

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 INDICTMENT NO: 0054/19
5
6
7

8 REGINA

9 V.

10 ANDRE JUNIOR RUSSELL
11 BASIL ANTHONY SMITH
12 KENDAL JEROME STRAUMANN
13 MARTIN ANTONIO TRENCH
14
15
16



17 **Appearances:**

Mr. Kenneth Ferguson for the Crown

18
19 Mr. Rupert Wheeler of Samson Law for the
20 Defendants
21

22 **Before:**

Justice Marva McDonald-Bishop (Actg.)

23 **Hearings:**

16th & 30th August 2019

24 **Delivery of Decision:**

10th September 2019
25
26
27
28

29 **HEADNOTE**

30 *Criminal Law – Illicit Trafficking – Misuse of Drugs Law - No local authorities*
31 *in respect of offences under s.19(2) of the Misuse of Drugs Law - Some local*
32 *authorities pertaining to the sentencing of offenders, mainly, in the Summary*
33 *Court, for offences committed under s.3(1) of the Misuse of Drugs Law –*
34 *Mitigation in these types of offences.*
35

36
37 **SENTENCE JUDGMENT**
38

1 1. The four defendants are Jamaican nationals. They are charged together on an
2 indictment containing a single count for the offence of Illicit Trafficking, contrary to
3 s.19(2)(a) of the *Misuse of Drugs Law* (2017 Revision).

4 2. The particulars of the offence are that the four defendants “*on the 6th day of September*
5 *2018, on a ship not registered in any country or territory, located 27 nautical miles*
6 *southeast of Grand Cayman, Cayman Islands, had in their possession a controlled*
7 *drug, namely 454.41 pounds of ganja, knowing or having reasonable grounds to*
8 *suspect that the drug was intended to be imported into the Cayman Islands*”.

9 3. The defendants pleaded guilty to this indictment in the Grand Court on the 16th August
10 2019, following pleas of guilty in the Summary Court that were subsequently set aside
11 as being null and void.

12 **Summary of facts**

13 4. The undisputed facts on which the guilty pleas are based may be outlined as follows.
14 On the 6th September 2018, the four defendants were intercepted about 27 miles
15 outside the territorial waters of Grand Cayman. They were intercepted after the Air
16 Operation Unit (AOU) of the Royal Cayman Islands Police Service (RCIPS) spotted a
17 suspicious-looking vessel, with four persons on board, and dispatched the Joint Marine
18 Unit (JMU) to the area. The AOU used the thermal imaging infrared camera to
19 identify the vessel with the four defendants on board. The vessel contained several
20 large packages and fuel drums.

21 5. The JMU and AOU pursued the boat, and during the pursuit, the defendants were
22 observed on the infrared camera system off-loading several large packages into the sea.



1 6. The vessel was eventually intercepted and identified as a 25-foot Jamaican-type canoe
2 with no registration information displayed on it or documentation on board. The four
3 defendants who were then identified to be Jamaican nationals were arrested.

4 7. A total of 22 packages were recovered and examined by drug officers. They were
5 found to contain ganja, weighing. 454.41 pounds.

6 8. The police found a receipt for the purchase of various items of food and beverage from
7 a supermarket in Petersfield, Westmoreland, Jamaica, among the personal effects of
8 one of the defendants. This receipt was dated the 5th September 2018. No fishing
9 equipment or any evidence of any lawful means of making a living was observed on
10 the vessel. The defendant, Basil Smith, was recorded to have said on caution:

11 *“Mi just a come a Cayman fi look for work cause Jamaica hard. I don’t know*
12 *nothing about anything on the boat, the bald head man and the plait head man was*
13 *who steering the boat.”*

14 9. On Saturday, the 8th September 2018, the defendants were interviewed under caution in
15 the presence of their attorneys-at-law. They all remained mute throughout their
16 interviews.

17 **The procedural history in the Summary Court**

18 10. The procedural history of this case is critical to the sentencing process, hence its
19 inclusion to provide a relevant background to the case brought by the defendants at the
20 sentencing hearing. The chronology of events provided by the prosecution and
21 augmented by the court’s own checks of the record of the Summary Court (with the
22 concurrence of counsel on both sides) has proven useful in establishing the relevant
23 procedural history that led to the arraignment of the defendants in this court.





11. The four defendants were initially charged with the offence of Importation of Ganja, contrary to s.19(2)(a) of the *Misuse of Drugs Law* (2017 Revision) (Charge #02009/2018).

12. The first hearing date in the Summary Court was on the 10th September 2018, when the prosecution were required to serve the relevant papers on the defence.

13. On the 25th September 2018: The defendants were represented by counsel, and the prosecution elected that the charge should be dealt with in the Grand Court. The matter was listed for a Long Form Preliminary Inquiry (LFPI) on the 10th October 2018. On that day fixed for the LFPI to commence, a discussion took place between the parties after the defence had pointed out that the charge of importation was not sustainable because the defendants were intercepted outside the territorial waters of the Cayman Islands. The matter was then adjourned to the 17th October 2018.

14. On the 15th October 2018: On this date, two days prior to the date fixed for the LFPI, another charge was laid against the defendants (Charge #02327/2018).

15. On the 17th October 2018: The matter was listed for hearing before Magistrate Donalds. The prosecution withdrew the initial charge of Importation of Ganja, pursuant to s.19(2)(a) of the *Misuse of Drugs Law* (2017 Revision), and laid a new charge of Possession of Ganja, contrary to s.19(2)(a) of the *Misuse of Drugs Law* (2017 Revision). The four defendants pleaded guilty to that offence. No charge of Possession of Ganja, contrary to s.3(1) (k) of the *Misuse of Drugs Law* (2017 Revision), was ever put to the defendants in the Summary Court. At the time of the guilty pleas, counsel on both sides, as well as the Magistrate, were not aware that the offence under s.19(2)(a) of the *Misuse of Drugs Law* was a category B offence and, therefore, required an

1 election to be made as to the mode of trial. Neither the prosecution nor the defendants
2 indicated any election to the Court.

3 16. On the 5th December 2018: The case was before Magistrate Foldats, and he observed
4 this irregularity in the proceedings. Crown Counsel, appearing at the time, then
5 indicated that the prosecution were electing trial in the Grand Court.

6 17. In response, defence counsel, Miss Fosuhene, indicated to the court that there had been
7 an election on the 14th November 2018, for the case to be dealt with in the Summary
8 Court and, therefore, the defendants had a legitimate expectation of being sentenced in
9 the Summary Court. Magistrate Foldats adjourned the case for the resolution of the
10 issue of whether an election had already been made. There were several mention dates
11 before different Magistrates between the 12th December 2018, and the 4th June 2019,
12 to, among other things, resolve the question.

13 18. On the 4th June 2019: The case was listed for hearing before Magistrate Gunn. She
14 indicated that the court record had revealed that there was no election in the matter and
15 drew counsel's attention to the decision of the Cayman Islands Court of Appeal
16 (CICA) in *R v De Acosta*¹. This indication, reportedly, led to a concession from the
17 defence and the guilty pleas to Charge #02327/2018 were declared by Magistrate Gunn
18 to have been null and void.

19 19. The Crown then elected trial in the Grand Court, and the case was committed to the
20 Grand Court after a Short Form Preliminary Inquiry (SFPI) was conducted.



¹ [2006] CILR 362

1 20. On the 12th August 2019: The defendants, in this court, raised a plea in bar of *autrefois*
2 *acquit* on the basis that the Summary Court had already dismissed the charge on the
3 indictment. Alternatively, they contended that the prosecution should either be barred
4 from proceeding in the Grand Court or that the indictment should be stayed on the
5 ground of abuse of process because:

- 6
7 i. the charge to which it relates has already been dismissed by the Summary Court;
8 and
9 ii. they have been given a legitimate expectation that they will not be prosecuted for
10 that offence [on the indictment]”.

11
12 The defendants also asserted, through their counsel as a preliminary point, that the
13 charge alleged on the indictment is not before the Grand Court as it was never sent by
14 the Summary Court.

15 21. The prosecution strongly contested the position taken by the defence. Crown Counsel
16 contended that the plea of *autrefois acquit* could not succeed because the withdrawal of
17 the case in the Summary Court for a different offence could not properly ground such a
18 plea in bar. He also contended that there was no abuse of process.

19 22. After considering the submissions of counsel on both sides, the court ruled that the
20 defendants were not correct in their contention, both in fact and in law, that the
21 prosecution should be barred from proceeding with the indictment in the Grand Court.
22 Accordingly, the application for a stay of the proceedings in the Grand Court failed for
23 reasons detailed in the Ruling below, which was delivered on the 16th August 2019.

1 **Ruling on Application to Stay the Indictment**

2 23. For the sake of completeness of these proceedings as they transpired on the 16th and
3 30th of August 2109 and the 10th September 2019, this Ruling is herein recorded.

4 *"This is an application brought by the four defendants by which they are asking*
5 *this court to make a preliminary ruling that they not be called upon to be*
6 *arraigned on the indictment, preferred in this court, in relation to a charge number*
7 *02327 of 2018.*

8 *The submissions on their behalf have been put in writing, quite helpfully and*
9 *usefully by counsel, Mr. Wheeler, and the court has had sight of those submissions*
10 *and has studied them thoroughly. The bases for the application, as set out in the*
11 *written submissions, are that the plea of autrefois acquit is available to the*
12 *defendants on the basis that the charge on this indictment has already been*
13 *dismissed by the Summary Court. The plea should, therefore, be sustained and the*
14 *charge on the indictment be dismissed.*

15 *An alternative ground is that the indictment is an abuse of process because, firstly,*
16 *the charge to which it relates has already been dismissed by the Summary Court,;*
17 *and, secondly, the defendants have been given a legitimate expectation that they*
18 *will not be prosecuted for that offence. The prosecution of the charge will bring*
19 *the criminal justice system into disrepute, and it is an abuse of process. An*
20 *additional alternative basis is that, in any event, the charge alleged in the*
21 *indictment is not before the Grand Court, as it was never sent by the Summary*
22 *Court. On those bases, the defendants are saying that the prosecution should*
23 *either be barred from further proceeding against them or the indictment should be*
24 *stayed.*

25 *This application is vigorously opposed by the prosecution, and Mr. Ferguson, on*
26 *their behalf, has filed extensive submissions, in writing, in which he has detailed*
27 *the chronology of events and the procedural history of this matter. The court is*
28 *grateful to him for that assistance.*

29 *The court, having considered the submissions in writing, and also having heard*
30 *both counsel in their oral arguments, had found it necessary to conduct an*
31 *examination of the court's record because it was seen that there was a clear*
32 *conflict between the prosecution and the defence as to what transpired before the*
33 *magistrates in the Summary Court. Having had sight of the record of the court,*
34 *and having had discussions with counsel in chambers, which was also recorded*
35 *(that transcript should form part of the record of these proceedings), the court*
36 *concludes that the application is unsustainable as a matter of law and as a matter*
37 *of fact.*

38 *The court has found favour with the submissions of the prosecution because those*
39 *submissions accurately reflect the history of the matter before the Summary Court.*
40 *That having been said, the defence's argument that the plea of autrefois acquit is*

1 available to the defendants, cannot stand because the charge on the indictment
2 was never dismissed by the Summary Court.

3 The record shows, as Mr. Wheeler concedes in the end, that the charge which he
4 said was dismissed, was, in fact, withdrawn. The law treats a dismissal on the
5 merits differently from a withdrawal, so the court need not go on to look at
6 whether there is proper proof of there having been a dismissal in this case. This
7 could have been established by the production of a certificate of dismissal or
8 acquittal. The court is satisfied that no dismissal took place.

9 The defendants did not join issue with the prosecution's contention that they were
10 not pleaded to the earlier charge number 2009 (which I will refer to in short form),
11 and that on the day when they were pleaded to the later charge 02327, the earlier
12 charge was withdrawn. Regardless of the label ascribed to it and the particulars
13 of offence, that charge was withdrawn. It, therefore, means that the Summary
14 Court had the jurisdiction to treat with charge 02327 of 2018. On October 17th,
15 2018, the defendants plead guilty to that particular charge. Pre-sentence reports
16 were requested, and subsequently it was discovered that there was an irregularity
17 in the proceedings in that neither the defendants nor the Crown had elected the
18 mode of trial or the venue of trial, whether it was to be the Summary Court or the
19 Grand Court.

20 The learned magistrate, having seen that irregularity, and having been guided by
21 the law as it relates to an election, found that the proceedings were a nullity up to
22 that point in terms of the guilty pleas. She, therefore, ruled that the guilty pleas
23 were null and void. It means, therefore, that with the pleas declared to be nullities,
24 the defendants would have been reverted to the position in which they were before
25 the pleas were taken. This means mean that the charge would still stand for a plea
26 to be taken, whether by indictment in the Grand Court or by information in the
27 Summary Court.

28 It happened that the Crown made an election that the matter be committed to the
29 Grand Court. It follows, therefore, that this court cannot find that the indictment,
30 which is preferred in the Grand Court, pursuant to that election, is an abuse of
31 process as alleged. The charge to which it relates has not been dismissed. The
32 defendants have not yet pleaded to the charge to which it relates because of the
33 declaration that the earlier pleas are nullities.

34 Mr. Wheeler's contention, that the defendants would have had a legitimate
35 expectation to be tried and sentenced in the Summary Court, with all due respect,
36 has no merit. Legitimate expectation would not have arisen in these circumstances
37 because all relevant parties were labouring under the misconception, it would
38 appear, that an election had been made or that it was not necessary that one
39 should be made. There was no promise made by the prosecution to the defence to
40 accept any plea to a lesser offence or to elect Summary Court trial and then
41 changed their decision to do so. Legitimate expectation does not arise.

42 But even if legitimate expectation had arisen, it must give way to the law, and the
43 law is clear that there must first be an election, before a valid trial can proceed in
44 the Summary Court. So, the law takes precedence over any legitimate expectation
45 that could have arisen in the minds of the defendants.

1 *There is no merit in that ground, as I have said, and so I must reject the argument*
2 *that the indictment is an abuse of process.*

3 *The alternative limb of the application is that the indictment is not before the*
4 *Grand Court because it was never sent from the Summary Court. This argument is*
5 *also rejected. Magistrate Gunn had provided her ruling to this court that the*
6 *matter is sent to the Grand Court. I see no basis in law to disturb that ruling. The*
7 *magistrate has provided something more on the record. She states that given that*
8 *the defendants have been in custody for some nine months, she believes that the*
9 *matter could be set down for arraignment and sentence on the same day, in which*
10 *case, the Grand Court could list it on a date other than the 14th of June, 2019.*
11 *She sought to set out the history of the case, obviously with the intention that the*
12 *Grand Court could be guided in treating with the matter expeditiously in light of*
13 *what transpired before her concerning the pleas.*

14 *So having said all that, in a nutshell, the submissions of counsel are there, which*
15 *would form part of the record. The court must reject the submissions presented by*
16 *the defence because they are not supported in law in these circumstances. The*
17 *application is, inevitably, refused. The defendants are to proceed to arraignment."*

- 18
- 19 24. Following the ruling that the indictment was properly laid in the Grand Court, the
20 defendants were arraigned, and all pleaded guilty to the charge on the indictment.
21 Sentencing was deferred.

22 **The Applicable Law**

- 23 25. Section 19(2)(ii)(B) of the *Misuse of Drugs Law* provides that on indictment in the
24 Grand Court, the offender is liable to a fine and imprisonment for 14 years. Section
25 19(2)(ii)(A), on the other hand, provides that on Summary conviction, the penalty is a
26 fine of \$10,000.00 and imprisonment for 2 years. The courts of the Cayman Islands
27 have construed these provisions to mean that the penalties are in the alternative and so
28 it is not mandatory for both a fine and a term of imprisonment to be imposed.

- 29 26. The *Cayman Islands Sentencing Guidelines*, as well as the *Statement on Tariffs and*
30 *Guidelines for Sentencing for Certain Offences*, issued by the Chief Justice of the

1 Cayman Islands in January 2002 ("The Chief Justice's Sentencing Guidelines, 2002"),
2 do not make provision for this offence of Illicit Trafficking.

3 27. Counsel have also advised the court that to the best of their knowledge, there are no
4 local authorities in respect of offences under s.19(2) of the *Misuse of Drugs Law*. Mr.
5 Ferguson explained that this is because, up until recently, the authorities would
6 intercept vessels transporting controlled drugs within the territorial waters of the
7 Cayman Islands and so perpetrators would be charged under s.3 of the *Misuse of*
8 *Drugs Law*. There is, therefore, no authority brought to the court's attention, which is
9 directly on point with the instant case.

10 28. Counsel on both sides have used, as their point of reference, some local authorities
11 pertaining to the sentencing of offenders, mainly, in the Summary Court, for offences
12 committed under s.3(1) of the *Misuse of Drugs Law* in respect of large quantities of
13 ganja found on vessels at sea. I have been guided by those authorities, while bearing in
14 mind the definition of "tariff" in *The Chief Justice's Sentencing Guidelines, 2002* as
15 "the sentence to be applied in a typical case", with no aggravating or mitigating
16 features taken into account.

17 29. It is acknowledged that the maximum penalty is not to be imposed unless in the most
18 serious of offences and in relation to an offender who deserves such a penalty.
19 Guidance is also derived from the principle stated in the *Cayman Islands Sentencing*
20 *Guidelines* that the court must not pass a custodial sentence unless it believes that the
21 offence is so serious that no other sentence can be justified².

² Section 4 of the *Alternative Sentencing Law*



1 30. I have had regard to the circumstances of the case and the circumstances of each
2 offender. I have adopted the recommendation in the Cayman Islands Sentencing
3 Guidelines that all available sanctions, other than imprisonment, that are reasonable in
4 the circumstances of each case, should first be considered. A sentence of imprisonment
5 must be regarded as a matter of last resort.

6 31. There is no question that the illicit trafficking in dangerous drugs and the intention to
7 import those drugs into a country unlawfully is a serious offence. Furthermore, the
8 importation of ganja and related offences are well established to be a scourge on this
9 island.

10 32. Magistrate Foldats, in the case of *R v Adlam (Derrick Anthony), Cunningham*
11 *(Demarco Deinton) and Morgan (Leroy Johnoton)*³ provides a colourful picture of
12 the prevalence of these offences within this jurisdiction, when he observed (page 1 of
13 written reasons for judgment):

14 *“Yet again we have foreign nationals before the court who are guilty of importing*
15 *illegal drugs into our country and who must be sentenced by this court.*

16 *Sadly, the narrative in these cases have become familiar, almost clichéd - a ganja*
17 *boat is intercepted, the culprits are apprehended, large quantities of illegal drugs*
18 *are recovered, and lengthy jail sentences are imposed. And yet, ganja boats*
19 *continue to arrive in our waters and recently, it seems, almost on a weekly basis.*

20 *Why? One reason must be that local demand creates a profitable market for illegal*
21 *drugs. Until this issue is adequately addressed, ganja boats will continue to arrive;*
22 *but that is a complex and difficult societal issue that this court is unable to resolve.*
23 *In the meantime, the lure of money will entice individuals, like these defendants, to*
24 *engage in drug importation schemes despite the risk of years in jail when*
25 *captured.”*

26
27



³ Unreported. Charge No 4697/2017 (23rd March 2018)

1 33. Given the nature of the offending, the quantity of drugs involved, as well as the
2 culpability of each defendant, this court is satisfied that the custody threshold has been
3 reached for the imposition of a custodial sentence for each defendant. The imposition
4 of a sentence of imprisonment is inevitable.

5 34. In determining the length of the custodial sentence, I have borne in mind the purpose
6 and the aim of sentencing, as documented in the Sentencing Guidelines. I have found
7 that while there should be a balancing of all these objectives, greater weight must be
8 attributed to deterrence, punishment and rehabilitation in the circumstances of this
9 case.

10 35. In making this decision, I have also borne in mind the proportionality principle, that is
11 to say, that the severity of the punishment inflicted should be proportionate to the
12 gravity of the offence and the degree of responsibility of each defendant.

13 36. In the absence of any evidence to the contrary, culpability is shared equally, among the
14 defendants.

15 37. The remaining question for this court is what should be the length of the sentence in
16 respect of each defendant.

17 **DETERMINING THE APPROPRIATE SENTENCE**

18 38. I do not believe that the circumstances of the offending and the offenders in this case
19 reasonably warrant the imposition of the maximum penalty of 14 years' imprisonment
20 prescribed by statute.



1 **A. The starting point and category range**

2 39. Counsel on both sides have brought to the court's attention several authorities, which
3 they contended should be utilised in determining the appropriate sentence range as well
4 as the starting point within that range.

5 40. The prosecution relied on these authorities and suggested a starting point of 4 to 5
6 years' imprisonment:

7 *i. Quest (Harold) v R*⁴;

8 *ii. Comrie (Mitchell) v R*⁵; and the case of

9 *iii. R v Adlam (Derrick)*⁶, *R v Grant (Glenval George)*⁷, *R v McCoy (Jason Phelan)*⁸
10 and *R v Samuels (Noel Alexander)*⁹.

11 41. The defence relied on *Comrie (Mitchell) v R* for the general principles of law to be
12 applied, along with a table of Summary Court cases reported in the Cayman Compass
13 newspaper.

14 42. The table of unreported cases and sentences that the defendants' counsel brought to the
15 attention of the court are these: *R v Adlam (Derrick Anthony)*, *Cunningham*
16 *(Demarco Deinton)* and *Morgan (Leroy Johnoton)*¹⁰; *R v Johnson (Joshua Eyon)*,
17 *Pillarchie (Linton Nypole)* and *Reynolds (Cephas Solomon)*¹¹; *R v Rose (Charles)*,

⁴ SCA0006/2009 – dated the 24th May 2010 (Cooke J Actg.)

⁵ SCA0001/2011 – dated 29th February 2012; (2012) CILR N3

⁶ (Charge #06571/13)

⁷ (Charge#06568/13)

⁸ (Charge #06480/13)

⁹ (Charge #06569/13)

¹⁰ *Supra*

¹¹ (Charge #04942/2017)



1 *Brown (Marvin) & Folkes (Andrew)*¹²; and *R v Swaby-Ebanks (Yoandy) & Wright*
2 *(Terry Christopher)*¹³. These cases show a sentencing range from a low of 28 months
3 to a high of 36 months for guilty pleas. There was one case reported in which the
4 defendant was sentenced to 42 months after a trial. They also illustrate sentencing in
5 respect of possession of ganja of varying weights (from 424 pounds to 810 pounds)
6 and the circumstances of each offender such as previous convictions and their degree
7 of cooperation with the police.

8 43. In placing reliance on those cases, Mr. Wheeler pointed out that it was not possible for
9 the sentencing court in those matters to determine the role of the defendants because
10 they were all crew members and no individual had a more prominent role than the
11 other, as is the situation in the instant case.

12 44. Counsel also noted that the cases all involved the offence of importation of ganja,
13 which means that those defendants had successfully arrived in the Cayman Islands
14 borders. He submitted that the *actus reus* in this case, is different, there being no need
15 to bring the drugs into the jurisdiction, and the *mens rea* is of a lower standard, which
16 is knowledge or having reasonable suspicion that the drug is intended to be imported.
17 On account of that reasoning, counsel submitted that some discount should be applied
18 to the usual starting point in importation of ganja cases in arriving at an appropriate
19 starting point in this case.

20 45. Counsel recommended a starting point between 20 months (1 year 8 months) to 25
21 months (2 years 1 month).

¹² (Charge #00577/2018

¹³ (Charge *00169/2018



1 46. I had indicated to Mr. Wheeler during his submissions that if the reasons for sentences
2 of the Magistrates in the cases reported in the *Cayman Compass* could be obtained to
3 verify all this information which he highlighted to be applicable in determining the
4 starting point, then that would have been a more reliable source. This would have been
5 necessary because the newspaper may not have recorded all the material facts and
6 circumstances, which would have guided the Magistrates in arriving at the appropriate
7 sentence in each case. Regrettably, I have not received the reasons for all the sentences
8 from counsel. There is, therefore, an obvious limitation in placing reliance on the cases
9 merely on the length of the sentences and the quantities of ganja involved. This
10 limitation arises from the fact that the court would not be seized of the relevant
11 information as to the personal circumstances of each offender, which is an essential
12 consideration in the sentencing process.

13 47. The sentences in those cases would have been arrived at after the court would have
14 considered personal circumstances of aggravation and mitigation and a reduction for
15 the guilty plea subsequently applied. The starting point must be determined by having
16 regard to the sentence that would be given, following a trial and without regard to
17 aggravating and mitigating factors and the guilty plea.

18 48. Through the assistance of the criminal registry, I obtained the reasons for sentence of
19 Magistrates Foldats and Gunn in three cases heard in the Summary Court, which
20 included, it seems, two of the matters referenced by Mr. Wheeler. The cases for which
21 reasons for sentence have been obtained are:



1 i. *R v Adlam (Derrick Anthony), Cunningham (Demarco Deinton) and Morgan*
2 *(Leroy Johnoton)*¹⁴;

3 ii. *R v Ricketts (Oshane Nickoy), Robinson (Andre Washington) and Maxam*
4 *(Nicholas Odell)*¹⁵; and

5 iii. *R v Swaby-Ebanks (Yoandy) & Wright (Terry Christopher)*¹⁶.

6 49. The Magistrates, in arriving at their decisions in the cases above, usefully referenced
7 several other cases, including *Quest*¹⁷ and *Comrie*¹⁸, which are among the authorities
8 relied on by the parties in this case. The cases, including those cited by Mr. Wheeler
9 from the reports in the *Cayman Compass*, do serve to, at least, to illustrate the range of
10 sentences imposed in the Summary Court for a guilty plea in cases involving the
11 importation of large quantities of ganja into the Cayman Islands by boats.

12 50. In the absence of specific sentencing guidelines treating with this particular offence,
13 and given the lack of any recorded precedent for the offence under consideration in this
14 case, invaluable guidance is obtained from the reasoning of the Honourable Chief
15 Justice in *Comrie*¹⁹.

16 51. In that case, the Appellant pleaded guilty to, among other things, being concerned with
17 the importation of ganja with intent to supply, contrary to s.3(1) of the *Misuse of*
18 *Drugs Law* (2009 Revision). The Appellant was sentenced to 5 years' imprisonment
19 for each offence, with the sentences to run concurrently. The total weight of the ganja
20 recovered by the police was 395.2 pounds. The Appellant, however, admitted that

¹⁴ *Supra*

¹⁵ (Charge #s00172/2018 & #00173/2018)

¹⁶ *Supra*

¹⁷ *Supra*

¹⁸ *Supra*

¹⁹ *Supra*



1 about 50 pounds belonged to him. He explained that he saw ganja being loaded onto
2 the boat and loaded some for himself intending to sell it when he arrived in Grand
3 Cayman. He had no previous convictions.

4 52. The Chief Justice referred to the UK Sentencing Guidelines, as detailed in the case of
5 *R v Aramah*²⁰, and observed that, the UK guidelines cannot assist with the appropriate
6 starting point in this jurisdiction given the difference in the prescribed penalties, but,
7 that they assist with the relevant considerations a sentencing judge should take into
8 account when sentencing an offender for importation and possession of controlled
9 drugs with intent to supply. He concluded that the starting point in relation to the tariff
10 in this jurisdiction would be “significantly lower” than that of the UK, albeit that the
11 relevant factors to be taken into account may be similar.

12 53. The Chief Justice established the following as the three key factors that the court
13 should have regard to when sentencing in such cases:

- 14 i. The quantity of ganja;
15 ii. The defendant's role in the commission of the offence; and
16 iii. Whether the defendant has previous convictions.

17 54. He noted that the quantity of drugs is often the most important factor in sentencing for
18 drug offences. He cited *Guardiola v R*²¹, in which it was held that the length of the
19 sentence is to be measured by the quantity of the drugs involved, and that a sentence of
20 at least 2 years' immediate imprisonment, for the importation of approximately 100
21 pounds of ganja, was appropriate.

²⁰ 76 Cr. App R 190

²¹ (Grand Court) 1994-1995 CILR N-20

1 55. After considering several authorities and the facts of the case before him, the Chief
2 Justice concluded that the starting point used by the Magistrate was manifestly
3 excessive. He opined that an appropriate starting point would have been somewhere
4 in the region of 3 - 4 years' imprisonment, given the Appellant's secondary role, lack
5 of previous convictions and the amount of ganja acknowledged by him, which was not
6 disproved by the Crown. He also found that the Magistrate did not make reference to
7 the giving of any credit for the guilty plea in her sentencing remarks. The Appellant,
8 he stated, was entitled to a significant discount, given his admissions and cooperation
9 with the police.

10 56. The Chief Justice concluded that the appropriate sentence should have been 3 years'
11 imprisonment when credit was given for the guilty plea. He ordered that sentence to be
12 substituted. It can be concluded that the provisional sentence (that is before allowance
13 was made for the guilty plea) would have been higher, somewhere in the region of 4
14 years.

15 57. In the case of *R v Adlam (Derrick)*²², *R v Grant (Glenval George)*²³, *R v McCoy*
16 *(Jason Phelan)*²⁴ and *R v Samuels (Noel Alexander)*²⁵, Magistrate Gunn, after a
17 review of several authorities, held that the appropriate starting point for a crew member
18 charged with the importation of 174 pounds of ganja, as a first offence, and who is of
19 good character, was 3 years' imprisonment. Mr. Ferguson submitted on behalf of the
20 prosecution that the starting point in the instant case should be higher than that of 3

²² (Charge #06571/13)

²³ (Charge#06568/13)

²⁴ (Charge #06480/13)

²⁵ *Supra*



1 years utilised by the magistrate by virtue of the larger quantity of ganja involved in this
2 case. The case of *Quest*²⁶, he said, is instructive in this regard.

3 58. In *Quest*²⁷ (a Jamaican ganja-boat case), the offender was sentenced to 4 years'
4 imprisonment for possession of 192.42 pounds of ganja with intent to supply
5 (Caymanian Compass 9th March 2009). The Chief Magistrate observed that the
6 sentence would have been the same had the offence been one of importation of ganja.
7 The sentence was confirmed both by the Grand Court²⁸ and the Court of Appeal²⁹.

8 59. In *R v Adlam (Derrick Anthony), Cunningham (Demarco Deinton) and Morgan*
9 *(Leroy Johnoton)*³⁰ the quantity of ganja involved was 461.74 pounds. All three
10 defendants plead guilty. After assessing the seriousness of the offence, by reference to
11 harm and culpability, Magistrate Foldats set the starting point at 4 years'
12 imprisonment, where the offender's role was limited to that of a crewman. He did so
13 after having regard to *Comrie*³¹ and *R v Adlam (Derrick)*³², *R v Grant (Glenval*
14 *George)*³³, *R v McCoy (Jason Phelan)*³⁴ and *R v Samuels (Noel Alexander)*³⁵, as well
15 as *R v Hydes (Leon), Swaby-Powery (Clibland) & Crowe (Marlon)*³⁶. In the latter
16 case, Justice Quin imposed sentences of 34, 42 and 54 months' imprisonment on three
17 defendants who pleaded guilty to importing 194 pounds of ganja into the Cayman
18 Islands.

²⁶ *Supra*

²⁷ *Supra*

²⁸ (SCA No. 06/09)

²⁹ (CICA No. 15/2010).

³⁰ *Supra*

³¹ *Supra*

³² (Charge #06571/13)

³³ (Charge#06568/13)

³⁴ (Charge #06480/13)

³⁵ *Supra*

³⁶ Unreported. Inds. 35-37/19



1 60. The cases considered thus far do show that the category range for the importation of
2 ganja, in cases with similar quantities as in this case; involving similar offenders with
3 no previous convictions and following guilty pleas, entered at an early stage of the
4 proceedings, is between 30 months' (2 years 6 months') to 45 months' (3 years 9
5 months') imprisonment.

6 61. I find that a sentence of 48 months (4 years') imprisonment) is an appropriate starting
7 point for a first-time offence of importation of the quantity of ganja in this case. The
8 intention on the part of the perpetrators would have been the same as that required to
9 import ganja into the Cayman Islands. I would accept that the sentences imposed for
10 the importation of ganja could be treated as a useful guide in determining the starting
11 point to be used for this offence.

12 62. This offence of Illicit Trafficking is treated by the legislature as being different from
13 the importation of ganja, as evidenced by the elements which constitute the offence
14 and the penalties prescribed for it. I conclude that there is a justifiable basis for
15 utilising a lower starting point for this offence than that used in the cases of
16 importation of ganja. The discount from the usual starting point in importation cases is
17 allowed in recognition of the fact that the boat had not yet reached within the territorial
18 waters of the Cayman Islands at the point of discovery.

19 63. Having had regard to the quantity of ganja involved, which was not insignificant, and
20 the role played by the defendants, as crewmen, in conveying the drug across the high
21 seas, I believe that a starting point of 42 months' (3 years 6 months') imprisonment is
22 appropriate. This starting point is arrived at by reference to the nature and seriousness
23 of the offence, which involves the quantity of the drug, the culpability of the



1 defendants and the harm of their offending. There is nothing from the prosecution to
2 establish that any of the defendants was the mastermind.

3 *Legitimate expectation*

4 64. Mr. Wheeler had urged the court to impose a sentence that would have been imposed
5 by the Summary Court had the defendants been sentenced there, in keeping with the
6 pleas of guilty they entered in that court, shortly after being arrested and charged. He
7 relied on the principle of legitimate expectation and the *dicta* of Lord Bingham CJ in *R*
8 *v Nottingham Magistrates' Court, ex. p. Davidson*³⁷. In that case, the Applicant
9 appeared before a Magistrates' court and indicated an intention to plead guilty to the
10 offences for which he was charged. After hearing submissions of the prosecution and
11 the defence, the Magistrates concluded that their powers were sufficient for the matter
12 to be dealt with in that court. The Magistrates adjourned the matter for a pre-sentencing
13 report, and the Applicant subsequently appeared before a Stipendiary Magistrate. The
14 Stipendiary Magistrate decided that his powers of punishment were not sufficient and
15 committed the Applicant to the Crown Court for sentence. The Applicant made an
16 application to quash the decision of the Stipendiary Magistrate to commit him to the
17 Crown Court for sentence and for the matter to be remitted to the Magistrates' court to
18 be heard by a differently constituted bench.

19 65. The Applicant argued that the Stipendiary Magistrate had no power to commit him for
20 sentence following the indication given by the Magistrates on his earlier appearance in
21 court that he would not be committed for sentence. The Applicant succeeded in his
22 contention. The court quashed the order committing him to the Crown Court for
23 sentence.

³⁷ [2000] 1 Cr App R (S) 167

1 66. Lord Bingham CJ held at page 169 of the report:

2 *"The principle which governs legitimate expectations of this kind is not in*
3 *doubt...it can in my judgment be summarised in the following way. If a court at a*
4 *preliminary stage of the sentencing process gives to a defendant any indication as*
5 *to the sentence which will or will not be thereafter passed upon him, in terms*
6 *sufficiently unqualified to found a legitimate expectation in the mind of the*
7 *defendant that any court which later passes sentence upon him will act in*
8 *accordance with the indication given, and if on a later occasion a court, without*
9 *reasons which justify departure from the earlier indication, and whether or not it*
10 *is aware of that indication, passes a sentence inconsistent with, and more severe*
11 *than, the sentence indicated, the court will ordinarily feel obliged, however*
12 *reluctantly, to adjust the sentence passed so as to bring it into line with that*
13 *indicated. The question which arises on this application is whether the factual*
14 *basis for applying that principle is made out."*

15

16 67. The Lord Chief Justice concluded that there was a factual basis in the case for the
17 application of the principle of legitimate expectation.

18 68. Mr. Wheeler submitted that based on the proceedings in the Summary Court, which led
19 to the defendants' guilty pleas and preparation for sentence in that court, they would
20 have had a legitimate expectation to receive a sentence within the jurisdiction of the
21 Summary Court and not the Grand Court.

22 69. The circumstances of this case are distinguishable from those that obtained in *R v.*
23 *Nottingham Magistrates Court*³⁸ and the principle of legitimate expectation, as
24 described by Lord Bingham CJ, is not applicable. The Magistrate, in this case, had no
25 authority to take the pleas in the circumstances she did, without the prosecution or
26 defence having been put to their election as to the mode of trial. It is firmly established
27 on indisputable authority that where a plea is taken in the Summary Court in cases,
28 which are triable either way, without an election first having been made as to the mode

³⁸ [2000] 1 Cr App R (S) 167

1 of trial, the plea, is a nullity and the proceedings would be invalidated. See *R v De*
2 *Acosta*³⁹.

3 70. The prosecution having exercised their election to have a Grand Court trial, upon the
4 pleas having been declared a nullity, the defendants could not properly have had a
5 legitimate expectation to be given a sentence in the Grand Court that does not exceed
6 the maximum sentence that could have been imposed by the Summary Court. The case
7 falls outside the circumstances contemplated in *R v Nottingham Magistrates Court*⁴⁰.

8 71. Accordingly, there is no basis to reduce the sentence from the starting point to make
9 allowance for the operation of the principle of legitimate expectation and to fit the
10 sentence within the jurisdiction of the Summary Court.

11 **B. Aggravating factors (common to all defendants)**

12 72. Having been guided by the list of potential aggravating factors in the *Cayman Islands*
13 *Sentencing Guidelines* as taken from section 4(c) of the *Alternative Sentencing Law*,
14 I have identified the following as aggravating features that would result in an upward
15 adjustment from the starting point in relation to each defendant:

16 i. Prevalence (the offence falls within a class of kindred offences, which are
17 prevalent)

18 ii. Planning of the offence

19 iii. An attempt to conceal/ dispose of evidence

³⁹ *Supra*

⁴⁰ *Supra*



1 73. These aggravating features that are common to all defendants have served to cause an
2 upward adjustment from the starting point to 51 months' (4 years 3 months')
3 imprisonment.

4 **C. Mitigating factors**

5 *i. Delay*

6 74. Mr. Wheeler submitted that the court should make an allowance by way of a discount
7 in the sentence based on the unfair treatment of the defendants. He cited the delay on
8 the part of the prosecution in settling the charge for which the defendants ought to have
9 been tried and the procedural error in the Summary Court that resulted in the
10 defendants' earlier plea of guilty being invalidated. He also pointed out that these
11 procedural blunders led to the committal of the defendants to this court to be sentenced
12 almost one year after their initial guilty pleas. Mr. Wheeler contended that due to no
13 fault of the defendants who have pleaded guilty from as far back as October 2018, the
14 long delay in sentencing them had operated unfairly on them and their families, who
15 have not known their fate. This unfairness, he said, calls for a reduction in sentence.

16 75. Crown Counsel Mr. Ferguson accepted that the defendants are entitled to an
17 appropriate discount for their guilty pleas. He conceded that due to the matters that
18 have been dealt with in the courts, and the time which it took to have the procedural
19 issues resolved, each defendant is entitled to a full discount for his guilty plea. He also
20 noted that they had entered guilty pleas from the 17th October 2018, which were,
21 ultimately, declared to be invalid due to no fault of their own.



1 76. Mr. Wheeler countered that the reduction in sentence on account of the guilty plea is
2 not enough because that reduction would make no allowance for the fact that the
3 defendants would have been almost a year in serving their sentences. He argued that
4 given the delay in resolving the issues concerning the correct charge and the election,
5 the defendants would be starting their sentences a year later.

6 77. Although I would not label what has occurred as unfair treatment of the defendants, it
7 is clear that they have been prejudiced on account of the undue delay in the settling of
8 the charge to be laid against them and the making of the election as to the mode of
9 trial. They were adversely affected by the procedural error in the Summary Court,
10 which was not at all intentional, but which resulted in a delay in the disposal of the
11 case.

12 78. *The Cayman Islands Sentencing Guidelines* do not expressly recognise delay between
13 the commission of the offence and disposal of it as a relevant mitigating factor. The
14 UK Sentencing Guidelines, however, explicitly do so. Those guidelines, in treating
15 with the offences of wounding and grievous bodily harm, for instance, do identify
16 delay due to no fault of the defendant as a relevant factor going towards mitigation of
17 sentence.

18 79. It is clear, however, that in this case any unfair operation of delay is partially mitigated
19 by the fact that the defendants are entitled to be credited for time spent in custody. I do
20 not accept, however, that credit for the guilty pleas is to make up for the delay in
21 disposal of the matter as posited by Mr. Ferguson. Different considerations drive the
22 allowance to be made for a guilty plea, and delay in the disposition of the case is not
23 one of them.



1 80. It is accepted that the defendants had been in custody awaiting sentence for about 8
2 months following their admissions of guilt at the earliest opportunity that presented
3 itself. They would have started their sentences almost a year ago had the procedural
4 issues not occurred. A discount in the sentence would give recognition to the fact that
5 they were deprived of the opportunity to begin their sentences at an earlier time
6 following their early guilty pleas. Having taken into account that the defendants will be
7 credited for time spent in custody, I believe that it is reasonable to give a further
8 discount to each defendant on account of the delay that resulted from the procedural
9 error and the failure of the prosecution to settle the correct charge against them within
10 a reasonable time. They were entitled to be sentenced within a reasonable time of
11 indicating an intention to plead guilty.

12 81. I would accord a 3-month reduction in sentence to each defendant for the delay in the
13 proceedings, which was due to no fault of their own. This would move the starting
14 point downwards to 48 months (4 years).

15 *ii. Remorse*

16 82. Mr. Wheeler has cited remorse as a factor to be considered in mitigation of sentence.
17 The defendants have not backed their expression of remorse by any genuine evidence
18 of it. There was no cooperation with the investigations as they remained mute on
19 interview and so they have done nothing to assist law enforcement. This verbalised
20 expression of remorse is not backed by any hard evidence and, therefore, does not
21 attract any significant weight in mitigation for sentencing. Some authorities are of the
22 view that inherent in a plea of guilty is an expression of contrition or remorse. This
23 view, however, is not always the case, especially in cases where persons have been

1 caught red-handed and have no likely chance of an acquittal, as in the circumstances of
2 this case.

3 83. The weight to be attached to remorse, however, has been examined, more specifically,
4 in treating with the sentence to be imposed on each defendant, having regard to his
5 personal circumstances and his reported attitude to the offence.

6 *iii. Economic circumstances*

7 84. The commission of these types of offences is, invariably, driven by economic
8 considerations, whether for need and/or greed. Poverty, however, cannot be an excuse
9 for criminal activities and so the financial circumstances of each defendant will not be
10 treated as a factor going to mitigation. To treat it as a mitigating factor would have the
11 effect of encouraging persons who are poor to break the law on account of economic
12 circumstances and, particularly, so within the context of an offence in which the drive
13 and objective to realise some financial gains are inherent in its commission.

14 85. While I will not mitigate the sentence on account of need, I will not view the
15 defendant's involvement in the commission of the offence as resulting from greed and,
16 therefore, as a factor to be used to aggravate the sentence. Poor economic
17 circumstances are, therefore, not used to affect the sentence in any way.

18 *iv. Responsibilities for families in Jamaica and the impact of pre-sentencing*
19 *detention*

20
21 86. This type of offence does not readily admit to mitigation on account of family
22 considerations. The possibility of incarceration should have been paramount in the
23 minds of these defendants, when they undertook this illicit enterprise, beyond the
24 shores of their homeland, to infringe the laws of a foreign State. They would have

1 known that they were committing a criminal offence, not only against the laws of their
2 own country but that of the foreign State. I see no need to generally reduce the
3 sentences on account of the impact of the offending on the defendants' responsibilities
4 for families in Jamaica. Except in the case where a defendant is proved to have been
5 the sole caregiver for minor children, no recognition is usually given to family
6 responsibilities as a mitigating factor.

7 *v. The absence of previous convictions*

8 87. It is accepted that relevant previous convictions can be taken as aggravating factors in
9 causing an upward adjustment to the starting point. In contrast, the absence of any
10 previous, relevant or recent conviction is a basis for mitigation in sentencing. Two of
11 the defendants have previous convictions, and two do not. For this reason, the
12 consideration to be given to the absence of previous convictions, as a mitigating factor,
13 has been considered during dealing individually with each defendant.

14 **D. Reduction for guilty pleas**

15 88. Although it is quite evident that these defendants were caught red-handed and have no
16 viable defence in law, therefore leading to an overwhelming case against them, I will
17 not take away the full credit to be accorded to them for pleading guilty. This is part of
18 the recognition given to the fact that they had pleaded guilty at an early stage of the
19 proceedings but were prevented from being sentenced due to the procedural issues.
20 This, along with the 3-month allowance already given for the delay, should be
21 sufficient to remedy any unfairness or prejudice resulting from the procedural error in
22 the Summary Court.



1 89. Each defendant is entitled to a one-third (1/3) discount on account of the guilty plea,
2 which will be reflected in the sentence finally handed down in respect of each of them.

3 **The Sentences Imposed**

4 90. I will now turn to the consideration of the appropriate sentence in respect of each
5 defendant because although their culpability is treated as being identical or
6 indistinguishable, their personal circumstances are different. A Social Inquiry Report
7 (“SIR”) was obtained by the court concerning each defendant. These SIRs, which now
8 form a part of the record of the court, have been considered.



9 **Andre Junior Russell**

10 91. Defendant Andre Russell is 34 years old. He has no children but, reportedly, has
11 assumed the role of financial provider for his parents and younger siblings. He claimed
12 to have been carrying the financial burden of his family from a tender age due to
13 illness of his parents.

14 92. He has no previous convictions and is assessed as having a low risk of re-offending.
15 He is described as a productive member of society who does not have any anti-social
16 pattern in his development. He expressed remorse and disappointment at himself. He
17 also indicated that he would change his friends who, he claims, have influenced him to
18 do negative things.

19 93. I have used the sentence of 4 years as the reference point to arrive at the appropriate
20 sentence, there is no critical aggravating factor in his circumstances. Having had
21 regard to his relatively favourable antecedent report and low assessed risk of re-
22 offending, I believe that he deserves a sentence that is lower than his co-defendants’.

1 94. I have arrived at a provisional sentence of 36 months' (3 years') imprisonment.

2 95. He is entitled to a one-third 1/3 reduction in this sentence on account of his guilty
3 plea.

4 96. The sentence to be imposed on Defendant Andre Russell is 24 months' (2 years')
5 imprisonment.

6 97. He is to be credited for time spent in custody.

7 **Basil Anthony Smith**

8 98. Defendant Basil Smith is 45 years old, which makes him the oldest of the group. He
9 has 10 children, 4 of whom are minors. He, reportedly, is the sole provider for 7 of
10 them. According to him, he is unable to feed his family due to inadequate and unstable
11 employment.

12 99. He has one previous conviction in the Cayman Islands for illegal landing in 2010, for
13 which he was sentenced to 3 months' imprisonment. Illegal landing is, somewhat,
14 similar to the offence for which he is herein charged, being the expression of an
15 intention to enter the Cayman Islands illegally. It is a conviction, which, even, if not
16 such as to aggravate the sentence, is one that puts him in the position that he cannot be
17 treated as having any previous conviction to mitigate his sentence. He has breached
18 the immigration laws of the Cayman Islands and so cannot be treated as a defendant of
19 good character. It will, however, not be viewed as a recent conviction, it being almost a
20 decade ago. It will not move the sentence from the starting point.



1 100. Using the sentence of 4 years as the point of reference in treating with his sentence
2 (having balanced the common aggravating factors with the credit allowed for the
3 delay), I have taken into account the responsibility for his dependent minor children
4 and his overall circumstances as a mature man.

5 101. I have arrived at a provisional sentence of 42 months' (3 years 6 months')
6 imprisonment. He is entitled to a one-third (1/3) discount on account of his guilty plea.

7 102. This puts the sentence to be imposed on him at 28 months' (2 years 4 months')
8 imprisonment.

9 103. He is to be credited with the time spent in custody.

10 **Kendal Jerome Straumann**

11 104. Defendant Kendal Straumann is 31 years old. He indicated the difficulties in finding
12 employment in Jamaica and that his employment had been, primarily, short-term
13 projects. He has had frequent changes in jobs. His most prolonged period of
14 employment has only been two weeks. He has the financial responsibilities for his
15 small family, which includes one child of 5 years old, who has a stomach condition
16 that requires surgery.

17 105. His reason for involvement in the offence is financial; he was in it for the money. He
18 expressed remorse and stated that he has let down his family and feels ashamed of
19 what he has done. Like the others, there is no hard evidence of this remorse, but I will
20 attach some weight to his apparent contrition, even if relatively slight.

21 106. This Defendant is reported as having no previous convictions, which is a significant
22 mitigating factor in his case. He is assessed as being at a medium risk of re-offending.



1 107. Having taken into account the adjustment from the starting point, after the common
2 aggravating factors are weighed against the reduction of the 3 months credited for the
3 delay, I will now apply a further discount in the sentence on account of his favourable
4 antecedent report. These favourable circumstances include the absence of previous
5 convictions, his contrition, his responsibility for a minor child, and his efforts at
6 making use of educational opportunities, while in pre-sentence incarceration.

7 108. I form the view that a provisional sentence of 40 months (3 years 4 months')
8 imprisonment would be appropriate.

9 109. He is to be given full credit for the guilty plea, which reduces this sentence by one-
10 third (1/3).

11 110. His sentence shall be 26 months' (2 years', 2 months') imprisonment.

12 111. He is to be credited for time spent in custody.

13 **Martin Antonio Trench**

14 112. Defendant Martin Trench is 32 years old. He has had previous encounters with the
15 criminal justice system of the Cayman Islands. He was deported. He has six previous
16 convictions recorded against him, including convictions for possession and
17 consumption of ganja, as well as immigration offences. It is also shown that in the
18 past, he had committed other offences while on a suspended sentence. He has been
19 assessed at a high risk of re-offending, which adversely sets him apart from the other
20 defendants.



1 113. There are a few factors that could increase the probability of recidivism, including his
2 non-compliance with previous court orders. He explains his involvement in the
3 commission of the offence as a consequence of his indebtedness and unfortunate
4 economic circumstances in Jamaica.

5 114. Having applied the common aggravating factors, which cause an upward adjustment to
6 the starting point and the 3 months credited on account of the delay, I will commence
7 his sentence by starting at the sentence of 48 months (4 years) imprisonment.

8 115. This Defendant's previous convictions are not treated as relevant or recent to aggravate
9 the sentence. His history of non-compliance with previous sentences, however, cannot
10 be ignored within the context of the high risk of re-offending or high probability of
11 recidivism – an evaluation recorded in the SIR. Failure to comply with previous
12 sentences is an aggravating factor that the court ought to take into account.

13 116. He has, however, expressed some remorse, albeit not backed by any hard evidence of
14 genuineness on his part, such as cooperation with the authorities, to warrant any
15 marked adjustment to the starting point. I, nevertheless, take his expression of regret
16 into account and the fact that he is exhibiting positive signs while on remand, such as
17 pursuing educational opportunities. The reason proffered of financial difficulty, which
18 led to the commission of the offence, is not accepted as a mitigating factor.

19 117. When the aggravating and mitigating factors are balanced and having had due regard to
20 his background, a provisional sentence of 48 months (4 years) seems proportionate.

21 118. The Defendant is entitled to a 1/3 reduction for the guilty plea.

22 119. This leads to a sentence of 32 months' (2 years 8 months') imprisonment.



1 120. He is to be credited with time spent in custody.

2 **Disposal**

3 121. In summary, the sentences imposed on the defendants are as follows:

4 i. **Andre Junior Russell:** 24 months' (2 years') imprisonment;

5 ii. **Basil Anthony Smith:** 28 months' (2 years 4 months') imprisonment;

6 iii. **Kendal Jerome Straumann:** 26 months' (2 years 2 months') imprisonment;

7 iv. **Martin Anthony Trench:** 32 months' (2 years 8 months') imprisonment.

8 122. They are all to be credited with time spent in custody to date.

9 123. It is recommended that the defendants be deported at the end of serving their sentences.

10 **Application for forfeiture of the vessel**

11 124. The prosecution has applied, pursuant to s.25(2) of the *Misuse of Drugs Law*, for the
12 vessel on which the defendants were found with the controlled drug to be forfeited to
13 the Crown. There was no objection to this application from the defendants.

14 125. It is ordered that the vessel used by the defendants in the commission of this offence be
15 forfeited to the Crown.

16 **Dated this the 10th September 2019**

17 
18 **McDonald-Bishop J**
19 **Acting Judge of the Grand Court**

