Cell Phone Evidence

7. The first and main ground of appeal is that the judge erred in admitting cell phone evidence records from the United States. The problem arose in this away. T-Mobile US Inc. ("T-Mobile") is a cell phone provider located in the USA. The Crown sought admission in evidence of computer records in respect of a cell phone number (404) 784-7997 attributable to the Appellant. Ms Mulligan, who appeared for the Appellant both at the trial and on the appeal before us, objected on the ground that the records had not been properly proved. The judge admitted the evidence and helpfully gave carefully prepared written reasons on 2 November 2017.

8. The evidence was obtained in the following manner. Eric Stowers, an officer of the US Department of Homeland Security, was asked to obtain subscriber details and call data records with regard to, inter alia, the number (404) 784-7997 for the period 1 January to 11 May 2015. He issued a subpoena to T-Mobile to provide "subscriber information and call detail records from January 1, 2015 to June 1, 2015, for telephone numbers (404) 784-7997, (407) 985-

0166" with a request to email the requested information to him. The subpoena was dated 3 September 2015 and said it related to smuggling of goods with respect to any controlled substance *into* the United States but I do not think anything turns o that error. On 16 December 2015 there was an internal email within T-Mobile from Adrienne Cobb saying: Your message is ready to be sent with the following file or link attachments: 4047847997. This was followed on 12 February 2016 by an automated message from T-Mobile saying: Your request is processing, Tracking ID: 834123. This was the same tracking ID as had been mentioned in the previous internal email. It was not, however, until 5 April 2016 that Mr Stowers received an email from T-Mobile attaching the relevant printout, stated to be in response to the subpoena, together with a document headed "interpreting call data". Mr Stowers' evidence was that he received the documents in the course of his business, profession and/or occupation with the Department of Homeland Security, that the information therein was supplied by an employee of T-Mobile and that he reasonably supposed that employee to have had personal knowledge of the matters dealt with in all the relevant documents.

9. Had the disclosure provisions in sections 3 and 4 of the Disclosure and Criminal Reform Act 2015 been in force at the material time and steps been taken to secure a witness statement from the relevant person at T-Mobile it is unlikely that the present issues would have arisen. Be that as it may the Appellant is entitled to insist that the rules are complied with before documentary hearsay evidence is admitted.

10. The legislation is not entirely straightforward. The starting point is Part VIII of the Police and Criminal Evidence Act 2006 ("PACE") which is headed "Documentary Evidence in Criminal Proceedings". Section 75 deals with first hand hearsay. It provides that:

First-hand hearsay

75 (1) Subject to subsection (4), a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—

(a) the requirements of one of the paragraphs of subsection (2) are satisfied; or

(b) the requirements of subsection (3) are satisfied.

(2) The requirements mentioned in subsection (1)(a) are—

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that—

(i) the person who made the statement is outside Bermuda; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

(3) The requirements mentioned in subsection (1)(b) are—

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

(4) Subsection (1) does not render admissible a confession made by an accused person that would not be admissible under section 90.

11. The statement is admissible if either one of the requirements of subsection (2) or those of subsection (3) are satisfied. Subsection (3) is not relevant to the present case. Nor is the first requirement of subsection (2). That leaves the requirement that the person who made the statement is outside Bermuda and it is not reasonably practicable to secure his attendance or that all reasonable steps have been taken to find him but he cannot be found. I shall return to this provision later.

12. The next relevant section is section 76 which is headed "Business etc. Documents". It provides that:

> ***Business etc. documents***
> *76 (1) Subject to subsections (3) and (4), a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied—*
>
> *(a) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and*
>
> *(b) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.*
>
> *(2) Subsection (1) applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it—*
>
> *(a) in the course of a trade, business, profession or other occupation; or*
>
> *(b) as the holder of a paid or unpaid office.*

(3) Subsection (1) does not render admissible a confession made by an accused person that would not be admissible under section 90.

(4) A statement prepared otherwise than in accordance with section 5 of the Criminal Justice (International Cooperation) (Bermuda) Act 1994, or under section 81 or 82, for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

shall not be admissible by virtue of subsection (1) unless—

(i) the requirements of one of the paragraphs of subsection (2) of section 75 are satisfied;
(ii) the requirements of subsection (3) of that section are satisfied; or
(iii) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement.

13. The purpose of this provision is to permit the admission of business documents provided certain conditions are met. Those conditions are (a) that the document was created or received by a person in a trade business or profession etc and (b) that the information in it was supplied by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with. Subsection (2) makes clear that if the information in the document was supplied indirectly, each person through whom it was supplied must have received it in the course of a trade business or profession etc. There are, however, circumstances in which subsection 76(1) does not apply and the statement in the document is not admissible. The relevant one for the purposes of this case is that the statement was prepared otherwise than in accordance with section 5 of the Criminal Justice (International Cooperation)(Bermuda) Act 1994 ("The 1994 Act"). For understandable reasons the Crown chose not to

follow that route in the present case. They were not obliged to do so, and they followed what they thought was a simpler and quicker route through Mr Stowers. The fact that they chose not to do so brought into play the provisions of section 76(4)(b). The statement was not admissible unless they complied with one of the requirements of section 75(2) or those of section 75(3), or having regard to the lapse of time etc, the person who made the statement cannot reasonably be expected to have any recollection of the matters dealt with in it. In short, having chosen not to proceed by the 1994 Act route the Crown is thrown back to comply with the section 75 provisions.

14. In applying sections 75 and 76 there is an overriding "interests of justice" test in section 77. Section 77(2) provides:

> *(2) Without prejudice to the generality of subsection (1), it shall be the duty of the court to have regard—*
>
> *(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;*
>
> *(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;*
>
> *(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and*
>
> *(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.*

15. There is a further "interest of justice" test in section 78 that applies whereas here, the statement was not prepared in accordance with the 1994 Act. The relevant part of this section provides that:

> *the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—*
>
> *(i) to the contents of the statement;*
> *(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and*
> *(iii) to any other circumstances that appear to the court to be relevant.*

16. The remaining section of relevance is section 83 which provides that a statement in a document produced by a computer shall be presumed to be evidence of any fact therein.

17. The starting point seems to me to be that Mr Stowers is unconnected with T-Mobile other than that he was a conduit for obtaining the cell phone printouts. The judge rightly pointed out that the purpose of section 76 is to set out a scheme for the admission of business documents in evidence provided that certain conditions are met to satisfy the Court of their authenticity and reliability. Nothing he said in his statement or could say in evidence was likely to assist the Court on that, other than the circumstances in which he obtained them which was as attachments to an email from T-Mobile on 5 April 2016. The judge said in her ruling that the email was from Adrienne Cobb but Mr Stowers makes no mention in his affidavits who the author was and the email

itself indicates no more than that it was from T-Mobile. The only reference to Adrienne Cobb is in her email of 16 December 2015.

18. The first question is whether the requirement in section 76(a) was met. The document – the computer printout – was created by a computer but was its receipt by Mr Stowers sufficient to comply with the subsection? The only qualification is that the receiver must do so in the course of a trade, business or profession etc. The judge held that it was. On this interpretation any recipient who meets the qualification is sufficient, regardless of his connection with the source from which the document has come. The judge, however accepted that there was an alternative interpretation. She said:

> *"The subsection provides: "the document was created or* ***received*** *by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office" (emphasis added).*
>
> *It is a fair assumption that the reference to "****received"*** *in subsection (a) above is in reference to information coming into a trade or business etc.*
>
> *An employee would have received the information in the course of the trade or business etc and it would be put into and become part of the records. The example provided in the Criminal Law Review article ([1989] Crim. L. R. 15, 25) of all the letters to the Editor of the Times being admissible confirms this view. The various letters would come in to the Times and they become part of the Times trade or business records. Due to the nature of the business of T-Mobile this is probably not applicable to the facts of this case. The document in issue would not have come from an outside source.*
>
> *However, were that the case, then, the fact that Mr Stowers obtained the document by a lawful subpoena does not make him the receiver as contemplated by subsection (a)."*

19. We were not referred to any authorities that assist in deciding whether a document 'received by a person' within the meaning of section 76(1)(a) is to be construed more narrowly than the natural meaning of the words of the subsection suggest. *Blackstone's Criminal Practice 2018* at F.17.26 does, however refer to the similar section 117 of the Criminal Justice Act 2003 in England and notes that in *Clowes* [1992] 3 All E.R.440 transcripts of interviews between the liquidators of companies and persons involved with the companies were held to have been 'received' by the liquidators in the course of their profession as holders of the office of liquidator.

20. I would respectfully agree with the learned judge and hold that Mr Stowers did receive the printouts in the present case. In the first place that accords with the natural meaning of the words in the section. Second it is receipt of the document rather than the information that it contains that matters under section 76(1)(a). Section 76(1)(b) deals with the information contained within the document which is likely to be the significant factor for evidential purposes at a trial and there are restrictions to admissibility at this point. Third, the section apples to the admissibility of documents by the defence just as much as to the prosecution and I am not persuaded of the need for a narrow construction of subsection (1)(a) in either case.

21. The judge concluded that if she was wrong about the interpretation of section 76(1)(a), and Mr. Stowers did not 'receive' the document, it mattered not because it would be inferred that Adrienne Cobb was the maker of the document. I cannot accept this.

22. I turn next to section 76(1)(b). Here one has to look to the person who supplied the information in the document, regardless of whether or not he or she was the maker of the statement in the document. The question is whether that person had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

23. The judge referred to the Criminal Law Review article, concluding that the supplier of the information had to be ascertainable in the sense that the Court had to be sure that that person had or may reasonably be supposed to have had personal knowledge of the matter in question. The Court, she said, was permitted to act on reasonable supposition of the supplier's knowledge but not his identity. She relied on *R v Foxley*, a decision of the Court of Appeal of England and Wales dated 6 February 1995 of which we were supplied with a copy of an approved transcript of the judgment. Roch LJ said at p. 24:

> *"The Court may, as Parliament clearly intended, draw inferences from the documents themselves and from the method or route by which the documents have been produced before the* court."

24. Roch LJ was there speaking of section 24 of the Criminal Justice Act 1988, but the issue was similar.

25. Simmons J concluded that it was clear from the email of Adrianne Cobb, or could be inferred, that she was "the supplier of the information containing the statement that Perinchief is the subscriber associated with 404-784-7997." She added:

> *"Further the Court finds that Cobb may reasonably be supposed to have had personal knowledge of the matters dealt with therein. In the circumstances it may also be reasonable to infer that Cobb is the maker of the document containing the stated facts in fulfilment of subsection (a) (although the identity of the maker is not necessary to prove to satisfy the requirements of the section). The point is that someone in T-Mobile made the record or received the information that went into the record. The Court is satisfied, that in so far as the document in issue is concerned, that as the sender, Cobb acted in the course of her employment with T-Mobile.*

> *In this case considering the nature of the business concerned it is reasonable to infer that the company has an obligation to its subscribers to keep proper records. The scheme promotes an inbuilt guarantee of reliability in the document where it was created or received in the course of a trade or a business etc. The one page containing subscriber details is by its nature the type of information that a mobile phone provider would compile and in this case is consistent with the document having been provided by T-Mobile."*

26. Where I part company with the judge is her conclusion that that the provisions of section 76(1)(b) were complied with. Other that Adrienne Cobb was an employee of T-Mobile on 16 December 2015, there is no evidence that she sent the email to Mr Stowers on 5 April 2016 with the printouts, or indeed that she was still employed by them on that date. Nor is there any evidence of the capacity in which she was employed by them and thus whether she may have had personal knowledge of the matters dealt with.

27. The Crown's case in my judgment runs into a further difficulty under section 76(4). As the prosecution, understandably, chose not to go down the 1994 Act route, they had to comply with section 75(2). Assuming for present purposes that the person who made the statement was Adrienne Cobb, the prosecution had to establish that it was not reasonably practical to secure her attendance. The judge's conclusion on this was that the Court takes judicial notice of the costs of bringing witnesses from abroad to testify in a trial in Bermuda's Supreme Court. Whilst it is indisputably costly to bring witnesses from abroad to testify in Bermuda, I would hope that in future where appropriate use will be made of video link facilities, I cannot see that the section 75(2)(b)(ii) test was met in the present case. Apart from anything else cost was not regarded as a reason for not securing Mr Somers attendance.

28. The reasons for the rule against hearsay evidence are well known and where there are statutory exceptions the provisions must be strictly complied with. In

the present case it seems to me that the appropriate route was to call the person from T-Mobile to call the person who could properly speak to the computer records, whether that person be Adrienne Cobb or someone else, rather than Mr Somers. Had a statement been prepared from such a person it seems to me that it is highly unlikely that the evidence would have been contested. As Ms Clarke for the prosecution pointed out, once the evidence was ruled admissible at the trial the Appellant formally admitted that 404-784-7997 was registered with T-Mobile in her name. The evidence was relevant in that the number was used when the appellant was abroad. The number was in contact with Butterfield and Adlawan at relevant times and this she admitted in her evidence. Had the prosecution taken all appropriate steps to prove the cell phone evidence, the Appellant would still have been faced with the presumption in section 83 of PACE that a statement in a document produced by a computer is presumed to be evidence of any fact therein. Cross-examining Adrienne Cobb or anyone else from T-Mobile was unlikely to surmount that hurdle. Had the prosecution complied with the provisions of sections 75 and 76 it seems to be very likely that they would have met the "interests of justice" tests in sections 77 and 78.

Dock Identification

29. During Adlawn's cross-examination on behalf of Butterfield he was asked to identify the Appellant in the dock. Ms Mulligan on behalf of the Appellant objected. Ms Mulligan had previously successfully objected when the prosecution had made a similar application during its case. Adlawan had by chance seen the Appellant at the police station when he was to be interviewed and she was being processed. During his evidence he gave detailed evidence of the Appellant's involvement in the importation referring to the Appellant as "Ching." He said he'd seen her at the police station. The judge said that to allow a dock identification would be unfair. Ms Mulligan's argument was that if it would be unfair to admit a dock identification on the application of the

prosecution case it was equally unfair to admit it application of the co-defendant.

30. Ms Clarke submitted in the first place that this was not a dock identification in the true sense. There was evidence of previous contact between Adlawan and the Appellant, albeit he knew her as Ching. Secondly there had previously been a chance confrontation at the police station. Further, different considerations arise on an application by a co-defendant from one by the Crown. The Court has to balance the interests of the two defendants. Butterfield's case was that he was not a party to any conspiracy and any evidence of his involvement was solely because of his relationship with the Appellant. So he wanted the identification as it was probative of the fact that it was the Appellant rather than him who had previously been in direct contact with Adlawan. The judge had a discretion to exercise. The judge decided, correctly in my view, that the evidence was relevant and that, if at all, it was only minimally prejudicial. I do not think her decision can be faulted. The judge gave a full *Turnbull* direction to the jury.

No Case Submission

31. Ms Mulligan submitted there was no case to answer at the close of the prosecution's case and again at the end of the evidence. Both applications were in my judgment hopeless. Once the Appellant had given evidence the jury had to assess whether she was telling the truth and whether her evidence negative the inferences that might be drawn from the prosecution's evidence. The evidence of Butterfield also fell to be considered. The Appellant was perhaps fortunate that the judge ruled that the previous meetings with Adlawan in Florida were evidence as to background only. There was ample evidence to leave the case to the jury. She had twice met Adlawan in Florida and when she could not return to meet him again arranged for "J" in her stead to deliver the drugs to him. All this tied in with her activities on the day the drugs arrived in Bermuda.

The Jury's Question

32. Following retirement and shortly before they reached a verdict the jury asked to hear the evidence of Adlawan as to his second meeting with the Appellant. The judge summarised it to the jury. Its essence was that the woman, later identified as the Appellant, handed him four packages of drugs. Ms Mulligan wanted the whole of the evidence played back to the jury, a course that was rejected by the judge and in my view would have been wholly inappropriate. Ms Mulligan submitted that there was a danger that as a result the jury convicted the Appellant on the basis that the Appellant conspired to import drugs on occasions other than that resulting in the import on 5 May 2015. She fortifies this submission with the fact that the jury returned its verdict very soon after being reminded of Adlawan's evidence and that they acquitted her of the offence of conspiracy to supply.

33. The jury convicted both the Appellant and Butterfield unanimously of conspiracy to import. They also convicted Butterfield unanimously of conspiracy to supply and acquitted the Appellant of that offence. It is in my judgment idle to speculate upon why the jury returned their verdicts some 15 minutes or so after they had retired following the judge's answer to their question. There could have been many reasons. The most obvious reason why the jury acquitted the Appellant but convicted Butterfield of the conspiracy to supply is that they were not sure that her involvement continued after their importation to a sufficient extent to fix her as a party to an agreement to supply the drugs thereafter. It was between Adlawan and Butterfield that the drugs were to pass; there was no evidence as to what was to happen to them thereafter.

Conclusion on Conviction

34. The fact that the cell phone records were admitted without proper proof was in my view an error of law. In the circumstances, however, I do not think that it

significantly prejudiced the Appellant and I am satisfied that, absent the error, the verdict would have been the same.

Sentence.

35. There are cross appeals against sentence, the Crown contending that the sentence of two years' imprisonment was manifestly inadequate and the Appellant contending that it was manifestly excessive. Leave applications were heard by the Registrar and she gave a detailed reasoned judgment, granting leave on some grounds and refusing leave on others. Those on which leave was refused have been renewed.

36. I take first the Crown's appeal. Ms Clarke submits that the judge made three errors. The first error relates to the value of the drugs. Section 1(4) of the Misuse of Drugs Act 1972 provides that:

> *"For the purposes of this Act 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."*

37. D.S. Small gave evidence to the judge that the street value of the cannabis if sold in twists was $86,450. On the other hand, it was more often sold in smaller quantities known as quarters. If sold in quarters the street value was $37,000. The judge said D.S. Small said he had last seen a twist being sold six years ago. She said the prosecution was not in a position to dispute their witness's evidence that the more probable value of the cannabis based on its being sold in quarters was $37,000 and that she accepted that to be the maximum value.

38. D.S. Small's evidence was that he had been out of the drug squad for four years. His evidence was not that cannabis was not sold in twists, simply that quarters were more probable. The Registrar in hearing the leave to appeal

application appreciated this but was persuaded by Mr Richardson's attractive submission on behalf of Butterfield that the word "reasonably" should be read into the section before the words "be sold for" and that accordingly the figure of $37,000 should be taken as the maximum value of the cannabis. In my judgment both the judge and the Registrar fell into error. The words of the section are clear. What matters is the maximum amount for which the drug *can* be sold not the amount for which it will most likely or probably will be sold or reasonably can be sold. There are understandable reasons why Parliament passed the section in the terms that it did and it is not for the Court to water down its meaning. I would grant leave to appeal on this ground.

39. The Registrar granted leave on the ground that the judge did not give due weight to the fact that the Appellant had to be sentenced for conspiracy rather than the substantive offence. The leading Bermuda authority is *Richards v R, Davis v R, Hall v R* Criminal Appeals Nos 1, 4 and 5 of 1991 Roberts P said in response to a submission that the same sentence might well be imposed for import of a controlled drug as for possession with intent to supply:

> *"It appears to us that it would generally be right to impose, on a member of a conspiracy to import or to supply, a heavier sentence than the person found in possession of a drug, whether for import or for supply, since the part of the conspirator is usually a more prominent one."*

40. Ms Mulligan submitted that reliance on *Richards & Ors* is misplaced and the relevant principles are set out in *Verrier v DPP* [1967] 2 A.C.195. I disagree. The certified point of law that the House considered in *Verrier* was: *"Whether, in the proper exercise of judicial discretion, a court can pass a sentence exceeding five years' imprisonment for conspiracy to defraud by false pretences in a case where, had the conspiracy been carried out, there could only have been one charge of obtaining by false pretences."* The House answered the question in

the affirmative. Lord Pearson, with whom the other members of the House agreed, said:

> *"In my opinion it was open to the Common Sergeant to pass the higher sentence in this case, because there were grounds for treating the conspiracy as an offence different from and more serious than the substantive offence."*

41. He added the following words of caution which it is important not to misapply:

> *"Normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence: it can be justified only in very exceptional cases."*

42. In that case the court was concerned with the maximum sentence that could be passed for the substantive offence. In the present case the maximum sentence for the importation of cannabis is life imprisonment. Up to that maximum the sentence will vary on a case by case basis, depending on the facts. Where the conspiracy involves a single importation the penalty will depend on the involvement of the individual conspirator and it seems to me quite irrelevant what the sentence would have been had the defendant been the sole importer. The judge had to sentence the Appellant on the basis of the extent of her involvement in this conspiracy.

43. The Crown's third ground, on which the Registrar refused leave was that the judge should have taken into account that the conspiracy involved at least two previous importations. The judge in passing sentence said this:

> *"Evidence was permitted to be led as background information so that the jury would understand the context in which the relevant telephone communication occurred between Adlawan and Ms Perinchief in the context of the conspiracy indicted. The jury were warned that those occasions were not evidence of an agreement for the delivery that eventually occurred or formed part of the conspiracy charged."*

> *The court fails to see how that background information could be relevant to sentencing her on the conspiracy for which she has now been found guilty. What is relevant to sentencing is that her telephone communication with Adlawan shows that she had some level of involvement in organizing the delivery of the packages of drugs which were the subject of the trial. To that limited extent Ms Perinchief could be said to have played the part of an organizer."*

44. Given the Judge's ruling that the Appellant's previous meetings with Adlawan were evidence of background only and not overt acts of the conspiracy and that the trial proceeded on that basis it seems to me that the Appellant had to be sentenced as a conspirator to import drugs with a street value of some $86,000 on one occasion. I do not think this court can interfere with the judge's finding that she had some level of involvement of the delivery and to that limited extent played the part of an organizer. She heard the evidence and is better placed than this court to assess the extent of the Appellant's participation.

45. In deciding whether the sentence of two years' imprisonment was manifestly inadequate it is first necessary to decide what the appropriate sentence was in the light of the above findings. Ms Clarke submits that there are no guideline cases for the appropriate level of sentence for conspiracy to import cannabis and in particular extended conspiracies. This conspiracy was, however, on the findings of the judge, not an extended one and the Appellant's organizational involvement was limited.

46. Ms Mulligan referred to *Holder v R, Miller v Henry-Huggins* [2017] SC (Bda) 70 App (14 September 2017 and *Miller v Davies* [2014] Bda L. R. 15. Both were appeals from the Magistrates Court. In the latter case the street value of the cannabis was approximately $61,000. Kawaley C.J. said in the latter case that the basic sentence for offences of importation of cannabis of this value was in the range of one to three years immediate imprisonment. An appropriate sentence would have been two years bearing in mind the plea of guilty and the

assistance given to the police. The value of the cannabis was somewhat greater in the present case and the Appellant was party to a conspiracy that involved others in which she played some part in the organisation. In my judgment the correct starting point was three to four years. The starting point would have been higher had the quantity of the cannabis or the Appellant's involvement been greater.

47. I turn next to the Appellant's submissions that the sentence of two years' imprisonment was manifestly excessive and wrong in principle. The Registrar gave the Appellant leave to appeal on a number of grounds. Several can be taken together. In summary they complain that the judge failed to consider a non-custodial sentence. A Social Inquiry Report concluded she was suitable for community supervision but did not have a need for support services. The author added: "*The Department is aware that Ms Perinchief may be facing a term of imprisonment. As such it is recommended that she avail herself to the relevant rehabilitative services offered by the Department of Corrections."* The one mitigating factor in the case was the Appellant's previous good character.

48. Ms Mulligan based her submissions on the judge's failure to consider alternatives to incarceration. She relied on section 55(1) of the Criminal Code which provides that imprisonment is only to be imposed after all other sanctions authorised by law have been considered. It might be said that section 55(1) is a statement of the obvious. In many cases, however it is clear from the outset that an immediate custodial sentence is inevitable because of the gravity of the case. A moment's consideration will indicate that this is so and it is quite unnecessary for the judge to say so. Furthermore, the starting point for a judge to take an exceptional course is usually an early plea of guilty from the defendant and real evidence of remorse. Ms Perinchief told the probation officer she did not accept her offending behaviour and maintained she did nothing more than lend her co-accused her car. She was, of course, fully entitled to maintain her innocence and contest the trial but she cannot have it both ways.

49. Simmons J is an experienced judge who well recognises that the appropriate level of sentence for different types of offence is set both by statute and precedent in reported cases. This does nothing to detract from the principles that sentences are to be proportionate and that immediate imprisonment is to be avoided where possible. Ms Mulligan complains that the judge relied on *R v Bascome* [2004] Bda L.R. 28. In that case this Court considered whether the then new and comprehensive Code of Sentencing Practice (sections 53-71) were more than guidelines. Collett J.A. said at page 4:

> "*We have carefully considered these provisions and have concluded that, in essence, they are guidelines to which sentencers should have regard, but that in relation to drug trafficking offences under the 1972 Act they have ion no way deprived the existing principles of sentencing established by decisions of this Court of their force or authority. In declaring that an immediate custodial sentence is appropriate in such cases absent exceptional circumstances and in establishing a range of tariff sentences for the guidance of judges and magistrates, this Court has always been mindful of the principles which the Legislature has now enjoined sentencers to apply.*"

50. That remains a correct statement of the law and does not conflict with the decision in *R v Bell [2016] Bda L.R. 104.* that it was not necessary to find exceptional circumstances in order to suspend a sentence. Lest there be any doubt about it, I do not regard a suspended sentence as a realistic option on the facts of the present case.

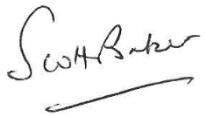
51. It is argued that the judge did not give appropriate weight to the Appellant's previous good character and favourable references. The judge said there was no statutory mitigation. Although in drug importation cases previous good character tends to carry little weight, particularly in the case of substantial importations, I would regard it of some weight in the present case although less than had there been a plea of guilty.

52. The next ground relied on by Ms Mulligan is that if, at the end of the trial, it is evident that the offence for which the Appellant was convicted was one which could properly have been dealt with summarily, it is unfair to punish her more harshly because the Crown exercised its discretion to have the case tried in the Supreme Court. This was *par excellence* a case that had to be tried in the Supreme Court and the Appellant fell to be sentenced on the facts as they emerged in the trial. There is nothing in this point.

53. The Registrar referred to the Full Court the issue of whether the level of sentence might be affected by the recent decriminalisation of small quantities of cannabis. In my view it does not. The illegal importation of cannabis for profit remains a grave offence and while the level of sentence is lower than for importations of hard drugs such as heroin or cocaine it is still, depending on the quantity, likely to be substantial.

Conclusion on Sentence

54. I do not regard any of the grounds of appeal, either individually or collectively as making a sentence of two years' imprisonment manifestly excessive. With a starting point of three to four years and the modest mitigation of a previous good character I regard the sentence of two years' imprisonment as rather low. In the light of the regrettable delay in bringing this case to trial which, was due in part to an unexplained delay of over five months for a decision from the judge on whether to quash the indictment, and the fact that the Appellant now has a young child I do not regard it as, in all the circumstances, manifestly inadequate. I would therefore dismiss both the Appellant's appeal and the Crown's cross-appeal against sentence.



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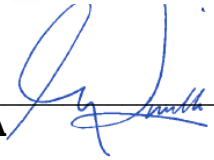
Bell JA



Smellie JA