

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCRAP 2007/002

[1] TYRONE KADAN
[2] JNO BAPTISTE STOUTE

Appellants

and

THE STATE

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins
The Hon. Mde. Janice George-Creque
The Hon. Mr. Michael Gordon

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Dawn Yearwood Stewart for the Appellants
Mr. Gene Pestaina (Director of Public Prosecutions) for the Respondent

2009: September 16;
2010: May 17.

Criminal Appeal – Aggravated Burglary – Appeal against Conviction – whether unsafe or unsatisfactory – Pre-trial publicity – Bias – whether the judge should have recused himself from hearing the matter - Refusal of joinder of offences – Whether edited interview notes tendered into evidence prejudiced the appellants – Appeal against sentence – whether sentence too severe –

The appellants were charged jointly with the offence of aggravated burglary and were both convicted and sentenced to ten years imprisonment. They appealed against their conviction on the grounds that it was unsafe and unsatisfactory having regard to adverse publicity; the prejudicial effect of the edited interview notes tendered into evidence which clearly showed that there were several robberies the police were investigating given the manner in which the interview notes were edited and then shown to the jury. The appellants contended further that there was an element of bias insofar as the trial judge having previously ruled on the voir dire in the earlier trial and which had resulted in a mistrial, could not bring a fresh mind to bear on the matter now commencing de novo. Further that he erred in law when he failed to admonish the Director of Public Prosecutions when he repeatedly interrupted defence counsel's closing speech with inflammatory comments designed to taint the minds of the jury. They appealed against sentence on the ground that it was too severe in all circumstances, particularly insofar as the sentence

imposed running from the date of conviction, amounted to 13 years after counting the period the appellants spent on remand and taking into account other charges which were pending. The prosecution's case was that one of the appellants pointed a firearm at an employee of the Coca Cola Factory. The employee made a report to the police and subsequently the appellants were taken into custody and the appellants were interviewed in connection with several robberies including the one at the factory. The second appellant also gave a statement to the police. At the trial, the police interview and statement were edited for use in the trial on the offence of aggravated burglary. The appellants raised objections before the trial on certain issues namely; pre-trial publicity, refusal of joinder of offences and bias. The first two objections were overruled and no ruling was made on bias. The appellants argued that the edited interview ought not to have been entered as an exhibit to the jury as it served to place before the jury incriminating facts prejudicial to a fair trial of the appellants.

Held: dismissing the appeal against conviction and sentence and affirming them.

1. The appellants failed to discharge the burden of establishing that pre-trial publicity had impressed on the minds of the prospective jurors, making it unlikely for an impartial jury to be impanelled.

Nankissoon Boodram v Attorney General 47 WIR 459 followed.

2. The refusal for joinder of offences did not cause unfairness in the trial, given the inordinate delay in the hearing of the matter, the time spans in respect of the incidents for which joinder of offences was sought and the fact that counsel was not retained in respect of those incidents.
3. The circumstances of this case did not meet the criteria for establishing bias. A ruling on the voir dire is never the end of the matter; if the statement is ruled admissible it goes to the jury to determine the weight that should be given to it.

R v Gough (Robert) [1993] A. C. 646 applied.

4. The practice of editing a defendant's statement to exclude prejudicial or irrelevant material is well recognised which is to guard against the danger inherent in merely blotting out or changing a word by overwriting a letter therein as occurred in this case. However while it amounted to an irregularity, given all the evidence, the court does not consider that the jury would have arrived at a different verdict.
5. That to satisfy prosecutorial misconduct it must be shown that the prosecutor's conduct amounts to such a departure from good practice as to be considered so gross that an appellate court would have no choice but quash the conviction.

Randall v The Queen [2002] UKPC 19 and **Nyron Smith v The Queen** [2008] UKPC 34 applied.

6. The maximum sentence for aggravated burglary is 14 years; therefore it is quite within the generous ambit of the trial judge's discretion in taking into account the further offences to impose a sentence of 10 years which in effect, counting time in remand, may have amounted to 13 years.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** The appellants were charged jointly with the offence of aggravated burglary. Their trial in the High Court for this offence commenced on 14th May 2007, and on 21st May 2007, the jury returned a verdict of guilty in respect of both appellants. On 30th May 2007, they were each sentenced to ten years imprisonment. They have appealed against their conviction and sentence.

The background

- [2] On August Monday, (4th August 2003), a public holiday in Dominica, around 8:15 a.m., one Jefferson Carbon, an employee of the Coca Cola Factory saw two men, one of whom had allegedly pointed a firearm at him. Mr. Carbon proceeded to police Headquarters and made a report. The Police visited the scene. On 8th July 2004, the second appellant was taken into custody, and on 9th July 2004, the first appellant was taken into custody. Between 8th and 9th July 2004, the police conducted an interview with both men in connection with several robberies including the robbery at the Coca Cola Factory. In addition to being interviewed the second appellant also gave a statement to the police. At the trial, the police interview and the statement were edited for the purposes of use in relation to the offence of aggravated burglary on which the trial was proceeding.
- [3] Before the actual trial got underway, Ms. Yearwood Stewart, counsel for the accused raised certain preliminary objections, three of which bear mention as they are also raised on this appeal. They are pre- trial publicity, bias, and refusal of joinder of offences. The learned trial judge overruled the objections in respect of pre- trial publicity, joinder, and made no ruling in respect of bias. The trial proceeded.

The grounds of appeal

[4] Counsel for the Appellant raised nine grounds of appeal. They are as follows:

1. The learned trial judge erred in law and misdirected himself when he failed to traverse the matter to the September 2007, Assizes by reason of adverse publicity.
2. The learned trial judge erred in law and misdirected himself when he failed to consider joinder of the offences.
3. There was a material irregularity when the edited interview notes tendered into evidence clearly showed that there were several robberies the police were investigating. However, the words were edited to read "robbery" - thus clearly having the effect of prejudicing the minds of the jury.
4. The learned judge was wrong on a question of law when he admitted the police interview with the appellants notwithstanding that the learned trial judge had expunged or edited the interview thus excluding highly prejudicial parts.
5. The interview ought not to have been entered as an exhibit to the jury as it was procured in contravention of the judge's rules and or was a concoction by the Dominica police force who all signed the documents and none of the appellants did so in the circumstances designed to trap, cross examine and get before the court incriminating facts in the interview prejudicial to a fair trial of the appellants.
6. There was a material irregularity when the learned trial judge failed to rule on the Application that he should recuse himself from the hearing of the matter on the basis of bias.
7. The learned trial judge erred in law and misdirected himself when he failed to admonish the learned Director of Public Prosecutions when he repeatedly interrupted Defence Counsel's closing speech with inflammatory comments designed to prejudice the minds of the jury and did prejudice the minds of the jury.

8. That the conviction of both appellants should be set aside as being unsafe or unsatisfactory.
9. The sentence was too severe in all the circumstances of this case.

Grounds already ruled upon by the court during the hearing

- [5] During the hearing of the Appeal, the court disposed of the issues of pre-trial publicity, joinder of offences and bias on the part of the trial judge and dismissed those grounds. For completeness, the reasons for dismissal of those grounds are now summarized.

Pre-Trial Publicity – Ground 1

- (a) Counsel for the appellants conceded that no evidence had been produced before the court substantiating the allegation of pre-trial publicity. The onus of establishing that pre-trial publicity is such that it would affect the minds of jurors so as to make it unlikely that an impartial jury could be empanelled is a heavy one. The case of **Nankissoon Boodram v Attorney General and Another**¹ is instructive of the principle. There it was held at page 460 that:

“the appellant had failed to discharge the heavy onus of establishing that the pre-trial publicity had been so widespread and indelibly impressed on the minds of the prospective jurors that it was unlikely that an impartial jury could be impanelled.”

- (b) In this case, the appellants do not even begin to meet the bar as there was a total lack of an evidential basis. The trial judge made this clear at page 28 of the Record. As the trial judge rightly stated, the onus was on the appellants to establish the likelihood of an unfair trial. Accordingly, the trial judge was right in dismissing the application for lack of evidence. This ground of appeal was therefore dismissed.

¹ (1994) 47 WIR 459

Joinder of offences – Ground 2

(a) In the same assizes the appellants had two further indictments on which they were to be tried on similar type offences. There were also other offences being dealt with either at the preliminary inquiry stage or which were under investigation by the police. Counsel for the appellants argued that given the pre-trial publicity, those offences should have been joined in one indictment. No authority was cited in support of the premise that pre-trial publicity afforded good ground for joinder of offences. Counsel contended that it was prejudicial to the appellants to be made to be tried for the several offences over consecutive Assizes which may result in longer periods of detention or incarceration brought about by the time which would be involved in a series of trials on singular indictments in respect of each offence. Time and cost savings were also urged as a good basis for the joinder.

(b) It is well settled that matters of joinder whether of offences or of defendants is one ultimately within the discretion of the trial judge.

Archbold 40th Ed. Para. 57 contains this statement:

“As a general rule, it is no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with one another than it is to try together distinct offences committed by the same person.”

(c) Counsel sought not only to join those offences on which indictments had been laid and was currently before the court, but also invited the trial judge to take notice of a further ten matters, then in the preliminary stages. Though they were similar type offences, they were not founded on the same facts, nor could they be said to be so closely connected as to the time of their commission. This was conceded by counsel. The trial judge referred to Rule 4 of the **Indictment Rules** which states as follows:²

“Charges for any offences may be (my emphasis) joined in the same indictment if those charges are founded on the same facts

² See Pg. 35 Record

or form or are a part of a series of offences of the same or similar character”

The trial judge pointed out the fact that there were three separate preliminary inquiries, three separate committals, three separate indictments and also the time differences between the alleged commission of various offences.³ Whilst joinder in appropriate circumstances may be beneficial this must be balanced against the danger of overloading an indictment as this can also be open to attack as being oppressive and prejudicial to an accused.

- (d) The trial judge refused the joinder, citing the delay in the hearings of the matter, the time spans in respect of the incidents for which joinder was sought, the fact that counsel was not instructed in respect of the other matters in respect of which joinder was being urged and the fact that joinder would inevitably lead to further delay in respect of which the matter was already plagued. He determined that separate trial on the offence with which the court was then seized would not cause unfairness in the trial of the appellants.
- (e) The court dismissed this ground of appeal as no fault could be found with the exercise of the trial judge's discretion in refusing joinder for the reasons he gave.

Bias – Ground 6

- (a) This challenge arose from the fact that the trial judge had previously presided over a voir dire in which the judge had previously ruled that statements given by the appellants were free and voluntary. No formal application seeking recusal of the trial judge was made. Counsel was of the view that the judge having previously ruled on the voir dire in the earlier trial which had resulted in a mistrial, could not bring a fresh mind to bear on the matter now commencing de novo. In essence counsel was

³ pg. 40 of the Record

suggesting that in the fresh trial it would be useless to proceed on another voir dire, in the fresh trial given that the trial judge had ruled in a certain way and could not be expected to rule differently.

(b) I agree that it could not be expected to have the trial judge come to a different conclusion on a new voir dire based on the same facts. I do not consider however, that it was necessary to enter upon a fresh voir dire, (i.e. a trial within a trial) as that aspect of the matter had already been determined. To my mind, it is no different to where pre-trial applications may be made for the determination as to the admissibility of confessions and the like before the actual trial gets underway. Indeed this is the modern approach rather than conducting a trial within a trial. This obviates the need for further time being spent as well as reduction of costs, on a trial within a trial where jurors already empanelled are then required to spend many hours sitting out of the courtroom whilst the issue of admissibility with which they are not involved is thrashed out between counsel and the trial judge. Placed in this context, it certainly does not provide a legitimate reason for recusal of the trial judge. In any event, this is not the test for determining bias. As set out in the case of **R v Gough**⁴ the criteria to be met for such a determination are (a) whether there was real danger of bias on the part of the person concerned, or whether a reasonable person might reasonably suspect bias on his part.

(c) It is also useful to remember that a ruling on the voir dire is never the end of the matter. If the judge rules the statement admissible, then it must still go to the jury, for them to determine what weight should be given to it at the end of the day.

(d) The court accordingly, was of the view that the circumstances of this case did not meet the criteria for establishing bias. A proper ruling by the trial

⁴ [1993] A.C. 646

judge would have been to dismiss the application. Accordingly, this ground of appeal was also dismissed.

Grounds 3, 4 and 5 - The prejudicial effect of the edited interview notes and statement

[6] Counsel quite conveniently argued these three grounds together as they overlap, and is centred on the prejudicial effect of the edited interview notes and the caution statement. It bears mention that counsel at trial did not pursue a fresh voir dire. The main complaint of counsel for the appellants relates to the manner in which the interview notes were edited and then shown to the jury. Counsel acknowledges that she rendered assistance in the editing of the interview notes. This was clearly for the purpose of guarding against the appellants being unduly prejudiced by them in the eyes of the jury. She also conceded that no objection was taken at the trial to the jury being shown the edited interview notes or that the editing had been undertaken in a form which was likely to prejudice the appellants. Indeed the Record of the proceedings discloses the focus of her cross examination of the police witness with respect to the interview notes and the statement as suggesting: (1) the answers written by the police were a concoction and (2) the answers were not freely given.⁵

[7] On this appeal she complains however, that the edited interview notes showed that the word “robberies” was edited to read “robbery” and that the pronounced “y” in that word showed that the police were investigating several robberies and that when placed before the jury in this form it would have been clearly obvious that the appellants were being investigated and were involved in several robberies. The interview notes were not signed by the appellants. In short, her complaint may be summed up this way: that the edited interview notes defeated the very purpose for which the editing was intended namely, to ensure that information, incriminating the appellants in the commission of other offences or other irrelevant information with regard to the offence would not be brought to the jury’s attention in the trial. One would have thought that this would have been clear to counsel at

⁵ [See Record pg. 287 – 293]

the trial, having assisted with the editing and being aware of the appearance of the edited version of the interview notes.

[8] Counsel contends that the edited interview notes ought to have been read out to the jury only and not shown to them. I have found nowhere in the Record nor has counsel pointed us to any part of the Record where this course was urged upon the court. Having viewed and perused the edited versions with the pronounced “y” in a number of places throughout, I venture to say that the manner of editing left much to be desired.

[9] The practice of editing a defendant’s statement to exclude prejudicial or irrelevant material is well recognised. **Blackstones Criminal Practice** 2005 para. 17: 43 refers to **Practice Direction (Criminal Proceedings: Consolidation)** [2002] 1WLR 2870 which is in these terms:

“24.4 . . . (b) When a suspect is interviewed about more offences than are eventually made the subject of committal charges, a fresh statement should be prepared and signed omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration or evidence about those offences is admissible on the charges preferred, such as evidence of system. It may, however, be desirable to replace the omitted questions and answers with a phrase such as: ‘After referring to some other matters, I then said . . .’ so as to make it clear that part of the interview has been omitted.

24.6 None of the above principles applies, in respect of committal proceedings, to statements which are exhibited (including statements under caution and signed contemporaneous notes). Nor do they apply to oral statements of a defendant which are recorded in the witness statements of interviewing police officers, except in the circumstances referred to in para. 24.4(b) above. All this material should remain in its original state in the committal bundles, any editing being left to prosecuting counsel at the Crown Court (after discussion with defence counsel and, if appropriate, the trial judge).”

[10] I consider that prosecutors as well as defence counsel would do well to follow this approach which is clearly designed to guard against the danger inherent in merely blotting out or changing a word by overwriting a letter therein, as occurred in this case.

- [11] Having so stated, the critical question seem to me to be whether the trial judge, notwithstanding counsel's tacit acceptance of the edited interview notes in the form in which they appeared, was nonetheless required to have a further look at the edited version and satisfy himself that the manner and form of the editing had been properly done and thus in a form fit for the eyes of the jury.
- [12] In **R v Weaver (George)**⁶ it was said by Sachs LJ (pg. 358), that the statement should not be edited until the trial, at which stage, '...counsel can confer, and the judge can, if necessary, take his part in the matter to ensure that any "editing" is done, if it is done at all, in the right way and to the right degree.'
- [13] It would seem to me that despite counsel not taking the objection, the trial judge in a criminal trial still retains the overriding obligation to ensure that prejudicial material is not placed in the jury's domain given the consequence of the entire trial process being rendered unfair. It seems to me, that had further consideration been given thereto in terms of the form of editing and the resulting appearance of the edited version, that the trial judge would have appreciated that the editing of the interviews notes in the form that it took had not achieved its desired end and that a fresh version ought to have been prepared for use by the jury, or the edited version merely read out. This amounted to an irregularity in the trial. I propose to consider later in this judgment the consequence of that irregularity.

Prosecutorial Misconduct – Ground 7

- [14] Counsel then sought to tie in the effect of the prejudicial interview notes with her 7th ground of appeal alleging prosecutorial misconduct. Specifically she complains of prosecuting counsel's interruption of her address to the jury. The court's attention was drawn to pages 669, and 674-675 of the Record. At page 669 to 671, what becomes clear is that counsel for the appellants was making use of the edited interview notes and statement in a manner suggesting that something was amiss in the way the interview and answers given were conducted whilst being fully aware of the fact that the notes and statement were edited.

⁶ [1968] 1 QB 353

The DPP sought to intervene to suggest that a certain course had been taken without saying what that course was. At page 674-675 counsel was in essence suggesting to the jury that an identification parade which involved the appellants took place after the police interviews and statement had already been given by way of casting doubt on the police's belief as to the perpetrators. Once more the Director of Public Prosecution intervened to interject that the identification parade was not in respect of the matter being tried.

[15] Counsel relied on two cases decided by the Privy Council, **Randall v The Queen**⁷, and **Nyron Smith v The Queen**⁸ as providing guidance on the bar against which prosecutorial misconduct is measured. In essence it must be shown that the prosecutor's conduct amounts to such a departure from good practice as to be considered "so gross or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong are the grounds for believing the defendant to be guilty."⁹

[16] I do not consider that what the prosecutor said comes even close to meeting the bar. In my view defence counsel, notwithstanding a duty to put the client's case at its highest, must do so fairly and seek to ensure that the correct factual position is being advanced. When counsel's address to the jury is considered on those aspects of the matter of which she complains it becomes clear that the DPP sought to intervene merely to ensure the correctness of the factual circumstances being advanced. I do not consider that it can be fair for counsel, after having the benefit of edited statement or notes seek to make use of the interview notes in the manner tending to suggest that some questions or answers were out of the blue or seemingly nonsensical. It is this approach which drew the prosecutor's intervention. That does not amount to prosecutorial misconduct. Accordingly, this ground of appeal, in my view is without merit and should be dismissed.

⁷ [2002] UKPC 19

⁸ [2008] UKPC 34

⁹ Randall at page 28

Lurking Doubt – Ground 8

- [17] The concept of “lurking doubt” emanates from the case of **R v Cooper**¹⁰ in *which* it was stated at pg. 34 by Widgery LJ thus:

“We are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that in all the circumstances of the case it is unsafe and unsatisfactory. That means that in cases of this kind the court must ask itself the subjective question whether we are content to let the matter stand as it is or whether there is some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it”

- [18] Counsel for the appellants listed fourteen reasons why she says the court should have a lurking doubt. The bulk of the matters raised were canvassed in her previous grounds with regard to the interview notes and the statement and the question as to whether the statement and interview notes were voluntary or were a concoction. This has already been addressed. Others related to conflicting evidence between two witnesses as to the date of the burglary; and the fact that the police who went on the scene after the burglary, did not mention their observations of the offices having been ransacked. However, there was evidence of the offices being ransacked.¹¹ As the Director of Public Prosecutions rightly says, these were all matters within the jury’s domain. Counsel also referred to the fact that a prosecution witness statement stated that appellant Stoute said words to this effect: “Look there we pass to enter.... Eric pulled a gun on the fella and he run.” - that this material was not edited out of the witness’ statement and thus prejudiced the minds of the jury. With all due respect to counsel, it appears she has overlooked the fact that the charge against the appellants was aggravated burglary. This evidence would have been part and parcel of the very offence charged. Though prejudicial, it was highly relevant to the charge. It should be borne in mind that all evidence led against an accused would no doubt be prejudicial to him. The test for exclusion is not simply that the information or material is prejudicial but rather whether its’ prejudicial effect outweighs its probative value.

¹⁰ [1969] 1 All ER 32

¹¹ See Record Pg. 116 – evidence of Jefferson Carbon

[19] Counsel also contends that unfortunate remarks were made by the learned trial judge and the Prosecutor and refers to pgs. 238-239, and 250-251 respectively of the Record. At these pages it is clear that the witness was dealing with the edited interview notes and statement and seeking to ensure that matter which was edited out was not given in evidence orally. At pg. 238-239, the excerpt of the Record in respect of which counsel grounds her complaint reads thus:

“Mr. Pestaina: we were at the beginning of this paragraph which I have stopped the witness. The second paragraph page 21. The court: That is the matter that is not related, so it doesn’t have to form part of this. This sentence refers to some other matter”

I do not accept that the learned trial judge’s remark as stated could in any way be considered as prejudicial to the accused given the language in which the statement was couched. At pg. 250 (lines 15-22) and pg. 251 (lines 1-7) the Record shows respectively as follows:

“Mr. G. Pestaina: My Lord we had gone through an exercise and I wish to have this witness read that statement but the exercise we had gone through, it must be read as a result of the exercise I am referring to. And so my Lord I would like this witness to read not from the very document but the amended version so to speak, if counsel has no objection”.

.....

“Mr. G. Pestaina: The very statement – usually the course is that the witness reads the exhibit but the statement cannot be read in its present condition. The court having gone through an exercise in this trial, I would like the witness to read the amended version, so to speak of the accused statement. Could I confer with counsel, my Lord so that we would guide the court properly?”

Here also, I must confess to seeing nothing wrong with the Prosecutor’s choice of words. It cannot reasonably be said that the jury were bound to draw an inference adverse to the appellants merely by virtue of those statements. I accordingly reject counsel’s contention.

The consequence flowing from the irregularity

[20] I now return to consider the effect or consequence flowing from irregularity I earlier found of having the edited interview notes placed before the jury, in the form the edited version appeared. In doing so, the question to be answered is this: whether, had the edited notes merely been read out, or had a fresh statement been prepared, the jury would entertain

doubt as to the guilt of the appellants and may have acquitted. Given all the evidence, I do not consider that the jury would have arrived at a different verdict. It is for all these reasons also, that I do not entertain a lurking doubt as to whether an injustice has been done. From a subjective standpoint, this case simply does not give one that sense or feel. In the circumstances I consider that this case is apt for the application of the proviso. Accordingly, I would apply the proviso and affirm the conviction.

Sentence – Ground 9

[21] The appellants say that the sentence of ten years imprisonment imposed running from the date of conviction, in essence, amounted to a sentence of 13 years after counting the period the appellants spent on remand. The maximum sentence for aggravated burglary is 14 years. The learned trial judge was asked by counsel for the appellants to take into account other charges which were pending either at the stage of the Preliminary Inquiry and also those in which Indictments had been preferred. In total some 11 further offences were put to the appellants to admit or not admit. All were admitted save for one offence on respect of which appellant Kadan was singularly charged. The offences were mostly of similar character albeit in varying degrees. The trial judge was guided by the these authorities urged on him by defence counsel and the prosecutor: **State v Vibert Hodge** 22 WIR 303; **R v Nicholson (James Kessack) (N0. 1)** (1948) 32 Cr. App. R. 98, **R v McClean (1987)** 9 Cr. App. R. (S.) 298 and section 45 of **The Criminal Law and Procedure Act** Cap. 12:01 - Laws of The Commonwealth of Dominica which, in essence, allows for the reception of or being guided by the English Practice in criminal matters.

[22] The rationale for adopting this course is a sound one. It allows an accused person to re enter society with a clean slate on release from prison. It avoids a multiplicity of proceedings thereby saving time and costs. It would be highly unlikely for the convict to face trial on those additional charges, once they have already been taken into account in sentencing. The dictum of Singleton J in **Nicholson** at pg. 99 is instructive where he said:

“Sentence is passed on the count or counts on which there has been a conviction, and no matter how many offences are taken into consideration, the sentence

cannot exceed that prescribed by law for the offence upon which there has been a conviction."

- [23] The trial judge after considering the mitigating factors, including in respect of Kadan, that he was a first time offender, as well as the time spent on remand, and on the other hand the nature of the offence and the circumstances surrounding its commission, as well as taking into account the other offences charged, imposed a sentence of 10 years.
- [24] Counsel seeks to suggest on this appeal that even though the trial judge was asked to take the other offences charged into account that this ought not to have affected the sentence or that taking them into account at the end of the day is meaningless. That cannot be and is indeed not the correct principle. They are taken into account with the full awareness that they will affect the severity of the sentence in much the same way as the court would weigh aggravating factors. The benefits of having them considered have already been expressed.
- [25] Counsel then urged the court, in essence, to separate the singular offence on which the appellants were convicted and not take into account the other charges. I do not consider that the function of this court is to approach the matter as if it was sitting as the trial judge. The appellant function is to review the sentence and to consider, based on what was before the trial judge, whether in the exercise of his discretion in sentencing he committed some error of law or principle or gave too much weight to some factor or failed to take into account some factor or where it can be said that he exercised his discretion in a manner that was manifestly wrong.
- [26] It has not been shown that the trial judge was wrong in the exercise of his discretion. It was quite within the generous ambit of his discretion in taking into account the further offences to impose a sentence of ten years which in effect counting time in remand may have amounted to 13 years. This was still within the maximum penalty allowed for aggravated burglary on which the appellants were convicted. Accordingly, there is no reason to disturb the sentences imposed. I would dismiss the appeal against sentence and

affirm the sentence of ten years running from the date of conviction as imposed by the trial judge.

Conclusion

- [27] The result is that although the showing of the edited interview notes, given their form and appearance, amounted to an irregularity, the facts and circumstances of this case attracts the application of the proviso. Accordingly, I would dismiss the appeal against conviction and affirm it. I would also dismiss the appeal against sentence and affirm the sentences imposed by the trial judge.

Janice George-Creque
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Michael Gordon
Justice of Appeal [Ag.]