The Court of Appeal for Bermuda

CRIMINAL APPEAL
No: 1A of 2018 and No: 18A of 2017

BETWEEN:

THE QUEEN

Applicant

-v-

KIMMISHA PERINCHIEF
JERMAINE BUTTERFIELD

Respondents

RULING

Cross-Applications for Leave to Appeal Sentence
Governing Legal Principles for Determining Leave Applications
Criminal Case Management before the Registrar of the Court of Appeal

Date of Hearing: Thursday 26 April 2018
Date of Ruling: Thursday 03 May 2018

Mr. Cindy Clarke (Deputy DPP) for the Applicant
Ms. Susan Mulligan (Christopher's) for the Respondent Kimmisha Perinchief
Mr. Charles Richardson (Compass Law) for the Respondent Jermaine Butterfield

Ruling by Registrar Shade Subair Williams:

Introduction

1. The Respondents were first indicted in the Supreme Court nearly three and a half years ago on 1 October 2015 in respect the following offences:

(i) Count 1: importation of a prohibited weapon, contrary to section 2(1)(b) of the Firearms Act 1973;
(ii) Count 2: importation of ammunition, contrary to section 3(1)b) of the Firearms Act 1973;
(iii) Count 3: conspiracy to import cannabis, contrary to section 4(3) of the Misuse of Drugs Act 1972, as read with section 230(1) of the Criminal Code.
(iv) Count 4: conspiracy to supply cannabis, contrary to section 5 of the Misuse of Drugs Act 1972, as read with section 230(1) of the Criminal Code.
(v) Count 5 (Jermaine Butterfield only): money laundering, contrary to section 45 of the Proceeds of Crime Act 1997.

2. Two years later, they were tried by jury on 23 October 2017 before Justice Charles-Etta Simmons. Both Ms. Perinchief and Mr. Butterfield were convicted on 30 November 2017 on Count 3. Mr. Butterfield alone was also found guilty on Count 4. Counts 1 and 2 resulted in acquittals for both Respondents.

3. The sentence passed by the learned judge together with her remarks were transcribed by the Court of Appeal administrator and circulated to Counsel ("the Transcript"). Simmons J summarized the charges and convictions as follows:

THE COURT: The jury convicted
11 Mr Butterfield unanimously of one count of conspiracy
12 to import a controlled drug, that was count 3, and
13 one count of possession of a controlled drug with
14 intention to supply, count 4. The jury convicted Ms.
15 Perinchief unanimously ah of one count of conspiracy
16 to import a controlled drug, count 3.
(See page 12 of the Transcript)

4. Notably, the learned judge misstated the charge contained in Count 4 which should have been recited as conspiracy to supply cannabis and not the substantive offence of possession with intent to supply. However, nothing turns on this error.

5. Nearly four months post-conviction, Justice Charles-Etta Simmons sentenced the Respondents on 19 March 2018. Ms. Perinchief was sentenced to 2 years' imprisonment on her single conviction and Mr. Butterfield was sentenced to 2 years imprisonment on both Counts 3 and 4 to run concurrently.

6. The Crown now seeks leave to appeal the sentences imposed in respect of both Respondents. The Prosecutor submitted that the sentences passed were manifestly

inadequate and 'obviously insufficient' in so far as they were wrong in principle in the following ways:

(i) The Learned Judge erred in law in not accepting 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;

(ii) The Learned Trial Judge erred in law in finding that the offence of conspiracy should not carry a higher sentence than the substantive offence;

(iii) The Learned Trial Judge erred in law in finding that it was not relevant that the Respondent Perinchief had been involved in the two previous importations of Controlled Drugs relative to this conspiracy.

7. Ms. Perinchief has also applied for leave to appeal her sentence on the principal ground that it was manifestly excessive. She pleaded eight sub-grounds in support of her overall position.

8. Pursuant to Court Circular No 12 of 2017, as issued by the President of the Court of Appeal, the Hon. Sir Scott Baker, the Registrar of the Court of Appeal is empowered to determine applications leave to appeal conviction and sentence. These applications for leave to appeal sentence were all made before me on 26 April 2018. At the conclusion of the hearing, I reserved my decision which I now deliver with reasons as stated below.

Applicable Test in Determining Leave Applications

9. In the civil litigation context, a litigant applying for leave to appeal must establish that there is an arguable case for appeal. In my previous ruling on leave in *D Tucker v Hamilton Properties Ltd [2018] SC (Bda) 21 Civ (6 March 2018)* I approved the following submission from Counsel at paragraph 12:

"…"*Pursuant to the case of Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81, which in turn cited the case of The Iran Nabuvat [1990] 1 WLR 1115, in which Lord Donaldson of Lymington stated "no one should be turned away from the Court of Appeal if he had* ***an arguable case*** *by way of appeal" (p. 1117 – emphasis added) and "That is really what leave to appeal is directed at, screening out appeals which will fail."* "

10. The 'arguable' test is endorsed by the learned authors of Taylor on Appeals (2000 edition) in the context of leave applications in Judicial Review cases. At paragraph 5-025 it reads:

"*The approach of the High Court to the permission stage is to consider whether the matter is arguable (citing R v Inland Revenue Commissioners, ex p. National Federation of self-employed and Small Businesses Ltd [1982] A.C. 617 at 643-4, per Lord Diplock). The main question is whether the Court is satisfied that there is a case fit for further investigation at a substantive hearing of an application for judicial review (R v SS for Home Dept, ex p Begum [1990] C.O.D. 107, CA.) The Single judge or Court at this stage will generally not "go into the matter at any depth"…although consideration would be more than a "quick perusal".*

11. Paragraph 7-045 briefly considers the role of a single judge in determining leave applications in criminal cases:

"*The single judge may (i) grant the application completely, or in part, (ii) refuse it or (iii) refer it to the full Court of Appeal without granting leave. Where a single judge decides to refuse leave to argue a point he should say so in terms. A comment such as "I was not impressed by those points" will leave the grounds available for argument…Where leave to appeal is granted but specifically limited to particular grounds, with leave on the others being refused, the leave of the Court is required before counsel can argue the grounds upon which leave has been refused…Counsel, in such circumstances, should notify the Court of his intention to seek leave on the other grounds and lodge a skeleton argument in support. In conviction cases, this must also be served on the Crown*…"

12. I am not aware of any previous decisions from any Court in Bermuda which has outlined the governing legal principles for the determination of leave applications in criminal cases. Traditionally, leave applications referred or renewed before the full Court were heard simultaneously with the substantive hearings as the issue before the Court was merit-based.

13. It is somewhat implicit from the remarks of Denys Roberts, P in *Enos v R 1989 Criminal Appeal No.23; [1990] Bda LR 30* that the test is tied to the simple question whether the appeal is with or without merit. In *Marcus Fiszer v The Attorney General [2016] JCA 217*, an application for leave to appeal a sentence imposed by the Royal Court was heard before the Court of Appeal in Jersey before Montgomery JA who dismissed the application because it was "*unarguable*".

14. At paragraph 4 of the Crown's written submissions, the suggested test (without reference to previous case law) is stated as follows:

4. It is submitted that the questions on this application for the Court to consider are:
- *whether there exists a particular and cogent ground of appeal; and*
- *whether that ground will have a substantial chance of succeeding.*

15. On my assessment, having had regard to these various suggested approaches, I find it necessary, in determining leave applications in criminal cases, to consider each ground of appeal separately. The correct test is whether or not each ground in question is arguable or meritorious. As part of that exercise, there should be a conservative analysis as to the likelihood of the Court interfering with a sentence, notwithstanding any errors that may have been made by the first-instance in reaching the sentence. In my previous ruling on an application for leave to appeal sentence in *The Queen v Kethyio Whitehurst [2018] CA (Bda) 1 Crim, 5 February 2018*, I stated at paragraph 26:

    "*…In a substantive appeal against sentence, the Court of Appeal would have to determine whether the sentence imposed was correct in all circumstances. If it is found that the sentence was not the correct one, the Court would then be left to determine whether the difference between the sentence passed and the correct sentence is significant enough to warrant intervention...*"

16. From time to time it will be appropriate to approve or refer a leave application to the full Court where issues of particular public interest are to be decided. In all cases, it is indeed important to specify and distinguish the grounds which have been approved, from those which have been refused or sent to the full Court for determination and to provide written reasons for so doing. Of course, an unsuccessful applicant has an unfettered right to renew a leave application before the full Court in any event, even in the most hopeless of circumstances.

The Crown's Application for leave to Appeal Sentence

17. The Respondents were tried as co-conspirators. The evidence before the jury was that on Tuesday 5 May 2015, the Crown's principal witness, one Rominito Adlawan, walked from the Hamilton Docks to another Front Street location with 1,729.1 grams of cannabis ("the cannabis") on his person concealed in a knapsack.

18. Mr. Adlawan was later arrested from a car in which the Respondent, Mr. Butterfield, was found to be present. Both the cannabis and a sum of cash were seized at that time from inside of the same car. The evidence was that the Respondent, Ms. Perinchief borrowed this car from another person and lent it to Mr. Butterfield. The Crown also produced evidence of text message exchanges between Ms. Perinchief, Mr. Butterfield and Mr. Adlawan relevant to the cannabis importation and a background affiliation between these parties.

19. The Crown's primary complaints are on the following issues:

    (i) the value of the cannabis involved in this case;

(ii) the role played by the Respondents as co-conspirators and their respective levels of culpability in comparison to substantive offenders; and

(iii) the Respondent, Ms. Perinchief's involvement in the two previous importations of Controlled Drugs relative to this conspiracy

The Value of the Cannabis

20. During the sentencing proceedings, Counsel for both Respondents took issue with the evidence at trial from narcotics expert, Detective Sergeant 538 Hayden Small, on the street value of the drugs.

21. DS Small was recalled to the witness stand at the outset of the sentencing hearing which commenced on Friday 16 March 2018. In his evidence in chief, DS Small said that the 1,729.1 grams of cannabis seized in this case would yield 3,458 twists, thereby producing a street value of $86,450.00, based on the weight of the drugs.

22. When cross examined by Mr. Richardson, DS Small stated that he attached a $25.00 value to each twist. The cross-examination of DS Small by Mr. Richardson ensued as follows, in so far as I was able to discern from the Court audio record:

Mr. Richardson:
When's the last time you made a seizure of $25.00 bags? It's been over 20 years, hasn't it?
DS Small:
No, my lady- that's not correct
Court:
Can you recall the last seizure- of that size bag?
DS Small:
My lady, I have been out of the drug unit for 4 years- so I would way it was a matter of six years
Mr. Richardson:
Let me ask you this, then- would you agree that the more popular- the most popular merchantable quantity of cannabis is a 7 gram quarter for $150.00
DS Small:
My lady, yes (inaudible)… a 7 gram quarter (inaudible)…$175.00
Mr. Richardson:
$175.00?
DS Small:
Yes my lady
Mr. Richardson:
Okay- let's do the math

Court:
Okay- so the pay-type envelope had gone the way of the dinosaur? (chuckles)
Mr. Richardson:
When's the last time you say pay-type envelopes? Let's be real about that.
DS Small:
My lady, it is not pay-type envelopes that are used anymore (inaudible)
Mr. Richardson:
Yes, it's definitely gone the way of the dinosaur
(multiple chuckles)
So, basically your calculation (inaudible) is basically bagged up every leaf, every seed in $25.00 bags and sold it all
Court:
Yeah, and he's now agreed that the 7 grams?
DS Small
A quarter, my lady
Court:
A quarter?
DS Small
Yes
Court:
Is even more popular now
DS Small
Is more popular, yes my lady
Court:
And that sells for a $175.00?
DS Small
That's correct my lady, yes
Mr. Richardson:
I am going to suggest to you that the price is actually $150.00
DS Small
My Lady, it depends on the time of season. The price fluctuates like any other commodity between summer time and winter time
Mr. Richardson:
But on average it's (inaudible) $150.00
DS Small
My Lady
Mr. Richardson:
'bout $600.00 an ounce
DS Small
Pardon me?

Mr. Richardson:
'bout $600.00 an ounce
DS Small
Yes, my lady, that's correct
…
…
Mr. Richardson:
Now 1729 grams- if we divide that by 28- that will us 61 ounces?
Court:
By 28?
Mr. Richardson:
Yes, 28 grams to an ounce
DS Small
1-7-?
Mr. Richardson:
2-9 point 1 divided by 28 grams gives you about 62 ounces?
DS Small
Yes, my lady 61
Mr. Richardson:
Point 75?
Court:
Well, he's rounding it up to 62
Mr. Richardson:
Let's do the 61- and if you times that by the usual street value of $600, what do we get? 37,000?
DS Small
My lady- that's sold by quarters or ounces- yes
Mr. Richardson:
But you agree that quarters and ounces are the most popular way to sell it?
DS Small
Yes, my lady
Mr. Richardson:
So, it's more likely that it will be sold that way than $25.00 bags of yester-year, correct?
DS Small
Yes, my lady

23. In addressing DS Small's evidence in her pre-sentence remarks, Simmons J stated:

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Detective Sergeant Hayden Small - - I'm sorry, but I
12 had printed off one for myself which I had comments
13 on in the margin [indiscernible] - - ah Detective
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14 Sergeant Hayden Small, who is considered, and has
15 been accepted by the Court as an expert on the sale
16 and distribution of narcotics in Bermuda.
17 He indicated that the
18 prosecution's estimate of maximum value is based on
19 the number of twists that can be produce from the
20 1729.1 grams seized in the case, which is
21 approximately 3.8 pounds. According to him a twist
22 sells for $25.
23 Under cross-examination by Mr.
24 Richardson Mr. Small agreed that the most popular
25 quantity in which marijuana is sold in Bermuda today

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1 is 7 grams, or what in the vernacular is termed a
2 quarter as opposed to the lower amount referred to as
3 a twist. He testified that he had last seen a twist
4 being sold 6 years ago. Mr Small agreed that a
5 quarter is sold on average for $150. Having accepted
6 that, he stated that the more probable value of the
7 amount of cannabis in this case, based on it being
8 sold in quarters, amounts to $37,000. The prosecution
9 was not in a position to dispute their witness's
10 evidence. In the circumstances the court accepts the
11 maximum value of the cannabis in this case as
12 $37,000.

(See pages 14-15 of the Transcript)

24. The Crown argued that the learned judge's finding that the maximum value of cannabis was $37,000.00 was not founded on DS Small's evidence. Ms. Clarke submitted that the learned judge either misunderstood or failed to properly consider that the evidence at the sentencing hearing was that it DS Small who had not personally seized a twist of Cannabis in six years. He was not saying that twists had not been seized by the Bermuda Police Service in the last 6 years. Ms. Clarke argued that the above remarks from the bench signified the judge's misconception that DS Small said that Cannabis had not been sold in twists for 6 years.

25. Counsel referred to section 1(4) of Misuse of Drugs Act which provides:

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.

26. Mr. Charles Richardson argued that the word "reasonably" should be read into section 1(4) so to produce the following meaning:

*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 (**reasonably**) be sold for in Bermuda.*

27. As a matter of statutory interpretation, I find strong merit in Mr. Richardson's submission that the word 'reasonably' ought to be read into section 1(4). To read this section any other way would be to invite applicability to the most remote of possibilities. This, on my surface assessment, engages the common sense rule on statutory construction. In my previous ruling in *R v C Foggo [2017] SC (Bda) 62 Crim (31 July 2017)* I stated as follows at paragraph 54:

There is a known principle of statutory interpretation called the Commonsense construction rule:
"It is a rule of law (in this Code referred to as the commonsense construction rule) that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment." (See Section 197 of Bennion of Statutory Interpretation)

28. At paragraph 36 of *R v C Foggo,* the rule against an interpretation adverse to an accused in the face of two or more reasonable interpretations was considered:

"*Counsel skillfully padded his arguments by reference to the general principles of construction against ambiguity, particularly in penal provisions. Mr. Richardson relied on judicial remarks made by Martin J.A. in the Canadian Court of Appeal case, R v Goulis 33 O.R. (2d) 55; [1981] O.J. No. 637; 125 D.L.R. (3d) 137 (p. 3 of 4):*
"… The Court has on many occasions applied the well-known rule of statutory construction that if a penal provision is reasonably capable of two interpretations, that interpretation which is the more favourable to the accused must be adopted…I do not think, however, that this principle always requires a word which has two accepted meanings to be given the more restrictive meaning. Where a word used in a statute has two accepted meanings, then either or both meanings may apply. The Court is first required to endeavor to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant to be adopted. This is merely another way of stating the principle that the conduct alleged against the accused must be clearly brought within the proscription…"

29. The ultimate success of Mr. Richardson's submission on this point is contingent on a reasonable finding that the evidence of DS Small was at least suggestive that the cannabis in this case could not reasonably be sold for more than $37,000.

30. DS Small, under cross examination by Mr. Richardson, referred to the sum of $37,000 as the maximum sum if the cannabis were to be sold by the ounce ie per 28 grams. DS Small's evidence was that it was more likely that the cannabis would be sold by ounce measurements than by $25.00 twists. He did not expressly say that the cannabis could not reasonably be sold for more than the $37,000 on ounce measurement. In fact, one may discern from his evidence that the cannabis could have been sold by the quarter, per 7 gram measurements, to yield a higher sum as such 7 gram quarters would sell for either $150.00 or $175.00 each depending on the season.

31. Notwithstanding, section 4 empowers the Court to make its own finding on the maximum value which the cannabis can *reasonably* be sold in Bermuda. Simmons J made a finding on the evidence before her. It was open to the Crown to re-examine DS Small on the reasonableness of selling the cannabis for an amount higher than the $37,000 yielded by a sale per ounce. However, the prosecutor abstained, despite the fact that this contentious point was the very reason for having DS Small return to the witness stand.

32. The underlying evidence upon which the Crown relies in support of its contention that the learned judge erred in finding that the $37,000 was the maximum sale value is insufficient. It is this thin evidential platform which renders this sub-ground unarguable and lacking in merit. For this reason, leave to argue that the sentence was manifestly inadequate on this limb is refused.

The Evidence of the Role played by the Respondents as Co-Conspirators

33. The Crown submitted that both of the Respondents carried out the role of an organizer and cited *Richards, Davis and Hall [1991] Bda LR 15*:

> *"…an organizer and supervisor he should, as a general rule, be more severely punished than an importer who merely carries the drugs ashore ….It may well be, as in this case, that the organizer is not found in possession of any drugs, but her part was crucial and she should be dealt with more severely than a courier."*

34. At paragraphs 16-17 of the Crown's written submissions, the Crown further addressed the respective roles played by the Respondents as co-conspirators. The evidence accepted by both the Respondents and the jury at trial was summarized as follows:

> *16. On the accepted facts of this case, Perinchief never came into possession of the drugs that were imported on this occasion. Perinchief was in direct contact with those identified as the physical suppliers of the drug on this occasion, she was in contact with Adlawan (the mule). She directed Adlawan in Florida as to whom he should collect the drug from; she directed Adlawan Bermuda to whom he should deliver the drug to, and was involved in ensuring Adlawan's payment for the importation.*

17. Also on the accepted facts of this case, Butterfield never came into possession of the drugs that were imported on this occasion. Butterfield was also in direct contact with the physical suppliers of the drug on this occasion, he was in direct contact with Adlawan to arrange collection of the drug in Bermuda and he was involved in ensuring Adlawan's payment for the importation, in fact was to collect the drugs and pay for them once they were in Bermuda.

35. Mr. Richardson argued that conspirators in Bermuda are liable to the same sentence as those convicted of the substantive offence. He referred to section 28 of the Misuse of Drugs Act 1972 which provides:

"*Attempts*
28 Notwithstanding anything in the Criminal Code [title 8 item 31], a person who attempts to commit an offence under this Act or solicits, incites, procures, or conspires with another to commit an offence under this Act shall be liable to the same punishment as is provided for that offence."

36. Mr. Richardson also referred to the judgment of the Court of Appeal in *R v Tucker and Simons [2010] Bda LR 39* where section 28 was relied on. Counsel criticized the *dicta* in *Richards, Davis and Hall [1991] Bda LR 15* in referring to the following passage on page 2 of the judgment:

"*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.*"

37. Counsel also referred to the words of caution made by Lord Pearson sitting in the House of Lords in *Verrier v DPP [1967] 2 A.C. 195 (HL); [1966] UKHL J1020-2 at p. 6*:

"*I think it is desirable to add some words of caution-*
(1) 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.
(2) Although it must follow logically from what is said above that it could in a very exceptional case be right to charge conspiracy even when the substantive offence had been committed and was charged, it should undoubtedly remain the general rule that, when there is an effective and sufficient charge of a substantive offence, the addition of a charge for conspiracy is undesirable because it will tend to prolong and complicate the trial. See Reg. v Dawson [1960] 1 W.L.R. 163, 172 and Reg v Davey (ibid) 1287, 1295.
(3) *I cannot imagine any case in which it would be right to give a greater sentence for an attempt than could be given for the substantive offence. It was held to be wrong in Reg. v. Pearce [1953] 1 Q.B. 30, and I agree with the reasons given in that case*."

38. The learned judge found that the Respondents were equally culpable as co-conspirators:

> The
> court finds that your culpability is on the same
> level as your co-defendant. The jury could not have
> found that you were in an operational or management
> position in the conspiracy. Therefore, for the
>
> *19.03.2018 Sentencing*
> reasons stated above previously, the appropriate
> sentence for you on count 3 is 2 years imprisonment
> with any time spent in custody to be taken into
> account. That is the sentence of this Court.

39. This ground of appeal is arguable as it turns not so much on the law but on a close analysis of the evidence. Section 28 makes a conspirator liable to the same punishment as a substantive offender, but in the end, much will depend on the evidence and the Court's assessment on who played what role and the respective levels of culpability. For this reason, I grant leave to appeal on this sub-ground against sentence.

Kimmisha Perinchief's involvement in the two previous importations

40. Simmons J made the following sentencing remarks on this issue:

> In the instant case - - this
> case - - 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 Adalawan
> 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. The *Phippson* case can be

distinguished because he admitted upon his plea of guilt that he had carried out two earlier importations.

(See pages 18-19 of the Transcript)

41. At paragraphs 20-23 of the Crown's written submissions, this ground of complaint is argued as follows:

20. It is submitted that the facts of this case confirmed that this conspiracy was not an isolated incident, but formed part of an ongoing operation, with at least 2 previous occasions were the importations had been successful.

21..The Court in their sentencing remarks said, "The Court fails to see how that background information could be relevant to sentencing."

22. Whilst it is accepted that the evidence of the 2 previously successful importations should not carry the same weight on sentence as a previous conviction; it is submitted that such evidence is relevant to the sentence as it tends to suggest and support other aggravating factors such as :

- *Her substantial links to others in the chain;*
- *Her close links to the original source;*
- *Her awareness and understanding of the scale of the operation;*
- *That this was not an isolated incident.*

23. It is submitted that the Learned Judge erred in that she had clearly overlooked, or undervalued, or misunderstood a salient feature of the evidence. It is therefore submitted that this is a cogent ground of appeal with a substantial chance of success.

42. The judge did not find this background evidence to be part and parcel of the conspiracy charged and the Crown, in its written submissions describes this as evidence of two previous successful importations. I was not referred to any evidential material from which I could identify an arguable case that the previous importations formed part of the conspiracy charged in Count 3. In fact, the judge found the contrary.

43. For these reasons, I see no merit in this ground and accordingly refuse leave to appeal sentence on this sub-ground.

The Respondent Ms. Perinchief's Application for leave to Appeal Sentence

44. Ms. Perinchief seeks leave to appeal sentence on eight separate particularized grounds of complaint. On grounds 1, 2, 3 and 5, the Respondent criticized the learned judge for having failed to properly consider the appropriateness or suitability of a suspended sentence or

other alternative sentence to an immediate custodial term of imprisonment. On ground 7, Ms. Susan Mulligan argued that the learned judge erred in penalizing the Respondent more harshly than she would have otherwise done, merely on the basis that Ms. Perinchief was tried in the Supreme Court and not the Magistrates' Court.

45. Simmons J in her sentence remarks said:

> There are generally accepted
> sentencing principles that have been established by
> the Court of Appeal that counsel are well aware of.
> Under the guidance of the Court of Appeal, it has
> been the policy and sentencing practice of the courts
> in Bermuda that sentencing in the Supreme Court is
> based on previous sentences meted out by that court,
> not the Magistrates Court. See *Herman Ray Steede* as
> mentioned. The Court of Appeal has always made it
>
> *19.03.2018 Sentencing*
> clear that a defendant whose case comes on for
> sentencing in the Supreme Court ought to expect a
> higher sentence than one meted out in the
> Magistrates' Court. The court recognizes the
> advantages and disadvantages of a Supreme Court
> trial.

46. The learned judge did not apply the principles outlined in Part IV of the Criminal Code so to give priority to the principle that sentences imposed in the Supreme Court will be more severe than in the Magistrates' Court:

> It is not for this court to consider that
> the 2001 amendments to sections 53,54 and 55 referred
> to earlier displace the clear authority of the Court
> of Appeal.

47. Ms. Mulligan argued that the Respondent did not volunteer or elect to be tried in the Supreme Court and that she should not be penalized by the Crown's decision to try the matter in the Supreme Court in prosecution of Counts 1 and 2 which did not result in conviction.

48. On my assessment, Ground 7 calls for clarification from the Court of Appeal on the supremacy of the statutory sentencing principles. This ground also triggers an analysis of the Court's powers of discretion in passing sentencing as any consideration on how this matter came to be in the Supreme Court for sentencing would call for an exercise of judicial discretion. I find that these are matters of importance and entail meritorious arguments. I

therefore grant leave on Grounds 1, 2, 3, 5 and 7 which all engage these two issues for resolve by the full Court.

49. On Ground 4, it is complained that the learned judge failed to find any statutory mitigating factors. The below remarks were made by Simmons J:

> Ms. Perinchief, there is no statutory mitigation in your case that is applicable. Although you did make a call to the courier to indicate to him that you would not be delivering the drug to him and identifying who would deliver it. The court finds that your culpability is on the same level as your co-defendant. The jury could not have found that you were in an operational or management position in the conspiracy. Therefore, for the
>
> reasons stated above previously, the appropriate sentence for you on count 3 is 2 years imprisonment with any time spent in custody to be taken into account. That is the sentence of this Court.

(See pages 25-26 of the Transcript)

50. Ms. Mulligan argued that this demonstrated the learned judge's failure to consider the Respondent's clean record and previous good character. Notably, the Court heard evidence from David Hollis, on the Respondent's antecedent history. So, the learned judge was presumably aware of Ms. Perinchief's previous clean record. However, the complaint is that the Respondent's sentence did not import the full or proper benefit her previous good character. I find that this ground is arguable and grant leave on Ground 4.

51. Count 6 calls for a reduction in sentence owing to the time spent on bail subject to conditions of travel restrictions. There is no previous case law known to me which approves sentence reductions based on time spent on bail, notwithstanding the bail conditions imposed. Bail conditions in the Supreme Court are common and do not qualify as a form of time already served. This ground in my judgment is unarguable and leave is refused.

52. Count 8 points to the impact of decriminalization of cannabis and the change of Parliament's attitude to the harmfulness of cannabis possession. This ground draws in issues of particular public interest. I, therefore, refer this particular ground of appeal to the Court of Appeal for its consideration on leave.

Conclusion

53. On the Crown's application for leave to appeal sentence I granted leave to argue that the sentence imposed was manifestly inadequate on the grounds that the learned judge's sentence did not properly give effect to the role played by the Respondents as co-conspirators and their respective levels of culpability in comparison to substantive offenders.

54. I refused leave to appeal on the ground that the learned judge erred in finding that the maximum value of the cannabis was $37,000.00. I also refused leave on the ground dealing with the complaint about the learned judge's disregard of evidence suggestive of Ms. Perinchief's involvement in the two previous importations.

55. On Ms. Perinchief's application for leave to appeal sentence I granted leave to argue that the sentence imposed was manifestly excessive on Grounds 1, 2, 3, 4, 5 and 7. I refused leave on Ground 6 and respectfully referred the application for leave on Ground 8 to the full Court.

56. On 26 April 2018 I reserve this ruling for it to be handed down to Counsel on a return date hearing fixed for Thursday 3 May 2018. However, due to the unavailability of both Counsel for the Respondents, I issue the following case management directions administratively:

    (i) The written submissions filed by the Crown on 23 April 2018 and the written submissions filed by Counsel for the Respondent, Ms. Perinchief, on 24 April 2018, both in respect of sentence, shall stand as the written submissions to be placed before the full Court on issues of leave and substantive argument.

    (ii) Counsel for the Respondent, Mr. Butterfield, shall file written submissions in reply to the Crown in respect of sentence on or prior to Thursday 10 May 2018.

    (iii) Counsel for both Respondents shall file written submissions in respect of their appeals against conviction on or prior to Thursday 10 May 2018.

Dated this Thursday, 3rd day of May 2018

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE COURT OF APPEAL