

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2022/0003

BETWEEN:

TARIK AARON

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Margaret A. Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Terrence Williams with Ms. Karlene Thomas-Lucien for the Appellant
Ms. Khadija Beddeau for the Respondent

2024: January 31;
July 25.

Magisterial criminal appeal – Appeal against sentence – Possession of a controlled drug – Spent conviction – Whether evidence of previous spent conviction of appellant was wrongly placed before the learned magistrate – Whether the learned magistrate erred in taking previous spent conviction of appellant into account and determining that appellant was not of positive good character – Whether the learned magistrate erred in failing to regard the spent conviction as the appellant having no previous convictions and thus a mitigating factor in sentencing – Age and youthfulness of offender in determining sentence – Whether the learned magistrate erred in failing to take into account the youthfulness of the appellant as a mitigating factor – Whether custodial sentence appropriate – Reduction in sentence – Whether sentence should be reduced due to delay in hearing appeal

On 8th June 2022, Tarik Aaron (“Mr. Aaron”) was sentenced to fifty-two (52) months imprisonment after being found guilty of possession of a controlled drug with intent to supply to wit, 27.1 kg of cocaine (with a purity level of 94.5%). The appellant was sentenced to fifty-two (52) months imprisonment. The appellant originally appealed against both his conviction and sentence but at the hearing of the appeal and in his written submissions, he abandoned

his appeal against his conviction. The appeal proceeded as an appeal against the sentence imposed by the learned magistrate only.

Mr. Aaron challenged his sentence on the grounds that the sentence handed down by the learned magistrate was unduly severe and based on incorrect principles. There were four (4) sub-grounds of appeal which were further particularised as follows: (i) the prosecution wrongly tendered evidence of a previous conviction which was spent; (ii) the learned magistrate erred in failing to treat the appellant as having no previous criminal record, and therefore a person of previous good character, and as a result, as a mitigating factor; (iii) the learned magistrate erred in failing to take into account the youthfulness of the appellant as a mitigating factor; and (iv) the learned magistrate double counted a single act, the attempt at disposal of evidence as two aggravating factors.

Held: allowing the appeal against sentence and ordering that the sentence of 52 months imprisonment be substituted with a sentence of 40 months imprisonment commencing from 8th June 2022, that:

1. Both the Criminal Justice (Alternative Sentencing) Act (“CJAS” or the “Act”)¹ and the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 (the “ECSC Sentencing Guidelines”) require the sentencing tribunal to consider the antecedents of an offender or the lack thereof when considering and constructing the sentence to be imposed. The court is entitled to look at and assess any relevant convictions which the offender may have. However, there is a limit as to what previous convictions a court can have regard to in sentencing an offender. Section 50 of CJAS sets out what the position is with respect to spent convictions and how the court must treat with such a conviction. Previous convictions are treated as spent convictions where the relevant period, in accordance with Schedule 4 of the Criminal Justice (Alternative Sentencing) Act, has elapsed from the date of conviction. The appellant in this matter was convicted for illegal entry in November 2006 and was sentenced to a fine of \$1,000 or 4 months imprisonment. This conviction therefore falls within Schedule 4 (1) of the Act. For the purposes of this matter the 2006 conviction was to be considered spent by November 2011, the five-year period set out in the relevant section having passed by the time this appellant fell to be sentenced in June 2022. Thus, evidence of a spent conviction cannot be admitted before a Court exercising its sentencing jurisdiction within the Virgin Islands. Accordingly, the evidence of the appellant’s spent conviction ought not to have been placed before the learned magistrate.

Section 50 and schedule 4 of the **Criminal Justice (Alternative Sentencing) Act** No. 10 of 2005 of the revised Laws of the Virgin Islands 2013 **applied**; **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019** applied.

¹ Act No. 10 of 2005 of the revised Laws of the Virgin Islands 2013.

2. Usually, where a court finds that an offender has previous convictions, this is treated as an aggravating factor and may result in a more severe sentence being imposed on the offender. Where, however, the offender is considered to have no relevant or recent convictions this is a mitigating factor and may lead to a less severe penalty being imposed. Though the learned magistrate considered that the appellant's spent conviction meant that he had no previous convictions, she nevertheless formed the view that he could not be treated as a person of previous good character and gave the appellant no credit for his previous good character. The learned magistrate, having the previous conviction before her, something which ought not to have been allowed, erred in taking this previous conviction into account and determining that the appellant was not of positive good character. The appellant ought to have been treated as a person without antecedents, and of good character and therefore the learned magistrate fell into error in respect of this issue.

3. The court should have rehabilitation to the forefront of its thinking in considering whether youthful offenders ought to be imprisoned. Much weight should be given to the rehabilitation prospects of the young offender, and where incarceration is required, the length of that period of imprisonment should be taken into account. When a judicial officer embarks on a sentencing exercise, they must take a holistic approach and look at all the facts and circumstances of the offence charged as well as the aggravating and mitigating factors of the offender. At the time of the commission of this offence the appellant was 22 years old. In this case there was a large quantity of cocaine, some 27.1 kg with an overall purity of 94.5%, and there was a trial after which the appellant was adjudged guilty. Determining that a custodial sentence is warranted in certain circumstances, does not undermine the principle that the appellant's age can still be a mitigating factor in sentencing in reducing the custodial sentence to be served in the appropriate circumstances. In sentencing the appellant, the learned magistrate looked at the aggravating and mitigating factors as well as the whole of the circumstances of the case and concluded that a custodial sentence was appropriate. Having considered the nature of the drug, cocaine, the amount of the drug, 27.1 kg, and all the surrounding circumstances, the learned magistrate was not clearly or blatantly wrong in arriving at a custodial sentence.

Sections 4 of the **Criminal Justice (Alternative Sentencing) Act** No. 10 of 2005 of the revised Laws of the Virgin Islands 2013 applied; **The Drugs (Prevention of Misuse) Act** No. 9 of 1988 of the revised Laws of the Virgin Islands 2020; **R v Sargeant** (1974) 60 Cr App R 74 applied; **Desmond Baptiste v The Queen** SVGHCRA2003/0008 (delivered 6th December 2004, unreported) followed; **Cosmus Bascombe v The Commissioner of Police** SVGMCRA2003/0022 (delivered 6th December 2004, unreported) followed; **Winston Joseph v The Queen** SLUHCRA2000/0004, 0007 and 0008 (re-issued 31st October 2001, unreported) followed; **Roger Naitram et al v The Queen** ANUHCRA2006/0005, 0006 and 0008 (delivered 15th December 2010, unreported) followed.

4. The Court of Appeal may, if it is of the opinion that a different sentence should have been passed, quash the sentence of the Magistrate and pass the sentence which is warranted. In this case, the Court was of the view that the spent conviction of the appellant was improperly placed before the learned magistrate and that on the face of the record played a role in the sentencing of the appellant, depriving him of the benefit of considered of having previous good character. Thus, the Court was inclined to review the sentence imposed by the learned magistrate and accordingly substituted a more appropriate sentence. Accordingly, the Court was of the view that a period of 6 months ought to be taken off the sentence of 52 months on account of the Appellant's previous good character.

Section 175 of the **Magistrate's Code of Procedure Act**, Act No. 10 of 1891 of the revised Laws of the Virgin Islands 2013 applied

5. Where there has been a delay in the appellate proceedings of approximately two years, a delay which was no fault of the appellant but not an inordinate one, the Court will further discount a period of six (6) months from the appellant's sentence. Accordingly, the Court considers that the sentence ought to be reduced as a result of the delay between the appellant's conviction in June 2022 and the hearing of the appeal in January 2024, by a further period of 6 months.

JUDGMENT

- [1] **PRICE FINDLAY JA:** This is an appeal against the decision of the learned magistrate who, after a full trial, found the appellant guilty of possession of a controlled drug to wit, 27.1 kg of cocaine (with a purity level of 94.5%).
- [2] The appellant was sentenced to fifty-two (52) months imprisonment.
- [3] The appellant originally appealed against both his conviction and sentence but at the hearing of the appeal and in his written submissions, he abandoned his appeal against his conviction. The appeal proceeded as an appeal against the sentence imposed by the learned magistrate only.
- [4] Grounds 1 and 2 contended that the learned magistrate's sentence was unduly severe and based on incorrect principles.

- [5] There were four (4) sub grounds of appeal put forward which were further particularised by the appellant. They are as follows:
- (i) The prosecution wrongly tendered evidence of a previous conviction which was spent.
 - (ii) The learned magistrate erred in failing to treat the appellant as having no previous criminal record, and as a result, failed to treat this as a mitigating factor.
 - (iii) The learned magistrate erred in failing to take into account the youthfulness of the appellant as a mitigating factor.
 - (iv) The learned magistrate double counted a single act, the attempt at disposal of evidence, as two aggravating factors.

Spent Conviction

- [6] The appellant contended that at the sentencing phase, the prosecution tendered an antecedent report to the court showing that the appellant had a previous conviction for illegal entry on 1st November 2006, where he received a sentence of a fine of one thousand dollars (\$1,000) or 4 months imprisonment.
- [7] Counsel for the appellant further submitted that the learned magistrate rejected the appellant's submission that he ought to be treated as a person of good character, the learned magistrate having held that good character could not be asserted by the appellant.
- [8] The respondent accepted that the 2006 conviction was spent, but noted that the learned magistrate, in her reasoning, indicated that the court would not use the spent conviction as an aggravating factor, however, it could not be used to positively assert good character and so it could not have been mitigating.

- [9] The respondent further pointed to the reasoning of the learned magistrate where she described the appellant as someone with no previous convictions and that the appellant was treated as someone who had no previous convictions.
- [10] The respondent submitted that as a result, no negative inference was made against the appellant as it related to that spent conviction.
- [11] Both the **Criminal Justice (Alternative Sentencing) Act** (“**CJAS**” or the “**Act**”)² and the **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019** (the “**ECSC Sentencing Guidelines**”) require the sentencing tribunal to consider the antecedents of an offender or the lack thereof when considering and constructing the sentence to be imposed. The court is entitled to look at and assess any relevant convictions which the offender may have.
- [12] However, there is a limit as to what previous convictions a court can have regard to in sentencing an offender.
- [13] Section 50 of **CJAS** sets out what the position is with respect to spent convictions and how the court must treat with such a conviction.
- [14] Section 50 states:
- (1) “Subject to the provisions of this section, where a person has been convicted of or sentenced for an offence or offences of which he was convicted, if the relevant period in Schedule 4 applicable to the sentence has elapsed, the conviction of that person is spent and that person, in respect of such conviction, shall be treated for all purpose in law as a person who has not committed or been charged with or the subject of that conviction.
 - (2) Notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject to the provisions of this section -
 - (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in the Virgin Islands to prove that a person has committed or

² Act No. 10 of 2005 of the revised Laws of the Virgin Islands 2013.

been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

- (b) a person shall not, in any such proceedings, be asked, and if asked, shall not be required to answer, any questions relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.
- (3) Subject to the provisions of any Order made under subsection (5), where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority -
- (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
 - (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.
- (4) Subject to the provisions of any Order made under subsection (5) -
- (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and
 - (b) a conviction that has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.
- (5) The Executive Council may by Order -
- (a) make such provisions as seems to it appropriate for excluding or modifying the application of either or both subsection (3) (a) and (b) in relation to questions put in such circumstances as may be specified in the Order;

(b) provide for such exceptions from the provisions of subsection (4), as seems to it appropriate, in such cases or class of cases, as in relation to convictions of such a description, as may be specified in the Order.

(6) The following sentences are excluded for the purposes of this section -

(a) a sentence of imprisonment for life;

(b) a sentence of imprisonment, or detention in a youth custody and training centre for a term exceeding 30 months;

(c) a sentence of detention during Her Majesty's pleasure.

(7) For the purposes of this Act the relevant period applicable to a sentence is the period specified in Schedule 4 reckoned from the date of the conviction in respect of which the sentence was imposed."

[15] Schedule 4 of **CJAS** states:

"SCHEDULE 4
(Section 50(7))

RELEVANT PERIODS RESPECTING SPENT CONVICTIONS

1. If the sentence was one of more than 6 months but not more than 30 months imprisonment, detention in a youth custody or training centre the relevant period is 7 years from the date of conviction; if the sentence was 6 months or less imprisonment, detention in a youth custody or training centre, or a fine the period is 5 years from the date of conviction; if the sentence was suspended, the period is the same as if it had been immediate.
2. If the offender was conditionally discharged, placed on probation, or made the subject of a care order, or an attendance centre order, the relevant period is 2 years from the date of conviction or that for which the order remains in force, whichever is longer."

[16] The appellant in this matter was convicted for illegal entry in November 2006 and was sentenced to a fine of \$1,000 or 4 months imprisonment. This conviction therefore falls within Schedule 4 (1) of the **Act**. For the purposes of this matter the 2006 conviction was to be considered spent by November 2011, the five-year period set out in the relevant section having passed by the time this appellant fell to be sentenced in June 2022.

- [17] More importantly, section 50(2)(a) of **CJAS** states:
- (2) “Notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject to the provisions of this section.
- (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in the Virgin Islands to prove that a person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and”
- [18] Such evidence is clearly not admissible before a judicial authority exercising its sentencing jurisdiction within the Virgin Islands. Accordingly, the evidence of the appellant’s spent conviction ought not to have been placed before the learned magistrate.
- [19] In looking at the transcript of the proceedings at page 669 the learned magistrate stated:
- “I do not consider that the defendant has positive good character...”
- [20] At page 659 she continued:
- “But I can’t take good character into account...”
- [21] At page 662:
- “So then we have the antecedents of the defendant. The defendant has no previous convictions...”
- [22] It is clear that though the learned magistrate considered that the appellant’s spent conviction meant that he had no previous convictions, she nevertheless formed the view that he could not be treated as a person of previous good character.
- [23] The learned magistrate therefore gave the appellant no credit for his previous good character. It is usual where a court finds that an offender has previous convictions that this is treated as an aggravating factor and may result in a more severe sentence being imposed on the offender. Where, however, the offender is

considered to have no relevant or recent convictions this is a mitigating factor and may lead to a less severe penalty being imposed.

- [24] The learned magistrate, having the previous conviction before her, something which ought not to have been allowed, erred in taking this previous conviction into account and determining that the appellant was not of positive good character. The appellant ought to have been treated as a person without antecedents, and of good character and the learned magistrate fell into error in respect of this issue.

Age and Youthfulness

- [25] The appellant also complains that the learned magistrate failed to take into account the age and youthfulness of the appellant in constructing her sentence. At the time of the commission of this offence the appellant was 22 years old.
- [26] The appellant submitted that sentencing principles require the courts to recognise youthfulness not only as an explanation for the offending but to address its mind to the general undesirability of imprisoning young first-time offenders.
- [27] The court should have rehabilitation to the forefront of its thinking in considering whether youthful offenders ought to be imprisoned.
- [28] Much weight should be given to the rehabilitation prospects of the young offender, and where incarceration is required, the length of that period of imprisonment should be taken into account.
- [29] A sentencing court must always bear in mind the principles of sentencing when faced with this task. This Court has long been guided by the principles set out in **R v Sargeant**,³ and in the case of **Desmond Baptiste v The Queen**.⁴

Retribution, deterrence, prevention and rehabilitation

³ (1974) 60 Cr App R 74.

⁴ SVGHCRA2003/0008 (delivered 6th December 2004, unreported).

- [30] Where the court is faced with the first-time offender, it is for the discretion of the sentencer to determine the importance of this factor. This is done not in isolation, but together with all the other relevant mitigating factors which may be relevant. It is clear from the authorities, that the more serious the offence, the less likely that this particular circumstance will have much relevance.
- [31] As set out in **Desmond Baptiste**, Byron CJ stated at paragraph 30:
- “On the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account.... As with first time offenders the more serious the offence, the less relevant will be these circumstances.”
- [32] In sentencing, the learned magistrate should approach the matter, by first having regard to the circumstances of the offence and determine whether a custodial or non-custodial sentence is appropriate for the offence charged.
- [33] In this matter while the learned magistrate did not articulate clearly her reasons for imposing a custodial sentence rather than a non-custodial one, she, before embarking on the application of the sentencing guidelines did go through the evidence which was led at the trial and concluded from there that a custodial sentence was appropriate.
- [34] This was a large quantity of cocaine, some 27.1 kg with an overall purity of 94.5% and there was a trial after which the appellant was adjudged guilty.
- [35] In **Cosmus Bascombe v The Commissioner of Police**⁵ (one of the many cases forming part of the **Desmond Baptiste** appeals) – Byron CJ opined, that persons found in possession of large quantities of drugs should receive a custodial sentence.

⁵ SVGMCRAP2003/0022 (delivered 6th December 2004, unreported).

At the time of the offence Bascombe was in his early twenties and had pleaded guilty, it was also his first offence.

[36] When a judicial officer embarks on a sentencing exercise, they must take a holistic approach and look at all the facts and circumstances of the offence charged as well as the aggravating and mitigating factors of the offender.

[37] In **Winston Joseph v The Queen**,⁶ Byron CJ stated:

“The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors....[i]t is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark on an evaluative process. It must weigh the aggravating and mitigating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however, the mitigating factors are outweighed by the aggravating factors, the sentence must tend to go higher.”

[38] Further, in **Roger Naitram et al v The Queen**⁷ Baptiste JA stated:

“Sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the guidelines into account the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate.”

[39] The learned magistrate in her sentencing looked at the aggravating and mitigating factors as well as the whole of the circumstances of the case and concluded that a custodial sentence was appropriate. Determining that a custodial sentence is warranted in certain circumstances, does not undermine the principle that the appellant’s age can still be a mitigating factor in sentencing in reducing the custodial sentence to be served in the appropriate circumstances.

⁶ SLUHCRA2000/0004, 0007 and 0008 (re-issued 31st October 2001, unreported).

⁷ ANUHCRA2006/0005, 0006 and 0008 (delivered 15th December 2010, unreported).

- [40] As indicated earlier, Byron CJ had stated that where persons are found in possession of large quantities of drugs, they should receive custodial sentences.
- [41] This is what the learned magistrate did here, and I can find no fault with the fact of a custodial sentence in all the circumstances of this case.
- [42] In the BVI drug trafficking is a serious threat to society at large and such offences are treated by the legislature as serious crimes for which a fine may not be sufficient punishment. A fine ought not to be the punishment where incarceration is a more appropriate way of dealing with the offender.
- [43] The quantity and quality of the drug and the role of the appellant in this incident, even when taking into account the mitigating factors, demonstrated that this was a serious offence.
- [44] The appellant submitted that the learned magistrate failed to consider the provisions of **CJAS** in arriving at an appropriate sentence for the appellant.
- [45] Section 4 of **CJAS** states:
- “A court, in determining sentence for an offence, shall have regard to such of the following matters as are relevant and known to the court
- (a) the circumstances of the offence;
 - (b) other offences (if any) that are to be taken into account;
 - (c) where the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character, that course of conduct;
 - (d) personal circumstances of any victim of the offence;
 - (e) injury, loss or damage resulting from the offence;

- (f) the degree to which the defendant has shown contrition for the offence -
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;
- (g) if the defendant has pleaded guilty to the charge of the offence, that fact;
- (h) the degree to which the defendant has co-operated in the investigation of the offence;
 - (i) the need to protect the community from the defendant's criminal acts;
 - (j) the deterrent effect any sentence under consideration may have on the defendant or other persons;
 - (k) the need to ensure that the defendant is adequately punished for the offence;
 - (l) the character, antecedents, age, means and physical or mental condition of the defendant; and
 - (m) any other matter that the court considers appropriate."

[46] The Court was also directed to section 5 of **CJAS**:

"(1) A court may make an attendance centre order in the case of a person under 21 -

- (a) who has been found guilty of an offence punishable by imprisonment (not being an offence the sentence for which is fixed by law);
 - (b) who could have been committed to prison for default of payment of a sum of money; or
 - (c) who has failed to comply with any requirement of a probation order.
- (2) An attendance centre shall operate at such times and under the direction of such persons as the Governor may by Order designate.
- (3) An application to discharge an attendance centre order shall be made to a judge or magistrate and, subject to subsection (4), the discharge of such an order shall be by order of the court.
- (4) Where the court that made the order is the High Court and that court included in the order a direction reserving to itself the power to discharge the order, the power shall be exercised by the High Court.
- (5) An attendance centre order may be varied by a Magistrate's Court or Youth Court on the application of the offender or the officer in charge of the relevant attendance centre.

- (6) The power to vary an attendance order is a power by order -
 - (a) to vary the day or hour specified in the order for the first attendance at the relevant attendance centre; or
 - (b) if the court is satisfied that the offender proposes to change or has changed the offender's residence, to substitute for the relevant attendance centre an attendance centre which the court is satisfied is reasonably accessible to the offender, having regard to the offender's age, the means of access available to the offender and any other circumstances.
- (7) Where an application is made under this section by the person in charge of an attendance centre, the court may deal with the application without summoning the offender.
- (8) In this section the "relevant attendance centre", in relation to an attendance centre order, means the attendance centre specified in the order or substituted for the attendance centre so specified by an order made by virtue of subsection (6) (b)."

[47] I do not consider this section to be relevant to this matter as it relates to children and young persons, terms which are defined in the definition section of the **Act** and which do not apply to the appellant.

[48] Sentencing is a discretionary exercise to be carried out by a judicial officer after taking all relevant factors into consideration. This is recognised by the **Criminal Justice (Alternative Sentencing) Act**. Section 4 of **CJAS** merely codifies the guidelines as set out in **Desmond Baptiste**.

[49] This Court was referred to the English decision of **R v Clarke (Morgan) and others**⁸ where the court correctly opined at paragraph 5:

"Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purpose of sentencing. So much has long been clear."

⁸ [2018] EWCA Crim 185.

[50] In this case, the appellant was a young man but not one who had just passed his eighteenth (18th) birthday. The appellant was twenty-two (22) years old at the time of his offence, was a father, and worked at the family business.

[51] In **R v Peters; R v Palmer; R v Campbell**⁹ the learned judge stated at paragraph 11:

“It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence. Although the passage of a eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual’s true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore, although the normal starting point is governed by the defendant’s age, when assessing his culpability the sentencing judge should reflect on and make allowances as appropriate upwards or downwards for the level of the offender’s maturity.”

[52] In **R v Clarke (Morgan) and others**,¹⁰ Burnett CJ stated at paragraph 5:

“Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays...young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision even if an offender has passed his or her 18th birthday.”

[53] In the exercise of her discretion, the learned magistrate at page 667 of the transcript said:

“...and I did not consider that he was of a youthful age where his “youth” (use) or lack of maturity explained his offending.”

[54] The learned magistrate having seen and observed the appellant over the course of the trial, and having heard the evidence adduced by the Crown formed the view, as she was entitled to, that the appellant’s age and lack of maturity was of no moment in explaining his offending.

⁹ [2005] EWCA Crim 605.

¹⁰ [2018] EWCA Crim 185.

[55] The learned magistrate was clearly aware that she ought to consider the issue of age and maturity and having done so concluded that this had no effect on this appellant's offending. In all of the circumstances, it cannot be said that the learned magistrate was blatantly or clearly wrong to have arrived at the conclusion which she did.

[56] I borrow the words of Burnett CJ in **R v Clarke**¹¹ where he said at paragraph 39:

“It is quite clear from the totality of the hearing and then the sentencing remarks that this experienced judge was sensitive to the question of youth and immaturity.”

[57] This appellant was the captain of a vessel found with a large quantity of cocaine on board and who engaged in a high-speed chase with the authorities. All of these are factors which the learned magistrate had before her and which would have guided her decision in coming to the conclusion that she did with respect to the age and maturity of the appellant.

[58] The appellant submitted that under the **Drugs (Prevention of Misuse) Act**¹² (the “**Drugs Act**”), that the learned magistrate could have ordered imprisonment, a fine or both and that the learned magistrate gave no reason for imposing a custodial sentence.

[59] It is not disputed that section 16 of the **Drugs Act** provides for the following penalties:

“16. (1) A person who commits a drug trafficking offence or the offence of being in possession of a controlled drug for the purpose of drug trafficking is liable -

(a) on summary conviction --

(i) to a fine of \$100,000 or where there is evidence of the street value of the controlled drug, 3 times the street value thereof, whichever is the greater, or

¹¹ Supra n. 9.

¹² Act No. 9 of 1988 of the revised Laws of the Virgin Islands 2020.

(ii) to imprisonment for a term not exceeding 10 years but not less than 3 years,

or both such fine and imprisonment.”

- [60] It is trite law that because a statute sets out imprisonment as the penalty it does not necessarily mean that a term of imprisonment for that offence is mandatory. However, the sentencing process is at the discretion of the judicial officer after consideration of all the relevant factors. Due regard must be given to the nature of the offence as well as to any special circumstances of the particular offender.
- [61] The learned magistrate had before her the relevant background information relative to the appellant including his personal circumstances and background, so that she was properly informed before embarking on the sentencing exercise.
- [62] The learned magistrate from page 659 to page 662 assessed the relevant evidence adduced before her. She then considered the submissions of both defence and prosecuting counsel including their submissions on the appropriate sentence for the appellant.
- [63] She then embarked on a step-by-step analysis of the **ECSC Sentencing Guidelines** for the offence of drug trafficking, including possession with intent to supply.
- [64] The learned magistrate considered each stage carefully looking at the role played by the appellant setting a starting point, then considering the aggravating and mitigating factors of both the offence and the offender. I have already dealt with the issue of good character and his previous convictions and will not repeat it here.
- [65] She then proceeded at each stage to use the grid to calculate the sentence. The learned magistrate considered time spent on remand and gave the appropriate discount for same, further she considered delay in arriving at her sentence all the

while explaining each step she took and why. The appellant was left in no doubt as to the reasons for his sentence.

[66] As stated earlier, when one examines the nature of the drug, cocaine, the amount of the drug, 27.1 kg, and all the surrounding circumstances, the learned magistrate was not clearly or blatantly wrong in arriving at a custodial sentence.

[67] The appellant submitted that the **ECSC Sentencing Guidelines** provides that the sentencer must ensure that all sentences are clearly expressed and must state the reasons for arriving at the final sentence imposed, and further that the court must demonstrate a rational basis for the sentence imposed.

[68] Here, unlike what transpired in **Graham and another v Police and other cases**,¹³ the learned magistrate has provided full reasonings for her decision and it cannot be said that there is an absence of reasons or that her reasons are inadequate. It cannot be said that in this case, it is impossible to know whether the learned magistrate misdirected herself on the law or whether she misapplied the facts of the case which were before her.

[69] The learned magistrate observed the principles requisite for a fair hearing and as required, provided clear and intelligent reasons for her decision on sentencing. I can find no fault with the approach adopted by the learned magistrate save for the issue of the spent conviction and the good character issue.

Resentencing

[70] The Court of Appeal may, if it is of the opinion that a different sentence should have been passed, quash the sentence of the Magistrate and pass the sentence which is warranted.

¹³ (2010) 79 WIR 288.

[71] Section 175 of the **Magistrate's Code of Procedure Act**¹⁴ so provides:

“The Court of Appeal may adjourn the hearing of the appeal and may upon the hearing of the appeal confirm, reverse or modify the decision of the Magistrate or remit the matter with the opinion of the Court thereon to the Magistrate or may make such other order in the matter as the said Court may think just and may by such order exercise any power which the Magistrate might have exercised and such order shall have the same effect and may be enforced in the same manner as if it had been made by the Magistrate: Except that the Court of Appeal may, if of opinion that a different sentence should have been passed quash the sentence passed by the Magistrate and pass the sentence warranted by law (whether more or less severe) in substitution therefor as the Court of Appeal thinks should have been passed.”

[72] In this case, the Court being of the view that the spent conviction of the appellant was improperly placed before the learned magistrate and that on the face of the record played a role in the sentencing of the appellant, he being deprived of consideration of him being of previous good character, the Court is inclined to review the sentence imposed by the learned magistrate.

[73] Further, the appellant submits that this Court ought to further reduce the sentence as a result of the delay between the appellant's conviction in May 2022 and the hearing of the appeal in January 2024.

[74] The appellant submits that the reduction in sentence should take into account that the appellant is being sentenced twice for the same offence.

[75] The appellant cited the case **Commissioner of Police v Jamal Grant**¹⁵ as authority for the double jeopardy principle in sentencing, however, on a close examination of that case, the principle applies when the appellate Court seeks to increase an unduly lenient sentence. Such is not the case here.

¹⁴ Act No. 10 of 1891 of the revised Laws of the Virgin Islands 2013.

¹⁵ SVGMCRAP2009/0025 (re-issued 14th July 2010, unreported).

[76] **Archbold: Criminal Pleading, Evidence and Practice 2009** at paragraph 7-368 states:

“Where a sentence is increased the practice of the Court of Appeal has been to allow some discount from what it considers to have been the correct sentence on account of what is commonly referred to as the double jeopardy principle.”

[77] It is difficult to see how that assists the appellant in this matter as the issue before this Court is not that of an unduly lenient sentence.

[78] As indicated earlier, the learned magistrate failed to take into account the good character of the appellant and he was entitled to a discount for this mitigating factor.

[79] This Court will discount the appellant’s sentence on account of his previous good character by a period of six (6) months.

[80] Further, where there has been a delay in the appellate proceedings of approximately two years, a delay which was no fault of the appellant but not an inordinate one, the Court will further discount a period of six (6) months from the appellant’s sentence.

[81] The sentence of the learned magistrate is therefore set aside and substituted with a sentence of forty (40) months from the date of his original sentencing, that is 8th June 2022.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Eddy D. Ventose
Justice of Appeal

By the Court

Deputy Chief Registrar