

IN THE GRAND COURT OF THE CAYMAN ISLANDS

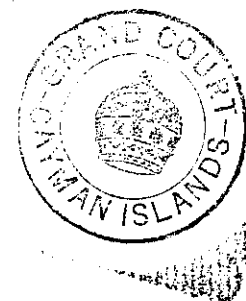
SCA-0043/OF 2010

BETWEEN

XAVIER QUINCY WALDRON

AND

THE QUEEN



APPELLANT

RESPONDENT

IN OPEN COURT

THE 5TH DAY OF AUGUST, 2011

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Lucy Organ of Samson & McGrath for the Appellant
Tricia Hutchinson, Crown Counsel, for the Crown

RULING

1. On 17th November 2010 the Hon. Chief Magistrate, following a trial, convicted the Appellant of the offence of possession of cocaine with intent to supply. She sentenced him to 12 years imprisonment.
2. This is his appeal against conviction and sentence. The three grounds of appeal against conviction are:
 - (i) The submission of no case to answer made at the close of the Crown's case should have been upheld in respect of the offence of possession with intent to supply for want of evidence on the Crown's case of intent to supply. The taking of judicial notice by the Chief Magistrate of the amount of drug as consistent with possession with intent to supply was impermissible in the circumstances and, occurring after the event of the submission of no case to answer, could not redeem the Crown's case.

- (ii) Evidence of the Appellant's bad character was wrongly admitted by way of cross-examination of the Appellant over the objection of defence counsel.
- (iii) The record of the interview conducted by the Police of the Appellant was wrongly admitted by way of cross-examination of the Appellant despite the Crown's refusal to admit it as part of its case.

(i) The case for the Crown

3. The evidence given on the Crown's case was that on Friday 20th November 2008, at about 8:30 pm, Inspector Harford of the Royal Cayman Islands Police Service went into the male rest room at the Globe Bar, Maples Road, George Town. There he saw two men inside the restroom; Shankino Ebanks and the Appellant. The Appellant was standing smoking a cigarette and drinking a beer. Insp. Harford asked the two men what they were doing and requested a search of their persons, invoking the powers of search under the Misuse of Drugs Law.
4. The Appellant was searched and Insp. Harford recovered two packets from his left front pants pocket; one containing a cream coloured rocklike substance and the other a white powder resembling cocaine.
5. The Appellant was arrested and the items later, at the police station, packaged and marked as exhibits.
6. At the trial, Insp. Harford gave evidence that the items recovered were sent for analysis and the results were positive for cocaine in the two packages, weighing 5.40 grams and 6.32 grams respectively.
7. The certificate of analysis produced pursuant to the Misuse of Drugs Law by the analyst in fact states that both packages contained a cocaine base (a preparation of cocaine) of the

respective weights mentioned. The packages therefore contained a "hard drug" within the meaning of and prohibited by the Misuse of Drugs Law.

8. That, apart from the purely formal evidence of PC Mendez as to the charging of the Appellant with the offence, was the extent of the evidence given on the Crown's case.
9. The Appellant, although interviewed under caution by Inspector Hartford and a written record made, the Crown chose not to introduce the interview as part of its case. The view taken by Crown Counsel was that the interview was entirely self-serving.
10. At the close of the Crown's case, Ms. Organ made her submission of no case to answer, Ms. Hutchinson replied for the Crown and the Chief Magistrate ruled that there was a case for the Appellant to answer.
11. The transcript of the proceedings record the arguments in terms that anticipate the way they have been deployed before me now and so it is convenient that I quote from the transcript:

"Defence: The Crown relies on two statements. They base their case entirely on quantity which in this case is one-half an ounce. There is no evidence of any paraphernalia being found, no cash, no evidence of a lifestyle suggesting drug dealing, no evidence of how these drugs are normally sold. Their entire case is based on that quantum of under half ounce of a cocaine base. We submit that no jury could find an intention to supply and that the Crown has failed to establish a *prima facie* case.

“Crown: There were two separate packages. We say the amount is significant and consistent with his being in possession with intent to supply. There is nothing from the accused to suggest that he was even a social user. In the circumstances, we say an inference can be drawn that he possessed the cocaine with intent to supply.

Defence: The Crown has not adduced his interview so the Court does not know what he would say and there is nothing to say that he is not a user as he failed to provide a specimen.

Ruling: Case to Answer.”

12. While there were no reasons expressed for the ruling of a case to answer, it appears from the Chief Magistrate’s reasons ultimately given upon the decision to convict, that she regarded the quantity of the drug by itself as providing a sufficient evidential basis for calling upon the Appellant to answer the Crown’s case for the offence of possession with intent to supply.
13. The reasons for her ultimate decision are conveniently set out now as taken from the Court record:

“REASONS FOR DECISION

The Appellant admits possession of just under a half-ounce of crack cocaine (cocaine base).

He denies however being in possession of the cocaine with intent to supply.

He gave evidence on oath in which he said that he purchased cocaine with his wages for his own use and in-chief described his use as occasional, limited to the weekends but then again, not every weekend either. He explained that he bought the drug in that quantity as it was cheaper to buy.

On the day in question, he said he had been on the road with a friend and asked that friend for a lift to Funky Tangs. He proceeded from there to the Globe Bar where he had a drink.

He went to the bathroom, was searched and the drugs found.

His evidence was tested in cross-examination and his narrative quickly unraveled with numerous inconsistencies arising with respect to the money he had that day and how he had spent it, what he had done when he got to the Globe Bar and his account of how and when he used cocaine.

When it was suggested to him that he wasn't speaking the truth, he responded "I am just confused."

The inconsistencies in his evidence, particularly with respect to his use of cocaine which he advances to explain his possession, undermines his credibility.

The Crown sought and was granted leave to cross-examine him on previous inconsistent statements made in interview. In the course of the cross-examination, he agreed that he had told the police that the drugs

they found him with belonged to Shankino Ebanks and that he had lied when he told them so.

He explained that he had lied because while he was in the bathroom, Shankino had been pestering him to supply him with drugs. He then observed Shankino talking on the phone and shortly after that the police arrived. In the circumstances, he had formed the view that Shankino had set him up, so he told the police that the drugs belonged to Shankino. He admits lying to deflect blame to a third party. I am mindful of the direction in Lucas of the need to remind myself of the varied reasons Appellants may have for telling a lie but the lie does not in any event support the Crown's case that he was in possession of the cocaine with intent to supply. Rather, the lie further undermines his credibility and shows him to be a man who would lie for convenience, to get out of trouble or to retaliate.

There is no other evidence to support his claim of cocaine use: no evidence of previous convictions for cocaine use and possession and no evidence of use following this arrest as he refused to supply a specimen of urine.

In any event, the use he claims is so infrequent and casual as to make a nonsense of his reasons for being in possession of such a large amount of crack cocaine.

The quantity of cocaine is, by itself, inconsistent with possession for personal use. I reject his assertion that he had it for his own use and convict him of the offence in the result.

Dated this 17th day of November 2010

Chief Magistrate.”

14. Having regard to the first ground of appeal, the first question that arises is whether the test of a prima facie case was met; that is whether there was sufficient evidence upon which to justify calling upon the Appellant to answer the charge of possession with intent to supply.
15. The test is classically stated in *R v Galbraith* 1 WLR 1039, 1042 (as often followed and applied in this jurisdiction) in this way:

“(a) *Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

(b) *Where, however, the prosecution evidence is such that its strength or weakness depends on the other matters which are generally speaking, within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the Appellant is guilty. then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.*

There will, of course as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge” (emphases supplied).

16. The application of this test can be challenging in proceedings where, as here, the tribunal of fact is both judge and jury. It gives rise to this question: Does the decision to call

upon a defendant necessarily imply that a conviction must follow if he fails to answer or fails to displace the weight of the Crown's evidence presented against him? The question is relevant here in examining the nature and effect of the Chief Magistrate's decision in calling upon the Appellant to answer.

17. In this regard section 70 of the Criminal Procedure Code (2010 Revision) is meant to provide guidance to the Summary Court where it provides:

"If at the close of the case for the prosecution the court considers that, subject to any fresh matter which might be revealed in the conduct of the defence, the prosecution has established a prima facie case, the Court shall, if no defence is offered, convict the accused, but, if the Court considers that a prima facie case on the evidence presented has not been established and the accused offers no defence, or submits that there is no case to answer, the court shall acquit the accused."

18. This provision has proven not to be free of difficulty in practice. There is, however, some judicial guidance available. In T. Webster v R 2009 CILR Note 20, Henderson J had this to say about the provision:

"..., despite the mandatory wording of section 70 of the Criminal Procedure Code, there is no automatic rule that a conviction must be the result when the Crown had adduced a prima facie case to which the accused had presented no evidence. It is possible, though unlikely, that the Crown's prima facie case would not be sufficient to convince the magistrate of the accused's guilt."

19. This explanation gives practical meaning to what is in effect, the provisional nature of a prima facie case.
20. In circumstances such as these presented here, the expression in section 70 – “*subject to any fresh matter which might be revealed in the conduct of the defence*” – also requires emphasis.
21. The expression is a further indication of the provisional nature of the finding of a prima facie case to answer, leaving room for the possible exculpatory effect that the evidence offered by a defendant might have. It recognises that in some circumstances, the finding of a prima facie case displaces onto a defendant, not the legal or persuasive, but the evidential burden of proof to answer the prima facie showing of guilt that has appeared from the evidence of the prosecution.
22. When such a case emerges it will come “within the province of the jury” because “on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty”. See Galbraith (above).
23. Thus, the case becomes one that should be allowed to be tried to completion by calling upon the defendant.
24. A magistrate sitting at once as judge of the law and arbiter of the facts, is experienced in carrying out the intellectual exercise of arriving at only the provisional view of a case that inheres in a finding of a *prima facie* case to answer, while reserving until after the conclusion of the defence (if one is offered), the ultimate decision on acquittal or conviction – the kind of intellectual exercise contemplated by section 70 of the Criminal Procedure Code.
25. That is the nature of the decision being appealed against here.

26. There was no dispute about the drugs being found in the possession of the Appellant, nor about its quantity.
27. The Chief Magistrate was entitled at the close of the Crown's case, to take the view that the quantity by itself required of explanation from the Appellant as to his intentions. Taken by itself, at nearly half an ounce of cocaine base, the quantity justified an inference, albeit a rebuttable inference on the prima facie basis, of an intention to supply.
28. The Appellant, having been called upon in those circumstances, did nothing to displace the inference of an intention to supply. In the view of the Chief Magistrate, reasonably formed having regard to all the evidence, the Appellant's credibility had been undermined by two things in particular: his ability to "lie for convenience" about the very reason why he was in possession of the drugs and the obvious prevarications over the extent and frequency of his own use of drugs.
29. Assessing the case as a whole, having regard to all the evidence in the case, the Chief Magistrate concluded as shown above that:

"The quantity of the cocaine, is by itself, inconsistent with possession for personal use. I reject (the Appellant's) assertion that he had it for his own use and convict him of the offence in the result."

30. The criticism (as part of the first ground of appeal) that judicial notice was impermissibly taken of the amount of drugs as consistent with possession with intention to supply is, in my view, in the circumstances of this case, misplaced.
31. I have sought to explain above why the decision of the Chief Magistrate is to be viewed as having been arrived at as a matter of inference, rather than as a matter of taking

judicial notice of concluded facts. But in the event I am wrong about that, I should consider the latter proposition and I now turn to do so.

32. While, having regard to her long experience of such cases the Chief Magistrate was able to form the prima facie view that possession of the particular quantity of drugs was inconsistent with personal use, she made no absolute finding that the amount of the drug, in and of itself, was conclusive of the issue of the intention to supply.
33. That issue was concluded by the absence of a credible explanation by the Appellant of personal use, for a relatively large quantity of drugs.
34. There was therefore no arbitrary finding that the particular quantity of drugs was indicative only of an intention to supply, such as to invite the criticism that the Chief Magistrate relied on her own knowledge by way of taking judicial notice, as the sole basis for conviction.
35. In my view, the limited extent to which she relied upon her own knowledge of the relationship between relative quantities of illicit drugs and their general use and consumption, was permissible for the purpose of calling upon the Appellant to answer. The inference that she drew – that the quantity was prima facie inconsistent with personal consumption – must surely come within the bounds of what an experienced judicial officer in this jurisdiction would be able reasonably to infer from knowledge gained over the years from very many cases involving the dealing in, use and possession of illicit drugs.
36. The following passages from *Phipson in Evidence* 15th Ed. Chp 2-07 – 09 II usefully sets the parameters for the application of the doctrine of judicial notice in the circumstances of this case:

”2.07 *Judicial notice covers the provisions of the Law, which is not a matter of evidence at all, and the acceptance of facts without admission or proof....The doctrine of judicial notice...applies not only to judges, but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience (R v Jones (1970) 54 Cr. App. R. 63, 68. The matters noticeable may include facts which are in issue or relevant to the issue, as well as the contents of documents and their methods of proof; and the notice is in some cases conclusive, and in others (eg. the genuineness of signatures) merely prima facie and rebuttable [(although the existence of this category has been doubted in academic discourse: Nokes, “The Limits of Judicial Notice (1958) 74 LQR 59, 70-75)]. Something which is the subject of judicial notice in one case need not be so in a subsequent case if the basis of its reception was its notoriety and that notoriety has since passed [(Quaere for example whether – as in Hoare v Silverlock (1848) 116 E.R. 1004 – the meaning of the imputation “Frozen Snake” in a libel case would be applied today)].*

Judges or jury as witnesses

2.08 *Although, however, judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess (Peart v Bolckow & Co. [1925] K.B. 399 et al) they may not, as might*

juries formerly, act on their own private knowledge or belief regarding the facts of the particular case (R v Sutton 4 M & S. 532, Wetherall v Harrison [1976] Q.B. 773 et al).

However, there is another line of cases which shows that a judge may rely on his own local knowledge where he does so “properly and within reasonable limits” (Reynolds v Llanelli Tinplate Co. [1948] 1 All. E.R. 140). This judicial function appears to be acceptable where “the type of knowledge is of a quite general character and is not liable to be varied by specific characteristics of the individual case (ibid). This test appears to allow a judge to use what might be called “special (or local) general knowledge”, and its application presents inferior and appellate courts with a task of some nicety (Keane v Mount Vernon Colliery Ltd. [1933] A.C. 309” (emphasis supplied).

37. Here, the issue about the taking of judicial notice, may be framed in terms of whether the Chief Magistrate in arriving at her prima facie view of the significance of the amount of drugs, did nothing more than “use her general information and that knowledge of the common affairs of life which men of ordinary intelligence possess” (Bolckow & Co. (above) or relied on her “own local knowledge properly and within reasonable limits” (Reynolds v Llanelli Tinplate Co. (above)).
38. It must also be recognised that the kind of nicety to which the House of Lords alluded in Keane (above), is not entirely absent from this case because the taking of judicial notice – to the effect in general that the possession of a relatively large quantity of cocaine base is

inconsistent with personal use – is liable to be varied by the specific characteristics and circumstances of a defendant.

39. Had the Chief Magistrate relied upon her own local knowledge of drug cases as the sole basis for her final conclusion as to the intention of the Appellant to supply the drugs, she would have left no room for the proposition that proof of the Appellant's subjective state of mind was still at large after she had called upon him to answer. That subjective state of mind may be seen as the kind of "specific individual characteristics of the individual case" that could vary the general assumption of proof otherwise to be taken by reliance on judicial notice. Here though, the assumption taken was not "general" nor conclusive; in my view going no further than permitted for inferring on the prima facie basis that the quantity of the drugs was inconsistent with personal use, leaving it open to the Appellant to give an acceptable explanation of his own intentions to the contrary.
40. In other words, to the extent judicial notice was taken, it was of the prima facie unlikelihood of the quantity of drugs – 12 grams of cocaine base – being obtained for personal consumption only; the conclusion of intention to supply being reached only after an examination of all the evidence.
41. Ms. Organ submitted that the amount of a particular drug in someone's possession and whether that is consistent with personal use is not a fact of which the Chief Magistrate can in any circumstances properly take judicial notice.
42. While there is an apparent logic to this submission, as a general proposition there is bound to be a point at which it breaks down; and is that point to be at a quantity of half an ounce of the drugs in question; or an ounce; several ounces or several kilo quantities for that matter?

43. Quantity by itself, depending on its magnitude, can surely support a prima facie and even conclusive inference of an intention to supply. There can however, be no arbitrary determination of what a minimum quantity should be for those purposes and so it is required that examination must be taken of the surrounding circumstances: See Walton v R 1994-95 CILR Note 10.
44. That, in my view, was the nature of the examination undertaken by the Chief Magistrate in this case, having drawn the prima facie inference from the amount of the particular drug, that justified calling upon the Appellant to answer the case of possession with intention to supply.
45. Whether, in the particular circumstances of the case, the quantity of the drug met the minimum amount that may be required for the purposes of such an examination, must surely be an issue to be left to the determination of the tribunal of fact.
46. While my primary conclusion on this ground of appeal is that the Chief Magistrate proceeded upon the basis of a reasonable inference drawn at the prima facie stage, the taking of judicial notice that the quantum of drugs was inconsistent with personal use, would have been, in the circumstances of this case, within the permissible bounds of the doctrine.

(ii) Evidence of the Appellant's bad character

47. The complaint by the Appellant in this second ground of appeal – that evidence of his bad character was wrongly admitted by way of cross-examination – is not supported by the transcript of the proceedings at trial. An excerpt from the transcript sets the correct context in which the impugned evidence was elicited.

48. It begins towards the end of the Appellant's examination in chief by Ms. Organ and goes over into his cross-examination by Ms. Hutchinson:

"I bought less than a half ounce of cocaine. I had used some of the cocaine on the way to town, yes. I expected the half ounce to last...well, as I say, I use it on the weekends. Don't use it during the week.

I bought that amount because its cheaper to buy it in this form than to buy it in smaller amounts...I didn't intend to sell or give the drugs to anyone else.

On Monday 23rd I refused to provide a specimen of urine. I was using at the time and I didn't want anyone to find out."

49. Having thus asserted his possession of the drugs as being only for personal use, the Appellant was cross-examined and the transcript records the following (at page 4 of 19):

"The drugs was for my personal use. I have been using cocaine off and on for a while. The first time I used it was 1999. Then I stopped for a very long time and started using again in 2004. I have been arrested by the police for marijuana. In 2004."

Ms. Organ: "Objection. Cannot be questioned on his antecedents. Hasn't attacked Crown witness, nor given evidence of good character.

Crown: He has put his own character in evidence. Entitled to explore the issue.

Ruling: Reserved."

50. Later in the cross-examination (and further cross-examination with leave), the transcript shows the Appellant volunteering information by way of explaining the use of his money earned that week, including the purchase, according to him, of the drugs in question for his personal use. The narrative is in part recorded as follows (at pages 5 of 19 and 12 of 19):

“On 20th November 2009, I get paid that day. \$500. I paid \$250 for the drugs...spent \$250 on drugs and \$200 on rent. \$50 was left. I bought some marijuana – two \$10 portions of weed – and a \$3 beer. I bought a friend a beer as well...”

I smoke one of the \$10 portions and put one down. Left it outside because I didn’t want to carry it inside.

Weed stinks. The one that I smoke would smell strongly on me.”

I have a history with that, with marijuana. If you check my files... (stopped by Court).

51. That further evidence having been adduced, the ruling of the Chief Magistrate on Ms. Organ’s objection appears at page 15 of 19 (typed as 15 of 17 in error) in these terms:

“Ruling:

Crown entitled to explore defendant’s drug use since he put his use of drugs in issue.”

52. Miss Organ’s criticism of this ruling is that it contravenes section 18(d) of the Evidence Law which mandates that a person charged with an offence and called as a witness on his defence, shall not be asked, or required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that with which he is charged; or is of bad character. She argues that the exceptions to this rule, which are set out in the provisos to section 18(d), do not apply to redeem the ruling

- because the Appellant fell within none of those exceptions (proviso (d)(ii) in particular) in giving evidence on his own defence.
53. In particular that he did not fall within proviso (d) (ii) because he did not personally or by his advocate, ask questions of the witnesses for the prosecution to establish his own good character or give evidence of such good character.
54. On the basis of the authority in Malindi v The Queen [1967] A.C. 439, the shield afforded by section 18(d) against cross-examination is not lost simply because the defence asserts facts relevant to the issue which if believed, show the accused in a more favourable light than that in which the prosecution's allegations would cast him. In Ellis [1990] 2 KB 746, it was also held that a general examination of the circumstances surrounding the prosecution's allegations was not capable of putting good character in issue.
55. As shown from the excerpts above from the transcript, what happened in the course of the impugned cross-examination was not, however, about putting the character of the appellant in issue.
56. His previous illicit use of marijuana and previous convictions for that offence having been put in issue by the Appellant, it cannot be said that the questions that followed in his cross-examination by Ms. Hutchinson, aimed at testing the truthfulness of his own evidence in that regard, went beyond the bounds permitted by the law.
57. As the transcript also shows, he was timeously interrupted by the chief Magistrate, before any further evidence potentially prejudicial to his rights under section 178, could have been disclosed by him.
58. It follows that this ground of appeal also fails.

(ii) The record of the interview conducted by the Police

59. As already mentioned, the Crown did not adduce the Appellant's police interview as part of their case. However, when cross-examining the Appellant, Ms. Hutchinson for the Crown sought to cross-examine the Appellant on an assertion made in the interview to the effect that he was holding the cocaine in question for Shankino Ebanks, intending simply to give it back to him. This assertion in the interview plainly contradicted the Appellant's later evidence given on oath to the effect that the cocaine belonged to him and was intended for his personal use only.
60. Ms. Organ objected to that cross-examination on the basis that the Crown had been under an obligation to adduce the record of interview as part of its case and having failed to do so, should not have been allowed to adduce it at that late stage on the defence case and during the cross-examination of the Appellant, as the statement on interview was "untested".
61. This objection was overruled by the Chief Magistrate on the basis that in his evidence on oath before her, the Appellant sought to advance a different version of events from what he told the police.
62. I see no basis for disagreeing with the Chief Magistrate on this issue: The Crown, in exercising its right not to adopt a wholly self-serving and exculpatory statement by the Appellant as part of its case – (*R v Duncan (1981)* 73 Cr. App. R. 359; *R v Sharp [1988]* 1 WLR 7; and *R v Richards* 2001 CILR 496) – is not precluded from cross-examining him by reference to it where some aspect of it clearly contradicts the evidence he later seeks to put before the Court as part of his defence.

63. It is a defendant's evidence in Court that, in such circumstances, later imbues the previous inconsistent statement with a relevance it would not otherwise have had and makes it germane to the question of his credibility as a witness.
64. Here the Appellant does not complain that his purely exculpatory interview statement was wrongly excluded from admission in that it contains his immediate, truthful reaction when first accused of the crime (as to which see McCarthy (1980) 71 Cr. App. R. 142). Here, on the contrary, the contents of the interview were disavowed by the Appellant himself and the limited admission of the interview statement by reference to the previous inconsistency contained in it, is criticised simply on the basis that the Crown had not adduced it as part of its case. But that criticism misunderstands the real basis for the admission of the previous inconsistent statement contained in the interview.
65. The Chief Magistrate correctly directed herself where she held, as set out above, that *"the lie further undermines his credibility and shows him to be a man who would lie for convenience, to get out of trouble or to retaliate"*.
66. For all the foregoing reasons, the grounds of appeal fail and the appeal is dismissed.

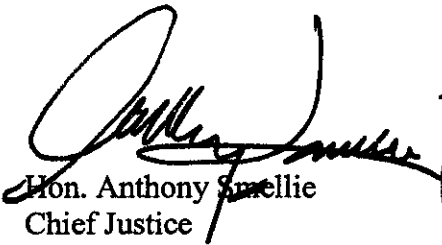
Appeal against Sentence

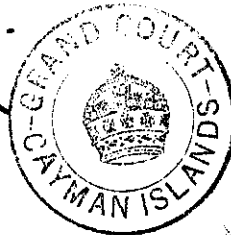
67. The sentence of 12 years imprisonment was imposed by the Chief Magistrate on the basis of her conclusions as follow:
- "The Chief Justice's sentencing guidelines indicate a sentence of 10-12 years for dealing in 4 grams or more of cocaine base. The defendant was found guilty after trial. Nothing mitigates the offence. The amount of crack cocaine involved is substantial."*
68. Ms. Organ criticizes the sentence on a number of bases.

69. First, the forensic analysis did not show the drug recovered from the Appellant to be “crack” cocaine. According to the laboratory report, both packets contained “cocaine base”. The impression that it was crack cocaine, the more addictive form, may well have influenced the severity of the sentence.
70. Second, the Chief Magistrate found that there were no mitigating circumstances in the Appellant’s case with regards to sentence. However, the evidence did not suggest that the Appellant had in fact as yet supplied drugs to anyone or had made any financial profit. In addition, on the evidence, it is submitted that the Appellant could not be described as anything other than a “low level retailer”: a factor that would advise a lesser sentence for a trafficking offence: *R v Djahit* [1999] 2 Cr. App. R. S. 142.
71. Third, while the Appellant does have a criminal record, he has no previous convictions for possession with intent to supply cocaine or indeed, any other “hard” drug. His previous convictions all relate to ganja. And he had but one previous conviction for possession with intent to supply ganja which dated back to June 2001 (for which he received a suspended sentence).
72. Fourth, the Chief Magistrate was incorrect to choose the highest tariff in the range of 10-12 years as provided for in the Sentencing Guidelines. The Appellant’s offending was not of the very worst kind of offending of its type and so the sentence was manifestly harsh and excessive in the circumstances.
73. Cumulatively, I accept that Ms. Organ’s submissions on sentencing carry some force.
74. Here, the Chief Magistrate was guided by a literal construction of the Sentencing Guidelines where it reads:

"For offences involving 2 ounces or more or 4 grams or more of cocaine base without mitigating features the tariff will be 10 to 12 years."

75. She was especially concerned by the quantity – at some 12 grams being three times as much as the amount of cocaine base identified by the Guideline tariff. She remarked that it was “crack” cocaine suggesting the most addictive form, but without there being evidence specifically to that effect.
76. Without the unduly heightened concerns specifically in mind, she may well have taken a less severe approach than imposing a sentence which was at the very upper end of the tariff.
77. Given the circumstances which do suggest that the Appellant is not a seasoned dealer but instead at worse, a “low level retailer” (*R v Djahit* (above)), I consider that the sentence can properly be reduced to one of eight years imprisonment. I so order.


Hon. Anthony Smellie
Chief Justice



October 3 2011