

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CASE NO: ANUHCR2018/0128

BETWEEN:

THE QUEEN

and

[1] MARCUS ISADORE
[2] PETER LUGAY

Defendants

Appearances:

Mrs. Shannon Gittens, Counsel for the Crown
Mr. Lawrence Daniel, Counsel for the 1st Defendant
Mr. Andrew O’Kola, Counsel for the 2nd Defendant

2021: November 4th, 5th, 8th, 9th, 10th, 29th, 30th;
December 1st, 2nd, 3rd, 7th, 8th, 10th, 13th, 14th, 15th, 16th;
2022: January 24th, 25th;
February 4th, 16th, 17th;
March 10th, 21st, 25th
May 9th.

DECISION

[1] **SMITH, J.:** This trial was conducted as a Judge Alone Trial by virtue of the **Criminal Proceedings (Trial by Judge Alone) Act**, No.8 of 2021, the charges on the indictment in this matter are mandated to be tried by a single Judge. The **Criminal Proceedings (Trial by Judge Alone) Act**, was signed by the Governor-General on the 28th May, 2021.

[2] I have arranged this ruling under the following headings:-

- i. Judge Alone Considerations
- ii. Counts on the Indictment - what the Crown has to prove in relation to Marcus Isadore
- iii. Counts on the Indictment - what the Crown has to prove in relation to Peter Lugay
- iv. Summary of the Crown’s case

- v. Summary of the case for Marcus Isadore
- vi. Summary of the case for Peter Lugay
- vii. Joint Enterprise
- viii. Non-disclosure of unused material
- ix. Is Ralph an accomplice?
- x. Isadore's evidence
- xi. Lugay's unsworn statement
- xii. Delay in making the report
- xiii. Police interviews-Lugay and Isadore
- xiv. Identification
- xv. Task Force
- xvi. Credibility of the witnesses
- xvii. Lies direction
- xviii. Good character direction
- xix. Circumstantial evidence
- xx. Hostile witness
- xxi. Did the defendants receive a benefit?
- xxii. The telephone evidence
- xxiii. Admission into evidence of the pink paper
- xxiv. Third Count-assault
- xxv. Discrepancies
- xxvi. Alibi
- xxvii. Verdicts-Isadore, Lugay

In Sitting as a Judge Alone – Considerations

- [3] In sitting as a Judge Alone the Judge is responsible for legal matters as well as distilling the facts of the case and applying those facts to the law. In addition to applying the facts to the law, I am also responsible for weighing up the evidence, deciding what has or has not been proved, and returning a verdict based on my view of the facts and the law. Where there are different accounts in the evidence about a particular matter it is my duty to weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in my view their evidence is honest and accurate. It is entirely for me to decide what evidence to accept as reliable and what I reject as unreliable.
- [4] When a defendant has given and/or called evidence, the Judge as the sole arbiter of the facts and the law must apply the same fair and impartial standards when weighing up the evidence of the witnesses for the prosecution and the defence. The Judge as the sole arbiter of the facts, does not have to resolve every issue that has arisen, but only those that are necessary for me to reach my verdict(s).
- [5] I am permitted to draw sensible conclusions and inferences from the evidence but I have warned myself not to engage in speculation or guesswork about matters which have not been covered by the evidence.

- [6] It is important that my verdict(s) are based only on my own independent view of the evidence and the facts of the case and more importantly, I must not allow myself to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/ preconceptions/ prejudices that I may have had.

The Counts on the Indictment and what the Crown had to prove

Marcus Isadore

- [7] This defendant was charged solely on Count One of the Indictment. That Count stated that Marcus Isadore between 1st January, 2017 and 31st March, 2017 at Fort Road, in the Parish of St. John in Antigua and Barbuda, omitted to perform his duty as a police officer and obtained 8lbs of cannabis for the benefit of himself and another.

Marcus Isadore and Peter Lugay

- [8] On the Second Count Marcus Isadore and Peter Lugay were jointly charged. The particulars of that offence were that both defendants on 25th April, 2017 at Brown's Bay in the Parish of St. Phillip in Antigua and Barbuda in the performance of their duties as police officers obtained 29lbs of cannabis for the benefit of themselves or others.

Peter Lugay

- [9] Peter Lugay was charged alone on the Third Count. The particulars of that Count were that on 25th April, 2017 at Brown's Bay in the Parish of St. Philip in Antigua and Barbuda used a firearm in the furtherance of committing the offence of corruption.
- [10] The Crown therefore had to prove the following:-
- a) That the two defendants were public officers/public officials;
 - b) They performed or omitted to perform their duties for the purpose of obtaining any property or benefit for themselves or another;
 - c) They obtained property;
 - d) The firearm was used in the furtherance of an offence, the offence being corruption.

The Crown's Case

Summary

- [11] I will now summarize the Crown's case briefly. The Crown's case was that Mr. Noel Johnson also known as "Tiba" and hereinafter referred to as such, was a farmer living in Villa. He indicated in his testimony that he sold vegetables as well as marijuana. On 9th February, 2017 he received a phone call from a Jamaican man who indicated that his brother would be interested in purchasing some marijuana from him. He met the said man later that evening and gave him a sample of his marijuana. On the 10th February he went to meet the Jamaican man in order to sell him the marijuana. He and his friend Jeff Lewis went to Fort Road by Kentucky Fried Chicken (herein referred to as KFC) in Jeff's vehicle, where they were to meet the man. It was alleged that while Jeff was parked in the vicinity of KFC, Tiba left the vehicle to look for the man. It was Jeff Lewis' testimony that Marcus Isadore came up to the jeep, asked for Tiba, reached inside the vehicle and took the bag containing said marijuana. He (Isadore) left a telephone number written on a pink paper with Jeff Lewis with instructions to call him when he next saw Tiba and for Tiba to call him. He was also told to say nothing about the taking of the bag of marijuana.
- [12] The Crown's case further was that on 25th April, 2017 the two defendants dressed in police tactical garb accompanied by Constable Paul Ralph dressed in plain clothes (he was on vacation) attended at Brown's Bay and took more marijuana from Tiba and that Peter Lugay hit Tiba in his back numerous times injuring him. While the officers were at Brown's Bay another witness Mosi indicated that the three officers had attended at Brown's Bay, took away buckets of marijuana and man-handled his friend Tiba. He gave general descriptions of two of the men but he said he knew Constable Paul Ralph. However, prior to them arriving at Brown's Bay, they had stopped at the Freetown Police Station. The stop was to facilitate them using a police vehicle for their operation. Upon arrival at the station they searched for the key to the police vehicle unsuccessfully. Constable Jeffrey placed the three men at the station searching for the key. The Crown's case was that they proceeded to Brown's Bay in a blue Tilda vehicle belonging to Marcus Isadore.
- [13] The Crown contended that the corruption offence encapsulated everything the defendants did on 25th April, 2017 and on the dates alleged in Count One on the Indictment pertaining to Marcus Isadore. Further, it was the Crown's case that the corruption charge was made up of all the actions carried out by Lugay and Isadore on the 25th April and they both went to Brown's Bay with the clear intention of taking the marijuana from Tiba and not turning it in nor arresting him. In brief that was the Crown's case.

Summary of the Defence Case - Peter Lugay

- [14] The defence case for Peter Lugay was launched on three fronts (1) that he was not present on 25th April, 2017 at Brown's Bay (2) that he was not identified by any of the Crown's witnesses and (3)

that the evidence of Constable Paul Ralph could not be relied upon because in their view, he had to be treated as an accomplice and as such his evidence was to be disregarded. At the close of the Crown's a No Case Submission was made and rejected. Peter Lugay was given his three options and he opted to give an unsworn statement from the dock. Counsel O'Kola contended that the only witnesses who put his client Peter Lugay at Freetown Police Station and thereafter Brown's Bay were Constable Leroy Jeffery and Constable Paul Ralph.

- [15] Counsel submitted that the evidence, in particular the identification evidence was weak and had been discredited as the witnesses Tiba and Mosi only gave general descriptions such as "one was tall and strapping, the younger one was shorter with some body." Counsel also posited that if Constable Ralph was indeed at Brown's Bay on the 25th April, he was there with two other unknown persons but not his client.
- [16] Finally, Counsel indicated that his client was not present on 25th April, 2017 and that **if he was there (my emphasis)** the use of his firearm was lawful and that by virtue of his profession as a police officer the charge in Count 3 was fundamentally wrong in law. In his submission Counsel stated that *"though the Corruption Act speaks to 'benefits' quite a few times, there seems to be no definition of said benefit. Therefore, one is to consider 'benefit' to be synonymous to 'advantage' which is defined in the Act. It is defined in many subsections however, applicable to the facts of this case, as 'a gift, loan, fee, reward or commission consisting of money or of any valuable security or other property or interest in property of any description. If this is said to be the benefit that Mr. Lugay gained, the Prosecution must provide the Court with proof of same. The Crown has simply failed to do so at the end of their case"*. This was the case for Peter Lugay. The Court will examine the unsworn statement of Peter Lugay at paragraph 56 of this ruling.

Defence Case- Marcus Isadore

- [17] Counsel for Marcus Isadore indicated that the Crown was unsure as to what actually occurred in relation to this case. He indicated in his submission and closing statement that Tiba's evidence did not accord with the particulars of the offence as contained in Count One. He took issue with the fact that there was no evidence of the marijuana being weighed, no sample being taken, no photographs of the buckets of marijuana, no evidence that Marcus Isadore was ever in or on Fort Road when it was alleged that he crept up to Jeff Lewis' jeep and took away the bag of marijuana.
- [18] Counsel posited that on 25th April, Tiba failed to identify Marcus Isadore as one of the perpetrators. Counsel said that Tiba said that he saw "two men in police navy blue clothing" and that Marcus Isadore was not identified by any of the witnesses.
- [19] In relation to Count Two the Defence said that Marcus Isadore was only placed on the scene by Officer Ralph and that his evidence was discredited. .

- [20] Further, Marcus Isadore put forward an alibi and called a witness to say that his blue Tiida motor car was actually parked at the witness' home on 25th April, 2017. The Court will examine the credibility of this witness in greater detail later in this ruling.
- [21] Marcus Isadore denied in his testimony of ever calling Tiba, he denied ever sending Tiba any voice notes nor did he ever send him any WhatsApp messages and that he turned in his personal phone over to the Task Force Unit. His defence always was that he was never anywhere near Fort Road during 1st January and 31st March, 2017 and Brown's Bay on 25th April, 2017.
- [22] In relation to the piece of paper admitted into evidence with Isadore's number on it Mr. Daniels indicated that the Crown failed to bring a hand writing expert to substantiate that the handwriting actually belonged to Isadore.

The Defendants have nothing to prove

- [23] As said earlier, in relation to the two defendants I have reminded myself that none of the defendants have anything to prove. They remain innocent until I have found them guilty based on the facts as I find them, the law I apply to the facts and the evidence marshaled by the Crown. I have also reminded myself to treat the Defence case with the same attention as that of the Crown.

Joint Enterprise

- [24] Joint enterprise is relevant to Count Two. It was the Crown's case that both defendants acted together in relation to the counts where they were jointly charged. In the Crown's opening address Counsel said that both Lugay and Isadore were jointly and severally liable for the Count Two on the Indictment.
- [25] The case of **Jogee vs. The Queen**¹ showed the restated principles governing parasitic accessorial liability to be:-

- The requisite conduct elements that defendant number 2 has encouraged or assisted the commission of the original offence by defendant 1.

- With regard to the conduct element, the act of assistance or encouragement may be infinitely varied. Both association and presence are likely to be relevant evidence on the question whether assistance or encouragement was provided but neither is necessarily proof: it depends on the facts. This principle was set out in the case of **R vs. Coney**² in great detail.

¹ (2016) UKSC 8

² (1882) 8 QBD 534

- [26] The evidence before the Court is that Lugay and Isadore were intricately involved in tracking down Tiba, taking the buckets of marijuana and making off with said buckets. They were part and parcel of the corruption offence knowing full well that they had no intention of arresting Tiba and logging in the confiscated marijuana. The Court notes however that the senior officer was at all times Marcus Isadore.

Non-disclosure of the unused material

- [27] The Counsel for Marcus Isadore and Peter Lugay both posited that the non-disclosure of the unused material was crucial as Constable Ralph had initially been treated as an accomplice; his interview was particularly relevant to their case. They both said that this premised on the fact that Ralph would have had an interest to serve.
- [28] Even though the Crown indicated through Ralph that the statement was incomplete, the issue having been raised by both Counsel the Court had to address it.
- [29] The treatment of unused material is different in the UK and Antigua. In the UK there are very strict and comprehensive rules relating to the treatment of unused material. In the English speaking Caribbean the question of the disclosure by the prosecution of statements of its witness to the defence is governed by the common law.
- [30] Generally speaking, the present position based on common law is that the prosecution must disclose to the defence the statements it intends to rely upon in relation to indictable offences and the more serious summary offences.
- [31] The source of and relationship between the prosecution's obligation to disclose and the constitutional right to a fair hearing was considered in the Privy Council cases of **Franklyn and Vincent vs R (1993) 42 WIR 262** (an appeal from Jamaica), and **Ferguson vs Attorney General (2001)** an appeal from the Republic of Trinidad and Tobago. In the latter case the appellant was acquitted by a jury after a trial. He then filed a constitutional motion stating that statements had been collected by the police from four persons and these persons had not been called at the preliminary enquiry, the inquest nor at the trial and their statements had not been disclosed to the defence. When the matter came on at the High Court Lucky J held: that in relation to the coroner there was no duty to call the named witnesses or to disclose their statements at either the inquest proceedings or the preliminary enquiry. The Court held that there was no breach of the provisions of sections 4 or 5 of the Constitution of Trinidad and Tobago and she dismissed the motion.
- [32] At the Court of Appeal the detailed and carefully reasoned judgment was given by De la Bastide C.J. (as he then was) with Hamel-Smith J.A. and Jones J.A. agreeing. The Court of Appeal held that at the inquest proceedings the Coroner was not obliged to call the witnesses or to disclose their statements. The Court of Appeal further concluded that there was also no obligation on the prosecution to call the four witnesses at the preliminary enquiry. But the Court of Appeal also held

that material which the prosecution had that is under a duty to disclose in an indictable case and should be disclosed at or before the preliminary enquiry.

- [33] Is there such an obligation on the Crown in Antigua and Barbuda to disclose this unused material? I would say yes. However, in looking at the consequence of the said non-disclosure in this particular case one has to consider whether it resulted in overwhelming unfairness and whether it amounted to a material discrepancy in the Crown's case. I agree with the Court of Appeal in the **Franklin** case when the Bench observed that the Appellants in that case had suffered no prejudice and they were not hampered in conducting their defence.
- [34] The Appellants not being satisfied with the findings of the Court of Appeal, appealed to the Privy Council. The Privy Council held that the fair trial provisions of the constitution did no more than codify the common law that an accused person should receive a fair trial.
- [35] The Board went further to say that undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of the statements on which the prosecution proposed to rely prior to the commencement of the trial. It said it was therefore desirable, where it is practicable, for statements to be provided. Further that in the circumstances, there was no risk of unfairness or injustice to either appellant, both of whom had fair trials. In concluding that the complaints of non-disclosure were technical in nature the Privy Council pointed out *"that in neither case was a request for disclosure made. Also, even if a request had been made and in accordance with the existing practice not complied with, there would have been no danger of either appellant being unfairly prejudiced in the preparation or conduct of his defence"*.
- [36] I am guided by this ruling and apply it to the case at bar. No evidence was put forward by either Defence Counsel that a request for the disclosure of the statement was ever made (until the trial had started).
- [37] I find that the technical non-disclosure did not cause any of the defendants prejudice in conducting their defence.
- [38] Finally, it is not every departure from good practice which renders a trial unfair. The crucial issue is whether there were such departures from good practice in the course of defendant's trial as to deny him the substance of a fair trial.

Is Ralph an Accomplice?

- [39] Part of the case for Peter Lugay as put forward by Counsel O'Kola was that Constable Ralph was an accomplice and that his evidence should be viewed with caution and essentially discarded. Counsel Daniel "piggy backed" on these submissions. It was Ralph's testimony that he was interviewed by ASP Quashie and Senior Sgt. Proctor and he gave a statement to them. He also

signed said statement. The Court has reviewed his testimony in great detail and notes that he said that he was initially treated as an accused person.

- [40] The Court finds the following facts: Ralph was a Constable and Isadore was a Corporal. So the senior officer on that operation was always Isadore. Indeed Ralph said in his testimony that *“the senior officer in the task force was always Corporal Isadore”*. It was he who told Ralph that they were going to look for Tiba, although he (Ralph) was on vacation. When they got to Brown’s Bay it was Isadore who gave Ralph the order to place the hand-cuffs on Tiba and to bring him to the back of the farm. When they were at the back of the farm it was Isadore who told Ralph to remove the hand-cuffs from Tiba and it was Isadore who urged Tiba to speak to Mosi.
- [41] From the evidence it was clear that Isadore was the senior officer and that he was the one giving out the orders and that Ralph was carrying out said orders. Further, Ralph said he heard Tiba asking for him (Ralph) for *“a break”*. He said he replied to Tiba that he was not in charge, the Corporal was the man in charge. This was not denied by Isadore. On the second occasion when Tiba asked for *“a break”*, the Corporal responded *“You begging him for a break, this operation never happened.”* From these facts the Court draws the inference that Corporal Isadore was in charge and Constable Ralph was following orders.
- [42] After the operation, two days later Ralph received WhatsApp messages from Officer Dorsett. When he called Isadore to find out why Dorsett was messaging him Isadore’s response was *“Nuh worry wid dat, I will take care of it”*. Again, clearly showing his authority in the matter. The man in charge so to speak. Was Ralph just carrying out orders or was he part and parcel of the plan to rob and beat Tiba?
- [43] Finally, the Crown made the point that if the Court were to consider that Ralph was an accomplice, who was he an accomplice to? Who did he act with? If the Court understands the case for Lugay as put forward by him and his Counsel he was never in the vicinity of Brown’s Bay on 25th April, 2017. Similarly the case for Mr. Isadore was that he too was nowhere near the scene on 25th April, 2017.
- [44] So Ralph was interviewed by two senior police officers and a statement was taken from him. Does this make him an accomplice? Did he know that the plan was to rob Tiba and take his property? Was this discussed and planned with Ralph? The Court cannot speculate and this was never put to him under cross examination. However, Ralph’s evidence was that when Isadore called him, he told him that he had information as to where Tiba was to be found. I am not satisfied or persuaded that Ralph had the requisite mens rea or information to make him an accomplice.
- [45] The Court and is entitled to draw certain inferences from the facts. It can be inferred from the facts that Ralph was following the orders of his superior officer. His evidence corroborates that of Tiba that marijuana was taken from his farm and loaded into a car driven by Isadore. From the facts, the Court also infers that there was no joint enterprise between Ralph, Isadore and Lugay. When the

evidence is viewed as a whole the Court can properly infer that Ralph did not know what the plan was.

- [46] The Court is also guided by section 42 of **The Criminal Procedure Act** Cap 117 which states: *No person offered as a witness shall, by reason or interest of any alleged incapacity from crime or interest, be excluded incapacitate a from giving evidence on the trial of any criminal case, or witness, in any proceeding relating, or incidental, to such case.*

Cross Examination of Constable Ralph

- [47] Under cross examination by Counsel Daniels, Ralph admitted that he was interviewed by Officer Quashie and Officer Proctor both putting allegations to him at Longsford Police Station. He said that they recorded a statement but he could not recall if he signed it. He also indicated that he did not know what became of the said statement. He admitted that the evidence about Tiba saying *"please, please leave something for me"*....and begging for a break did not appear anywhere in the statement he gave to the police. However upon the Court's perusal of the statement the Court does find that words to the effect *"please give me a break"* do appear in the statement. This was not a material discrepancy in the Court's view.
- [48] Under further cross examination Constable Ralph indicated that the Task Force reported directly to Inspector Stevens who was based at "C" Division and in charge of the Task Force.
- [49] He said that at Freetown Police Station he saw one officer on duty although when shown his statement he agreed that he had said that it was a two man shift but he never saw the second person, he only saw Constable Jeffrey.
- [50] He admitted that he made no notes in his pocket book about the operation, nor did he put a note in the station diary, nor did he inform Inspector Stevens about the said operation. Ralph also said that during his time on the Task Force Ray John was not in charge and that he was transferred from the Task Force upon his return from vacation sometime in June of that year.
- [51] Under cross-examination by Counsel O'Kola it was put it to the witness that he was not telling the truth and that he harboured bad blood for Isadore because they were both involved with the same woman. He admitted to being involved with the woman but did not harbour any bad blood towards Isadore because of it. He also suggested that he (Ralph) was somewhat jealous of Lugay because Lugay and Isadore had forged a close relationship and he admitted to this.
- [52] Ralph rejected the suggestion that he was working for Tiba and for Ray John and that he had never worked for a drug dealer named Randy. And he was forthright when he said that Lugay coming on the Task Force spoilt the relationship he had with Isadore. He was honest and forthright about this.

- [53] He admitted to going through financial hardship in 2015 and that he had to sell his vehicle but rejected the suggestion that he was doing work for drug dealers. He also admitted to taking up a solar charger/battery pack which belonged to Tiba and that Isadore had called him about the said charger and he had returned it to Isadore. Under cross examination he also admitted that he was interviewed by Quashie and Proctor and this time he said that he did sign the statement.
- [54] Under cross examination he further stated that when Isadora picked him up, Lugay was already seated in the vehicle. Counsel suggested to him that his version of events was concocted and this he denied. He was interviewed under caution at Longsford Police Station and he agreed that Peter Lugay's name was not mentioned
- [55] I have taken into account the cases supplied by Counsel O'Kola namely **Davies vs DPP [1954] AC 378 and Tillett (Dean) vs R (1999) 55 WIR 104 (Privy Council), Belize**. In the first case two persons entered a clothes shop. The first left the shop with some clothes which they had selected and the second produced a gun and held up one of the assistants. The second was allowed to leave the shop without paying. As they left, they were approached by a man with a gun; the first dropped the clothes and made his escape. In the course of an incident the second person shot the man with the gun. The appellant was charged with murder. The first person (who was himself charged with robbery) was called as a witness. He claimed that the appellant was the second person involved with the robbery and that he (the witness) knew him well; they had gone to the shop together, but the witness was not part of any plan to rob or to kill and had not known that the second person had a gun. The appellant denied that he knew the witness, denied involvement with the incident and put forward an alibi defence. The appellant was convicted of murder and his appeal to the Court of Appeal was dismissed. On further appeal to the Privy Council on the grounds (inter alia) that the witness should not have been called to give evidence as he was himself awaiting trial for the robbery and no direction as to accomplice evidence had been given by the trial judge. In that case it was advised that the appeal be allowed. The Court would distinguish the case at bar for the following reasons 1) Ralph was following the orders of a superior officer 2) he did not possess the requisite *mens rea* for all of the Counts on the Indictment.

Isadore's Evidence

- [56] Mr. Marcus Isadore was given his three options and he opted to give sworn testimony and so subjected himself to cross examination.
- [57] It was his testimony that he did not know anything about the allegations. He said he was not at KFC between 1st January, 2017 and 31st March, 2017 and further he was not one of the police officers who were at Brown's Bay on 25th April, 2017. He indicated that he did not know why he had been dragged into the allegations. He said that he had refused to participate in an identification parade because it was his right to refuse.

Peter Lugay's Unsworn Statement from the Dock

- [58] In his unsworn statement the defendant, Peter Lugay denied the charges on the indictment. In his statement he said that he knew Marcus Isadore and that that he started working with Corporal Isadore in 2016 and was transferred some time in 2017. He said that at the time of the incident he was not there. He said there was a blunder and he reported it. He went to meet with Sgt. Proctor and he put questions to him and he answered said questions. He indicated he told Proctor that he did not go to Kentucky Fried Chicken with Isadore, he was willing to do an identification parade and that he was willing to hand over his phone. He said he was questioned a second time and the police had copies of charges and at that stage he was advised not to cooperate with the police investigation. He doesn't know how he ended up in this matter. He said his relationship with Isadore was strictly about work.
- [59] He also said that he too refused to participate in an Identification Parade as it was his right to refused to do so. I have warned myself that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence. This is what the cases say. And so it is a matter for the tribunal of the facts to decide how much weight to give to the testimony of Peter Lugay and how credible I find his statement to be. Isadore's testimony was a bare denial of all of the allegations and I did not believe him.

Delay in making the report

- [60] It is most important to appreciate fully the effects of delay on the ability of a defendant to defend himself by testing the prosecution evidence or bringing forward evidence in his own case, to establish a reasonable doubt about his guilt.
- [61] Counsel for Marcus Isadore in his closing address urged the Court to view the delay in making a report as a significant factor and questions the truthfulness of the report due to the delay. In examining the length of the delay of three months, from the incident at Fort Road to the 25th April, 2017 the Court does not find it significant. In relation to the delay in reporting the matter of 25th April, the delay was three days.
- [62] Does the delay in making the report to the police make the report any less true? I have warned myself to take into consideration this delay of three months in the first instance and then three days but I do not find it substantial nor do I find that the delay in making the report resulted in any prejudice to defendant Lugay nor defendant Isadore.

Police Interview – Peter Lugay

[63] In the interview conducted by ASP Quashie on 9th May, 2017 when asked about the allegations put to him he responded that *“he did not know anything about that”*. At question 16 he was asked: at what stage do you inform your SPO that you made a bust and his response was *“when we find drugs we would call the SPO. The SPO would know what operation we going on and what not”*. When asked if he had ever deviated from this procedure, he responded *“no”*. At question 27 he was asked if he knew Noel Johnson aka Tiba and he said *“no”*. Further in the interview he said that he did not know where Brown’s Bay was and he could not recall the last time he was at Freetown, at question 101 he was asked about his whereabouts on 25th April and he said he could not recall. He said *“I can’t recall just like that”*. The Court bears in mind this interview was conducted on 9th May and the allegation took place on 25th April.

[64] In his interview with Senior Sergeant Proctor tendered as **MP#1** he indicated that he did not know anything about the allegations put to him. He indicated that he was assigned to Task Force Dockyard and that his SPO was ASP Ray John. In his interview he said that the Task Force was not assigned a cell phone but that he knew the numbers for Isadore which were 723-3345 and 764-9056. He again denied knowing Tiba. Lugay in his interview said that he said he transferred in March 2017.

[65] To the question: when last you were in Freetown he responded that he couldn’t recall

To the question: do you know where Brown’s Bay is?

A: No Sir

Q: when last did you go to Freetown?

A: I can’t recall

Q: can you recall where you were on 25th April?

A: I can’t recall

Q: Why didn’t you participate in an ID parade?

A: It was my right

Q: why didn’t you give the police your pin to get into your phone?

A: It was my right to do so

Police Interview-Marcus Isadore

[66] In his police interview dated 9th May, 2017 and tendered as **MP#2** in response to the questions:-

“Q: What are your phone numbers?

A: I was using at that time 764-9056 that was the Inspectors IPhone. I was using 723-3345 that's the phone I was using during that period

Q: when was the last time you have been in the Freetown/Brown's Bay area?

A: I can't recall”

[67] He said he had no idea who Bertrand Miller also known as Mosi was and he couldn't recall the last time he was in Brown's Bay. He denied making any calls to Tiba's phone and said that he did not recognize Tiba's number. He said he gave no one his phone code and that only his children had access to his phone.

[68] When it was put to Isadore that on 10th February he reached inside Jeff Lewis' vehicle and helped himself to the bag of marijuana he denied knowing anything about the allegation. He also denied writing his name on a paper and giving it to Lewis with the instruction to tell Tiba to call him. When he was asked to explain in detail his whereabouts on the 25th April, 2017 his response was that he could not recall. How long were you in the company of Lugay and Ralph? I can't recall. Where were you when you were in the company of Lugay and Ralph? Response was I can't recall.

[69] In assessing the responses by Lugay and Isadore in their police interviews I concluded that they were both lying. Their responses caused the Court to wonder why the Crown's witnesses would concoct such a story to implicate these two defendants. The Court has concluded that the witnesses have not concocted a story and that their version of events rang true and credible.

Identification

[70] Counsel for Isadore has entreated the Court to find that the Crown witnesses have failed to identify his client. On the incident of 25th April witnesses gave general descriptions i.e. *“one is thick and short and one was tall with some body”*. On the day in question Tiba said he saw two police officers approaching the jeep on Fort Road. He said one was *“tall and thick the other one was shorter but had a little body”* but they both were wearing dark clothes with Police written on it. He then turned and walked away. In applying the **Turnbull**³ guidelines and warning I have warned myself of the quality of the evidence. The Court considers that the time of the first allegation was early evening. The evidence of Jeffrey Lewis supports that of Tiba. He said *“when he reached Kentucky he parked and Tiba came out, he left the bag he had on the passenger side on the ground and said he was going to check someone. He was waiting on him, two persons approached and said they are police and one of them stretched and took up the bag on the ground and they asked for the guy who was sitting in the passenger side. I told him he had to come back and he took the bag.”* Lewis

³ (1977) QB 224

said further that *"The person on his side and who took out the bag was dressed in black, had a little body, taller than me and was dark in complexion"*. They both said the man who was seen on the first occasion was *"tall and strapping"*. He could not recall which of the men gave him the number.

[71] Mosi also testified that on 25th April, 2017 in Brown's Bay *"there was a tall one and a short one. They wore a uniform with police written on the back"*. Before he escorted them out they asked *"how many of them were there"*. So while it was clear, the Crown witnesses were not able to identify them by name, they are clear in their testimony and general descriptions that one was tall with a little body and one was younger and shorter. The general description did fit those of Isadore being the taller one and Lugay being the younger shorter one. In any event on 25th April, 2017 Ralph and Officer Jeffrey puts them both at the Freetown Police Station searching for the police vehicle key. Tiba also said in relation to the marijuana taken from the jeep at KFC *"one ah dem tek it and send message on mi phone, and ah dem come inna the bush. Ah de same police dem."* I find no merit in the suggestion that the quality of the evidence was weak.

[72] The Court has warned itself that in the absence of an identification parade the Court would require to approach it with great care: **R vs Graham [1994] Crim LR 212** and **Williams (Noel) vs The Queen [1997] 1 WLR 548**. The Court has assessed the identification evidence and has found that it has merit and is supported by the facts as set out in paragraph 72 and 73 above.

Task Force

[73] Much has been said in this case about the Task Force or tactical unit. Officer Ralph said ASP John never took over the task force while he was there. He said that in April 2015 the officer in charge was Murphy and that Robbins took over afterwards. He agreed that he did not report any operations to any of these supervisors. Officer Ralph also indicated that Peter Lugay was transferred sometime after his firearm was surrendered. Isadore was transferred early April 2017.

[74] The witness Ray John was called as a witness for Peter Lugay. It was his testimony that Isadore he was not working in the Task Force at the time of the allegation in April 2017. He testified that after that Task Force was disbanded there was a Task Force that was sent from SSU (Special Services Unit) which he, Ray John had authority over. He indicated that the two defendants worked with him on a Task Force and that they both did a very good job on the Dockyard Unit around sailing week. He said that there were other officers who were brought over into the Task Force and these officers included the defendants. On 25th April the witness said he was in charge of a Task Force and that Isadore was working in All Saints and Dockyard area. He said he could not recall if he was directly transferred to the Task Force. The witness when asked said he did not know Officer Ralph. The discussion on the Task Forces in my view did not take the case for Isadore or Lugay any further neither did it materially damage the Crown's case.

Credibility of the Witnesses

- [75] The witness Officer Ralph a police/fire officer with 15 years of service said he had known Lugay for two years prior to the incident. He also testified he knew Isadore for 15 years and that they worked together on the Task Force. I have been urged by Counsel O’Kola to find his evidence as being unreliable and not credible. The Court reminds itself that:-
- He admitted to taking up the battery pack/charger which belonged to Tiba
 - He admitted to knowing Tiba
 - He admitted to being somewhat jealous of the relationship between Lugay and Isadore
- [76] I found him to be forthright and credible despite Counsel for both defendant’s insinuating that he had an axe to grind and that he worked for drug dealers.
- [77] Significantly, Counsel for Isadore did not challenge nor suggest to Officer Ralph that his client was never there on 25th April and that Ralph was lying or making up a story. This evidence lies on the record as being unchallenged.
- [78] The cadre of police witnesses called for the Crown all came across as credible and forthright. The Court had no difficulty in believing them. I refer to Corporal Kerry Zachariah for example. It was his testimony that Tiba had told him certain things. He thereafter took Tiba to the hospital for a medical examination. What he was told corroborated the testimony of Mosi and the observations of Doctor de Castro. I also found the testimony of Tiba, Mosi and Jeffrey Lewis to be credible and cogent. Officer Dorsett called as a witness for the defendant Lugay, indicated that he knew Tiba and that he is his cousin. He met him in town crying after the incident and he advised him to make a report to the Police. He also gave him Ray John’s number which corroborated what Mosi and Ray John said in relation to receiving a call about the incidents. I will examine the witness called for Marcus Isadore in relation to his alibi later on in this ruling.

Lies Direction

- [79] In a Jury Trial the Judge would warn the jury that a lie is only evidence of guilt if they are satisfied that the lie was made deliberately. In a Judge Alone Trial similarly I have warned myself of this. Further as the trier of the facts I have reminded myself that people might lie not because they are guilty, but for other reasons (for example, to bolster a weak case, to protect someone, out of panic or to cover up disgraceful behaviour). I have also warned myself that if I find that the lie alone is insufficient evidence, I should not rely solely on the lie but should also look to the other evidence to corroborate guilt. In this case in relation to both defendants there is a mountain of evidence which can corroborate their guilt. In his police interview Isadore said that he had not been present at KFC nor at Brown’s Bay in April 2017. I found this to be a lie and I found ample evidence in the Crown’s

case to point to his guilt. The Court found the same in relation to Lugay as he too denied being in Brown's Bay on 25th April even though he was put there by Officer Ralph and he was put at Freetown Police Station by both Ralph and Jeffrey.

Good Character Direction

- [80] Both Lugay and Isadore are serving policemen who are on suspension and are not known to the Court. Both defendants are of good character and unknown to the Court. The Court therefore has to direct itself in the following terms. As is well known, the good character direction contains two limbs: the credibility direction, that a person of good character is more likely to be truthful than one of bad character; and the propensity direction, that a person of good character is less likely to commit a crime, especially one of the nature with which he/she is charged, than a person of bad character. The Caribbean Court of Justice delved into this in Court of Appeal decisions from Belize namely **Gregory August and Alwin Gabb vs. R**⁴. Justice Wit had this to say in that case: - *"As far as the "good character" defense is concerned, it is unnecessary for me to deal with it as I have already on substantive and genuine grounds concluded that the conviction of August is unsafe. More fundamentally, however, I am of the view that this defense is quite artificial and, frankly speaking, grossly overrated. To start with, it is a misnomer. I have directed myself also that the fact that a defendant has a clean criminal record does not say much, if anything at all, about his "character" (although this might be different with a "bad" criminal record)".*⁵
- [81] I also directed myself on the character of the witnesses. The Crown's witnesses all appeared to be of good character and seemed credible. I have directed myself on the fact that the witness for Lugay ASP Ray John is an officer on suspension facing certain allegations in the Criminal Court. However he remains of good character.

Circumstantial Evidence

- [82] When the Crown opened its case, Mrs. Gittens indicated that they would be relying on certain pieces of circumstantial evidence. The instances of circumstantial evidence relating to Marcus Isadore the Court found as follows:-
- [83] As it relates to **Count One** and **Two** which deal with Isadore, the following are the pieces of evidence which the Crown relied on:
- the police officer who approached the vehicle on the night of a date between 1st January and 31st March and took the drugs out of the vehicle at KFC had a general physical description that matched that of Isadore. The witness Tiba and Lewis both

⁴ CCJ Appeal Nos. BZCV2015/001 and BZCR2015/002.

gave a general description of him being “*tall and strapping*”. The man was clothed in the type of police uniform that Isadore wore at the time Special Services Unit (SSU).

- Jeffrey Lewis was given a number to call when he met up with Tiba again. The officer was Isadore who indicated that he wanted to reach Tiba (that number belonged to Isadore).
- Pestering messages were sent from Isadore's number to Tiba's phone wanting to meet up with him. This is in keeping with the police officer who gave Lewis the number in an effort to reach to Tiba.
- Isadore was one of the officers who went to Freetown Station asking about a man in Freetown and wanting to borrow the police vehicle. He was also one of the persons who carried out the search for the police vehicle key. There was direct evidence from Ralph and Officer Jeffrey who placed him at the Freetown Police station on the morning of 25th April.
- We then have direct evidence from Ralph that Isadore was at Brown's Bay and after ascertaining who Tiba was he told him that he had been looking for him for a while. He also told Tiba that he had been sending messages on his phone. The Court therefore infers him be the person from KFC who took the bag of marijuana from Lewis' vehicle.
- A message was sent to Tiba from Isadore's phone 4 days after the Brown's Bay incident [mobile forensic report] to ask if he wanted money.
- The same person also called and spoke to him on the phone and apologized for his “*partner mashing up Mr. Johnson's back*” and the promise was made to get back his phone charger/solar battery pack.
- Ralph gave evidence that Isadore called and asked him about the charger/solar battery pack and told him to bring it to him which he did. It was never returned to Tiba.

[84] In relation to the defendant Peter Lugay and **Counts Two** and **Three**, the circumstantial evidence is set out below:-

- Officer Jeffrey's evidence that Lugay was with Isadora that morning, at Freetown Police Station when there was the search for the vehicle key.
- Ralph's evidence that the Brown's Bay incident took place on that same day that the search for the key took place and that Lugay was with him and Isadore at Brown's Bay.
- Ralph having identified Lugay, the evidence of Tiba as to the fact that it was the younger shorter one that beat him in his back.

- the description of the gun which matched the photo of the firearm taken from Lugay.

[85] The evidence as it related to his participation in the taking of the drugs at Brown's Bay is from the direct evidence of Ralph taken together with the evidence of Mosel and Tiba who both spoke of the role that the younger, shorter officer played. The evidence was viewed as strands in a cord which when taken together formed the elements of the offences and so proved the guilt of both defendants.

Hostile Witness

[86] When Mosi was called to the stand he made it very clear that he was reluctant to testify. The Crown made an application to treat him as a hostile witness which was objected to by Mr. O'Kola, however the objection was overruled. When he finally testified he indicated that he heard the policeman ask him if his name was Tiba and one grabbed Tiba behind his neck so that he fell on his back. He said he could not recall that he told the police in his statement that they hit him with a shiny pistol. He said he told the police *"don't harass him, don't do the man like that."*

[87] So though the Crown deemed the witness to be hostile, his testimony was not in contradiction to his deposition. It's just that he was reluctant to give his evidence. The witness gave no evidence which was favourable to either defendant. His testimony was corroborating that of Tiba in many respects and cogent.

Did the Defendants receive a Benefit?

[88] Counsel for Lugay has posited that the Crown had failed to prove and show an essential element of the offences in Courts One and Two. It is Counsel's contention that if indeed the drugs were taken from Tiba, the Crown has failed to prove that the defendant received or obtained a benefit. The Crown on the other hand posits that benefit does not have to be proved as it is the part of the particulars which states for the benefit of him or another is proven simply by the fact that they obtained the property. There is no requirement for the Crown to prove what that benefit is. The Court agrees with the Crown in this respect and notes that the evidence clearly shows the defendants taking the buckets of marijuana and leaving with it. Ralph testified to this fact as well as Tiba and Mosi .

[89] The facts as the Court finds them are that the two defendants did take the cannabis from Tiba on 25th April and that when they did so they were acting unlawfully as they had no intention of 'booking in' the drugs. It was a purely selfish, dishonest and premeditated act as Isadore told Tiba *"this operation never happened"*. The Court also finds that Isadore took the marijuana from Jeffrey Lewis' vehicle as set out in the particulars of Count One on the Indictment.

The Telecommunications Evidence

- [90] I now turn to the telephone evidence. This evidence was given by Ms. Merchant who was deemed an expert having given her academic qualifications and her experience. She testified that Zachariah submitted a pink INO cell phone to her and that phone was examined. She was able to tell the Court that the phone had received a number of telephone calls and messages from a number and this number was the number used by Marcus Isadore.
- [91] Corporal Zachariah also testified that he retrieved a pink paper from Jeff Lewis and that pink paper bore a telephone number which was actually Marcus Isadore's number. Now, on the stand Lewis was not able to confirm that his handwriting appeared on the pink paper but Corporal Zachariah was able to say that he asked Lewis to sign it and that he Zachariah also signed the said pink piece of paper which was admitted into evidence.
- [92] I agree with Counsel O'Kola that the Crown could have obtained cell tower evidence which would have shown the exact location of Isadore's cell phone on 25th April, 2017 (even though Isadore was not his client). In any event just as I would warn the jury about not speculating I have so warned myself against it. The evidence of Mr. Lewis was that he was given a number to call whenever he saw Tiba again because the police officer wanted to reach Tiba (that number is Isadore's).
- [93] Messages were sent to Tiba's phone from Isadore's number, wanting to reach him. This is in keeping with the police officer who gave Lewis the number in an effort to get to Tiba. The evidence from Officer Merchant and the report submitted showed numerous messages from phone number 723-3345
- [94] On the second day of his testimony Isadore said he had lost his government phone and that he had handed over his personal chip to the unit. This is a chip that he said he had been using for over 20 years. (This was never mentioned to the police in his interview). The evidence is that Isadore gave Jeffrey Lewis a number to call and that number was Isadore's. Isadore then kept on harassing Tiba and asking him to meet up with calls and messages from his (Isadore's) number. This differs from what he told the police (see question 12 on the interview). Tiba, ignored the calls and messages and so that conduct is what leads us to Brown's Bay on 25th April.
- [95] The messages from Isadore's phone were very incriminating. The message linked Isadore to **Counts One and Two**. He testified that four days after he said his government phone had been lost, he handed over his personal chip to the task Force Unit. Why? He evidence is not credible nor believable.

Admission into evidence of the pink paper with the telephone number

- [96] The Court finds evidence is relevant if it is logically probative or disprobative of some matter which requires proof. In **DPP vs Kilbourne [1973] AC 729; (1972) 57 Cr App Rep 381**, Lord Simon of

Glaisdale explained the principle in finer detail. He said, in part, at page 756: *"Evidence is relevant if it is logically probative or disprobative of some matter which requires proof.... It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable"*.

- [97] To link logical probativeness with relevance rather than admissibility (as was done in **Sims ([1946] KB 531; (1946) 31 Cr App Rep 158]**) not only is, I hope, more appropriate conceptually, but also accords better with the explanation of Sims given in **Harris vs. Director of Public Prosecutions [1952] A.C. 694, 710**, *"evidence is admissible if it may be lawfully adduced at a trial."* I say this to highlight the admission of the pink piece of paper on which Isadore wrote his number on for Tiba to call him.

Third Count-Assault

- [98] The Court heard evidence from Officer Jacob who indicated that Peter Lugay was issued with a 9mm firearm. He said that as a result of certain information he contacted Isadore and told Isadore to contact Lugay and that both were to hand in their firearms and this was done. The witness Tiba indicated that he was assaulted by the shorter man with a firearm, a chrome coloured firearm.
- [99] His evidence was *"the shorter police came to me with a chrome silver gun and came and took me from Ralph and he said "ah you name Tiba ah you me a look for so long" and hit me with the gun in my back. Then he asked me questions and every question he asked he hit him with the gun and told me that he disappeared and that they would kill me and dig a hole and bury mi in the bush"*.
- [100] Tiba's evidence continued that *"The shorter police came to me with a chrome silver gun and came and took me from Ralph and "said ah you name Tiba ah you me a look for so long" and hit me with the gun in my back. Then he asked me questions and every question he asked he hit me with the gun and told me that he disappeared and that they would kill me and dig a hole and bury me in the bush."* He (Tiba) said *"God nah sleep"*.
- [101] The Crown also supplied further evidence to support the fact that Tiba had been injured. Jeffery Lewis in his testimony said when he saw Tiba in April *"I could see Tiba had some form of injury in his back area. He said he did not see anything until he got home. He saw a swelling in his back"*.
- [102] Officer Ralph said he did not see Lugay hit Tiba. However he did say that when Tiba was instructed to dig up and haul up the buried buckets of marijuana he said Tiba asked for help as *"his side was hurting him"*. The words ascribed to Tiba were *"officer can you help me to pull the rope? My side is hurting. I am feeling pain"*. Ralph then said that he and Lugay pulled the contents from the hole. Further Officer Dorsett indicated that when he saw Tiba, his cousin in town he was crying.
- [103] Now, as the tribunal of the facts I asked myself whether this evidence was shaken under cross examination. I did not believe so. Lugay used his firearm in the furtherance of the commission of an

offence. He was acting in an unlawful manner when he assaulted Tiba with his firearm. When Lugay and Isadore came upon Tiba they said to him *“you know how long we looking for you?”* That evidence came from Tiba himself and ties in with him ignoring the numerous messages that had been sent to his phone by Isadore.

- [104] The Medical Doctor’s observations corroborated Tiba’s testimony. The Doctor indicated that after she had examined Tiba she concluded that the patient had blunt trauma to the back and she opined that the injuries were caused by a blow to the back with a blunt object consistent with the report that was made. Mr. Daniel did not cross-examine the Doctor but under cross-examination by Mr. O’Kola it was put to her that she was not being truthful.
- [105] The Court concluded that the firearm was used during the commission of the offence. The Court can quite rightly infer that the manhandling of Tiba was part of an effort to instill fear and compliance on him for him to part with the drugs which they went there to take and to “keep quiet” about their illegal activities.
- [106] Defence Counsel for Lugay has urged the Court to find that the fact that Lugay was performing his duties as a police officer he could not be guilty of **Count Three** on the Indictment.
- [107] the evidence before this Court and the facts as I found them were that they (Isadore and Lugay) went to take Tiba’s property and that Lugay used his firearm to hit Tiba repeatedly. He was threatened with his file being pulled and he retorted *“go ahead, I don’t know what file you are talking about”*. As the Crown pointed out, the evidence from Tiba was clear, cogent and compelling and the Court agreed.

Discrepancies

- [108] I have warned myself that every case that comes before the Court will have discrepancies and inconsistencies. It is for me as the trier of the facts to decide whether the discrepancies are material and how much weight is to be ascribed to some of these discrepancies. The Court found there to be discrepancies on both sides. I have also warned myself that people hear and see things differently. I have further warned myself that there are often innocent discrepancies in the testimony of a witnesses. Such discrepancies do not necessarily mean that I must reject the entire testimony of a witness. The Court has to examine the discrepancies to see whether they are important, or whether they are unimportant. If the discrepancies are minor or unimportant, I may decide nonetheless to accept the witness’ testimony. If, however, the contradiction or the inconsistency is major, I may decide to treat the witness as unreliable and to decide whether to accept or reject the testimony as unreliable.
- [109] I am not persuaded nor convinced that the evidence of Tiba, Mosi and Constable Ralph’s evidence is so diametrically opposed to make the discrepancies material and fatal to the Crown’s case. Some of the discrepancies as found by the Court are set out below:-

- Ralph was picked up by Isadore and that Lugay was already in the vehicle and that Isadore was driving a blue Tiida. Both were dressed in their blue task force uniform. The mechanic says that this was impossible because the said blue Tiida was parked at his home.
- Ralph said that the three of them went to Freetown and that they were trying to locate the key for the vehicle. Isadore and Lugay said that this never happened.
- Ralph said he saw Constable Jeffrey at the Freetown station, Constable Jeffrey said he never saw Ralph.
- Lugay said he can't recall being at the Freetown Police Station, two weeks after the offence occurred (in his police interview).
- Ralph indicated that he did not observe Peter Lugay assaulting Tiba while in Brown's Bay,
- Ralph said he was picked up in Isadore's blue Tiida car. The mechanic however said that the said car was at his mechanic shop in April 2017.

Alibi

- [110] Defence Counsel for Marcus Isadore called Glenroy Joseph as a witness. He indicated that he had been working on Isadore's blue Tiida since 2017. He indicated that the car was towed to his shop and he observed that the vehicle had an electrical problem. He said the car remained in his custody through April 2017. The mechanic could not remember how many other vehicles he had at his premises but he remembered the vehicle was at his shop at the time of the incident late between March or early April. Under cross-examination by Counsel he indicated that he had known the defendant Isadore since 2016.
- [111] it was his evidence that he had a client/mechanic relationship with Isadore and that he had worked on Isadore's other vehicle in late in April or May and he had carried out maintenance work on it. He said that the jeep had an accident thereafter and he has not seen it since. He did not consider Isadore as a regular customer. In October 2018 he could not say which vehicles he was working on, nor July 2019 because he did not keep records. He could not recollect which vehicles he worked on in 2018 because he said he did not keep records on "stuff like that". He said that Isadore came to him to ask him to be a witness for Court about him working on the blue Tiida. He testified he could recall when he worked on the blue Tiida and when the car was by his shop. Under further cross examination by Counsel he insisted that he remembered when the car was there. However, as noted before, he admitted that he kept no records to that effect. He said he was having relationship issues at the same time the car was at his garage and so it stuck out in his memory. He testified the car was there for about a month. It was suggested to him that the timing was given to him by Isadore and he disagreed. The witness came across as rehearsed and he

seemed to be in Court solely to assist Isadore. The car issue was first raised as being at the mechanics shop on the second day of Isadore's testimony. It was in the Court's view contrived and I did not find the witness credible nor believable.

- [112] Ralph was adamant about a blue Tiida. It was never put to Ralph that it was not a blue Tiida by Defence Counsel

Verdicts

Marcus Isadore- Counts One and Two

- [113] Having reviewed the facts as I have found them and having applied the law, I am of the view that the Crown has proved its case beyond a reasonable doubt. I did not find Isadore, Lugay or Mr. Charles, the mechanic credible or believable. While I reminded myself throughout the deliberation on this case that Lugay nor did Isadore have anything to prove they both gave evidence. Starting with Mr. Isadore I found his whole account to be nothing but a tissue of lies. It was in my view patently clear that he was on the scene at Kentucky on Fort Road. He gave Lewis a number for Tiba to call him when he next came across him. The number on the paper was Isadore's number. The harassment then started. I find **Count One** on the Indictment proved against Marcus Isadore.
- [114] The messages from Isadore's phone to Tiba's phone can only be classified as harassing and bullying. The Court has warned itself not to speculate. However the evidence allows me to draw inferences and the Court infers that these police officers have been preying on persons such as Tiba.
- [115] The Court discounts the allegation of a "fit up" by Ralph, Tiba and Mosi as put forward by Counsel O'Kola. Why would these men make up a story of such magnitude? I do not believe that this was so. They were robbed of their marijuana and Tiba was hit in his back by Lugay. The property obtained being the cannabis is the benefit they both derived for themselves or another. Therefore, the Court finds that the facts and the elements of **Count Two** are proved against Isadore and Lugay.

Peter Lugay- Counts Two and Three

- [116] **Count Three**, I found this defendant to be as equally mendacious as his co-defendant. His unsworn statement from the dock was also a web of lies and deceit. He was there on 25th April at Freetown Police Station searching for the key to the police vehicle. Officer Jeffrey put him there as well as Officer Ralph. I am convinced and persuaded that Lugay hit Tiba in his back causing him injury which the doctor said was caused by blunt force. Further Mosi said he saw the younger officer slam Tiba in the ground. **Count Three** is proved against Peter Lugay.

- [117] **Obiter:-** Now, the Court recognizes that the cultivation of cannabis is illegal especially if done on a large scale. However that does not mean that rogue police can take it upon themselves to take away cannabis and not log it in and then turn around and say “this operation never happened” on the assumption that these two Rastafarians would not report the incident. But they did report it and that is why we are here today. Counsel for the Crown in her closing said that Isadore became greedy, he wanted more and so he went with the other two to Freetown Police Station and then on to Brown’s Bay.
- [118] This case is a despicable one and these two police officers should be ashamed of themselves. But I suspect this is just the tip of the iceberg. I will say nothing further at this stage but will reserve any further comments for the sentencing phase of this case suffice it to say that I quote Harris J in the case of **Kevil Nelson vs. The Queen**⁶ where he said referring to the offence and behaviour of the defendant who was a police officer *“In fact, it is peculiarly objectionable when one considers that he is a Police officer with the duty to protect and serve the public and to do so with a level of professionalism. Crimes like this set back the all-important but already deteriorating relationship between the Police and the citizenry”*.
- [119] both defendants will be remanded into custody until sentencing on 29th April, 2022. I will order that Pre-Sentence Reports be prepared by the Probation Department prior to sentencing.

Sentencing Remarks

- [120] The matter was adjourned on 25th March, 2022 for the Crown to provide its sentencing brief and for the Pre-Sentence Reports to be prepared. I am grateful to the Crown for their detailed brief which was received via email on 22nd April, 2022.

The Law and Sentencing Guidelines

- [121] The offence of corruption for which the defendants were convicted is governed by **section 3 (1) (b) of the Prevention of Corruption Act, 2004**. The penalty for the offence is found in section 8 of the Act which provides:

8 (1) A person who commits an offence under sections 3, 4, 5, 6, or 7 is liable upon conviction on indictment to a fine not exceeding one hundred thousand dollars and to imprisonment for a term not exceeding five years or, in addition to the penalty specified above, the court may do any or all of the following –

- (i) order the person convicted to pay the public body and in such manner as the Court directs, the amount or value of any property, benefit or advantage received by him;*

⁶ ANUHCRA2009/0015

- (ii) *forfeit his right to claim any non-contributory gratuity or pension to which he would otherwise have been entitled;*
- (iii) *declare any right under any non-contributory pension scheme to which he is entitled to be forfeited.*
- (iv) *declare him to be disqualified from holding any public office for a period not exceeding seven years from the date of conviction for the offence;*

Mitigation and character witnesses - Marcus Isadore

Inspector Charles Jack

[122] This witness the Reverend Dr. Charles Jack said he lived in Golden Grove and had given the Antigua and Barbuda Police Force 36 years of service. He said he knew Marcus Isadore and had worked closely with him finding him to be meticulous very committed, respectable and that he had a great deal of integrity. The witness said he admired him for being a team player and that he was able to send him out in the community to different church groups teaching the youths how to operate fire equipment. When Isadore went on these community visits the witness indicated that he received good reports thereafter. The witness said that the defendant exhibited exceptional leadership qualities. In terms of his leadership he was sometimes placed in charge of a shift and the shift would comprise of 17-18 persons. His discipline was good and he had no problems with him while he was his supervisor. The Reverend Dr. Charles indicated that he had played a part in his promotion and he had never known him to be involved in any drinking or smoking. He said in relation to the matter before the Court he was shocked and that he felt the offending was out of character for Marcus Isadore.

[123] Counsel for the Crown asked the witness how long ago had he supervised Marcus Isadore and he responded that it was 20 years ago. He added that when he learned of the allegations against Isadore he was shocked and surprised. He declined to use the word "disappointed" when it was suggested to him.

Mitigation and Pre-Sentence Report

[124] Counsel referred to the report highlighting the positive aspects of his client's life pointing out that he was a community minded and family man. The report was prepared by Mrs. Weston-Williams and indicated that the defendant had worked for the Antigua and Barbuda police force for 25 years attaining the rank of Corporal, having migrated from his home island of St Lucia. He drew to the Court's attention to the fact that due to his client's special skills he was transferred to police headquarters to join the Special Services Unit (SSU) where he would embark on operations. Counsel submitted that his client had dedicated himself to public service and referred to the interview with Mr. Elis Weaver who described the defendant as being an excellent employee who had good relations with his colleagues. Mr. Weaver expressed shock at the matter before the Court and said that it was out of character for Isadore. Further interviews revealed that persons expressed shock and disappointment at the conviction of the defendant. Counsel has asked the Court to be cognizant of the age of the defendant and that the *'foundation of the family had been*

shaken' and that Marcus Isadore would be starting his life over from scratch. He asked to Court not to impose a custodial sentence but to consider a fine.

Mitigation and Pre-Sentence Report - Peter Lugay

- [125] This pre-sentence report was prepared by Mrs. Cornelius-Hector. The author interviewed 5 persons including the defendant. All interviewed stated that they were surprised at the defendant's offending and that they found it to be out of character. Significantly however Mr. Caesar stated that he did not believe Lugay was the ring leader and that he had succumbed to pressure saying that *"if he was involved he was not the lead"*. This also ties in to the conclusions on the last page of the report where the author reports that those who were interviewed *"believed that there must have been some influence and pressure applied if that type of behaviour emanated from the defendant."*
- [126] At page 2 in the last paragraph of the report the author states *"He (Lugay) continued that there were many incidents that occurred that had him second guessing himself if he should stay on the tactical team. He further explained that after one incident in particular he made a report to the Supervisor Police Officer (SPO) but nothing was done about what happened. He stated that he was cautioned about reporting a senior officer. He explained that the police force is all about peer pressure and if you don't comply with orders you are branded as a punk and others will make a laughing stock of you. He shared that while after a while certain thing (which he did not disclose) started happening and the tactical team was dismantled"*. It appears from his interview that there was a lot weighing on his mind but which he stopped short of revealing. On page 3 of the report in the second paragraph he says to the author Mrs. Carolyn Cornelius-Hector *"that things were happening"*. The Court finds that full and frank disclosure to the Probation Officer would have enured to his favour and would have been viewed favourably by the Court.
- [127] The Eastern Caribbean Supreme Court has not drafted Sentencing Guidelines as yet for corruption offences in this region. However the Court can apply the learning of the guidelines and cases that enshrine the principles of sentencing.
- [128] The Court will first have to consider the consequence of the offence by assessing the harm caused by the offence. This may include the fact that it was multiple offences in relation to Isadore and that their actions are likely to damage the public's confidence in the Royal Police Force of Antigua and Barbuda at a time where public confidence is not at its highest. The Court would then consider the seriousness of the offence by assessing the culpability of the offender, for example, that the second incident was a group activity. From those considerations the Court can find the starting point of the sentence. The Court has determined that a starting point for the corruption Counts will be both custodial and financial. The defendants have already spent one month and two weeks in custody.
- [129] The next step would be the consideration of the aggravating and mitigating factors and the Court finds the following:

Offence

Aggravating Factors

- a. The first offence when the marijuana was taken was at a public place, i.e. the parking lot of KFC (*Isadore*)
- b. Breach of trust given that police officers are sworn to protect and serve (*Isadore and Lugay*)
- c. It can be inferred that Mr. Isadore took steps to prevent Mr. Johnson from making any report by his offer of money (*Isadore*)
- d. There was some amount of planning when one looks at how the first incident was committed with the lure of a “Jamaican man” wishing to purchase the drugs. (*Isadore*) In the second incident, went early in the morning under the guise of an operation and had even attempted to get a police vehicle to add more legitimacy to the event. (*Lugay*)

There were no mitigating factors in relation to the offence on the part of either offender

Offender

- a. Both defendants committed the offences while dressed in the tactical uniform of the Task Force. Additionally, the second incident was committed at a time when the defendant Isadore scheduled to be on duty at the Police Headquarters.

Mitigating Factors

- a. Both defendants are first time offenders
- b. Mr. Lugay is youthful, being aged 23
- c. Mr. Lugay is the father of a 2 month old baby

- [130] In relation to **Count One** which involves Marcus Isadore alone the court in applying the sentencing guidelines sentences Marcus Isadore to a custodial sentence of 6 months. The aggravating factors will be applied bringing the sentence to 9 months but will be toggled down wards to take into account his previous good character bringing the time to 7 months in prison. Defence Counsel has asked the Court to reflect the delay of four years to be reflected in the sentence. The Court therefore will reduce the sentence by 2 months bringing the sentence to 5 months in prison.
- [131] In relation to the **Count Two**, Corruption charge for Marcus Isadore with a starting point of \$80,000 (the maximum is \$100,000) this has been toggled upwards to take into account the aggravating factors to bring it to \$100,000. The mitigating factor of being of good character has been applied to this to bring the fine back down to \$80,000. The payments are to be made as follows:-

\$5,000 to be paid on or before 30th September, 2022
 \$5,000 to be paid on or before 31st December, 2022
 \$5,000 to be paid on or before 31st March, 2023
 \$5,000 to be paid on or before 30th June, 2023
 \$5,000 to be paid on or before 30th September, 2023

\$5,000 to be paid on or before 31st December, 2023

[132] Payments of \$5,000 are to be made every three months thereafter until sum is fully paid. In default of each payment, he is to serve 2 months in prison and defaults are to run consecutively.

[133] Marcus Isadore is to compensate the complainant Noel Johnson aka Tiba in the amount of \$100.00 forthwith for the battery pack/slar charger, in default of payment two months in prison to run consecutively.

[134] Peter Lugay is sentenced to two months imprisonment on **Count Two** (corruption). Time spent on remand is to be deducted from sentence. On **Count Two**, he is also fined \$30,000 to be paid as follows:-

\$3,000 to be paid on or before 30th September, 2022.

\$3,000 to be paid on or before 31st December, 2022.

\$3,000 to be paid on or before 31st March, 2023.

\$3,000 to be paid on or before 30th June, 2023.

\$3,000 to be paid on or before 30th September, 2023.

\$3,000 to be paid on or before 31st December, 2023.

[135] Payments of \$3,000 are to be made every three months thereafter until sum is fully paid. In default of any payment, he is to serve two months in prison and defaults are to run consecutively.

[136] Applying the Sentencing Guidelines to **Count Three** the Court finds the offence falls into level A-high in terms of seriousness as the firearm contained more than two rounds of ammunition. Since this was his work firearm, the firearm would have been loaded. The starting point would therefore be 75% of the maximum which equates to 7 ½ years with a range of 6 to 9 years. The Court is minded to use a starting point of 6 years. The Court finds the following aggravating and mitigating factors:-

Offence
Aggravating

- The defendant was in a position of authority
- It was his government issued firearm
- It can be inferred that the use of the firearm was both motivated by revenge since Tiba had failed to return calls and messages to Isadore and did not present himself and as such had disrespected the corporal. Also, it can be seen that it was used as a step to prevent Tiba from reporting the incident. He was beaten with the gun while threats of killing and burying him were made.

[137] The Court finds no mitigating factors in relation to the offence:-

Offender

- There are no aggravating factors in relation to the offender.

- [138] The mitigating factors are his age, his previous good character and the fact that he is the father of a young child.
- [139] The Court was interested to hear from Tiba. He indicated that his solar charger/power pack had not been returned to him and that it was given to him as a gift. In terms of the injuries received by Lugay he indicated that his back still hurt him especially when he had to lift heavy items. He also said that although he was still a farmer cultivating vegetables but because of his injuries he was not able to maintain his farm in the manner he was used to.
- [140] Taking all of the above into consideration and in looking at the totality of the offences the Court will not impose a custodial sentence but rather it will impose a compensation order on Peter Lugay in relation to **Count Three**. He injured the complainant in the most egregious and despicable manner, betraying his oath as a police officer to serve and protect the citizens of this country. He will pay Tibar compensation in the sum of \$3,500 EC to be paid by July 29th 2022, in default 6 months in prison to run consecutively with any other defaults.
- [141] The many cases out of Jamaica have proved instructive in relation to police corruption.
- [142] In **R vs Brendon Blair** (unreported), Court of Appeal, Jamaica, Resident Magistrates" Criminal Appeal No 129/1988, judgment delivered 18 January 1989, Carey JA stated that: "... *We would have thought that the incidence of corruption with the Force has been sufficiently publicized. This court has on occasions, prior to this, intimated that the sort of sentences which should be imposed for corruption by members of the Force will in fact be serious and condign. It is a matter of regret that police officers choose to continue to ignore what they know to be correct procedure and correct action on their part. They have taken an oath to uphold the law and are well aware that they cannot sell their services in this way. We wish to repeat, that if officers in the police force are caught and convicted of acts of corruption, they must expect sentences of the sort which were imposed in this case ...*" In that case the appellant was accordingly sentenced to two years imprisonment on each of the three counts of the indictment for the offences of bribery under the **Act**, the sentences to run concurrently. The consistency in the approach of this Court towards police officers convicted of acts of corruption has been evident in several cases since then. In the more recent cases of **Dewayne Williams vs R** [2011] JMCA Crim 17; **Clive Rowe vs. R** [2012] JMCA Crim 2; **Willard Williamson vs. R** [2015] JMCA Crim 8; **Patrick Williams vs. R** [2016] JMCA Crim 22 and **Roger Forrester vs. R** [2016] JMCA Crim 25, the appellants, who were all police officers, were sentenced to terms of imprisonment ranging from 4 to 12 months for breaches of the Jamaican Act.
- [143] I am grateful to Counsel on both sides for their submissions and patience in the final preparation of this ruling. I am also grateful to the Probation Department for their comprehensive and helpful reports.

Ann Marie Smith

High Court Judge

By the Court

Registrar