

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCR 2019/0016

DIRECTOR OF PUBLIC PROSECUTIONS

AND

**KARIM MAYNARD
ROMAIN TOTA
LEON ISAAC**

Appearances:

Mr. Tessaun Vasquez and Ms. Lanein Blanchette for the Director of Public Prosecutions.

Dr. Henry Browne QC and Mr. O’Grenville Brown for Karim Maynard.

Ms. Natasha Grey and Mr. Mikhail Charles for Romain Tota and Leon Isaac.

2020: June 9, 15, 18, 26, 30

[1] **THOMPSON, JR. J:** By an indictment filed on July 17th, 2019, the defendants were jointly charged with the following offences.

- (i) Count 1 - Fraudulent Evasion of Duty contrary to Section 185(2) (a) of the Customs Act
- (ii) Count 2 - Importation of a Firearm contrary to Section 4(1) of the Firearms Act
- (iii) Count 3 - Importation of a Controlled Drug contrary to Section 4(1) (a) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act
- (iv) Count 4 - Possession of Cannabis contrary to Section 6(2) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act
- (v) Count 5 - Possession of Cannabis with intent to supply contrary to Section 6(3) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act

[2] The defendant's trial commenced on February 17, 2020 and they were convicted via majority and unanimous verdicts of the offences listed above, save that the defendant, Leon Isaac, was acquitted of count 1 after a successful submission of no case to answer.

[3] In their sentencing submissions filed on March 18, 2020 the crown set out the following factual summary. Counsel for the defendants did not demur or object to this factual summary for the purposes of this sentencing judgment.

Factual Summary

[4] On the 2nd day of May 2017, Leon Isaac visited KDP, a Shipping Agent, at the Robert Llewellyn Bradshaw International Airport ("Airport"). While there, he was issued an airway bill with the number 81058343935 by a Customer Service Representative, paid the requisite fee of EC\$54.25 and signed his name. The consignee name on the airway bill issued to Mr. Isaac was Steadroy Moses and the 'Nature of Goods' was air mattress and deep fryer.

[5] On the following day, Leon Isaac visited the Air Cargo Shed at the Airport, spoke to Customs Officer 'A' and attempted to clear a package by presenting a triplicate port form. The said Port Form bore the 'Consignee Name' of Leon Isaac, the 'Account Name' of Steadroy Moses, and the 'Description of Goods' as air mattress and deep fryer. Mr. Isaac was unable to collect the items listed on the Port Form on this day as they were not yet available for collection.

[6] On the 8th day of May 2017, Mr. Karim Maynard who is a Customs Officer, visited the Air Cargo Shed and spoke to Customs Officer 'A' indicating that he had an airbed to collect for his girlfriend's son, noting however, that his name was spelt incorrectly on the airway bill. Mr. Maynard collected no items at that juncture.

- [7] Shortly thereafter on the said morning, Romain Tota, a Customs officer, approached a St. Christopher and Nevis Port Authority ("SCASPA") worker, Dunta France, in the Customs Examination Area with instructions to locate a package. Mr. Tota handed the SCASPA worker the same Port Form previously handled by Leon Isaac, the SCASPA worker located the package, which was a brown cardboard box bearing the airway bill number of 81058343935 and placed said box on the examination table.
- [8] Mr. Maynard thereafter collected the package from the examination table as well as a gate pass issued by the SCASPA worker. Mr. Maynard then approached the security officer at the gate, Mr. Bloice, and handed him the gate pass. He was then allowed to leave. He was seen handing off the package to another customs officer who placed same in a white car bearing vehicle number P9842, which Mr. Bloice wrote on the gate pass.
- [9] At or about 9:52am on the 8th day of May 2017, CCTV captured that part of the morning's occurrences which had been described by Mr. Bloice.
- [10] At or about 10:15am on the said day, Police executed a search warrant on the premises of one Steve Isaac in Conaree Village, where a brown cardboard box bearing the airway bill number of 81058343935 was found. The cardboard box contained two smaller boxes, one with an airbed and another with a deep fryer. Upon closer examination of the box containing the deep fryer, a magazine, the barrel of a 9mm pistol and 3 packages containing vegetable material later proven to be 838 grams of cannabis, were found inside the deep fryer.
- [11] Checks of the Customs and Excise records system, ASYCUDA, revealed that there was no record of any transaction done in relation to the airway bill number 81058343935. ASYCUDA is used to calculate and record duties paid on goods.

[12] Checks of the firearms register of the Royal St. Christopher and Nevis Police Force revealed that none of the Prisoners were holders of a firearms user's licence.

Count 1 – Fraudulent Evasion of Duty

[13] Section 185(2) of the Customs Act provides that a person convicted of this offence is liable on conviction to a fine of one hundred thousand dollars (ECD\$100,000.00) or the equivalent of three times the value of the goods, whichever is greater; or imprisonment to a maximum term of five (5) years.

[14] There is a paucity of local authorities that provide guidance on the sentencing range for this offence. There is no ECSC sentencing guideline for this offence and it is highly doubtful whether this offence, owing to its relative rarity will ever attract a definitive guideline.

[15] This Court has considered the UK Sentencing Council Guideline on Revenue Fraud. That Guideline provides useful guidance on the sentencing range for the offence of fraudulent evasion of excise duty under their Customs and Excise Management Act and which carries a maximum penalty of 7 years custody and a sentencing range of a fine of 150% of the defendant's relevant weekly income – 6 years imprisonment. The UK penalties are not on all fours with the penalty in St Christopher and provide useful guidance on how to treat with this offence.

[16] Step 1 in the UK Guideline requires the sentencing court to determine the offence category, that is to say, the offender's culpability and the nature of the harm caused. This requires an assessment of the offender's role and 'the extent to which the offending was planned and the sophistication with which it was carried out'.

[17] In this Court's view, the defendant's offending (Tota and Maynard) falls into the high culpability category for the following reasons. Firstly, their offending was part of a group activity which aggravates criminal offending as a general principle.

Culpability demonstrated by one or more of the following	
A – High culpability • A leading role where offending is part of a group activity • Involvement of others through pressure/influence • Abuse of position of power or trust or responsibility • Sophisticated nature of offence/significant planning • Fraudulent activity conducted over sustained period of time	
B – Medium culpability • A significant role where offending is part of a group activity • Other cases that fall between categories A or C because: ◦ Factors are present in A and C which balance each other out and/or ◦ The offender's culpability falls between the factors as described in A and C	
C – Lesser culpability • Involved through coercion, intimidation or exploitation • Not motivated by personal gain • Opportunistic 'one-off' offence; very little or no planning • Performed limited function under direction • Limited awareness or understanding of extent of fraudulent activity	

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm – Gain/intended gain to offender or loss/intended loss to HMRC

Category 1	£50 million or more	Starting point based on £1 million
Category 2	£10 million–£50 million	Starting point based on £30 million
Category 3	£2 million–£10 million	Starting point based on £5 million
Category 4	£500,000–£2 million	Starting point based on £1 million
Category 5	£100,000–£500,000	Starting point based on £300,000
Category 6	£20,000–£100,000	Starting point based on £50,000
Category 7	Less than £20,000	Starting point based on £12,500

Harm	Culpability		
	A	B	C
Category 4 £500,000 – £2 million	Starting point 5 years 6 months' custody	Starting point 4 years' custody	Starting point 2 years 6 months' custody
Starting point based on £1 million	Category range 4 years' – 6 years 6 months' Custody	Category range 2 years 6 months' – 5 years' custody	Category range 15 months' – 3 years 6 months' custody
Category 5 £100,000 – £500,000	Starting point 4 years' custody	Starting point 2 years 6 months' custody	Starting point 15 months' custody
Starting point based on £300,000	Category range 2 years 6 months' – 5 years' custody	Category range 15 months' – 3 years 6 months' custody	Category range 26 weeks' – 2 years 6 months' custody
Category 6 £20,000 – £100,000	Starting point 2 years 6 months' custody	Starting point 15 months' custody	Starting point High level community order
Starting point based on £50,000	Category range 15 months' – 3 years 6 months' custody	Category range High level community order – 2 years 6 months' custody	Category range Low level community order – 36 weeks' custody
Category 7 Less than £20,000	Starting point 15 months' custody	Starting point 26 weeks' custody	Starting point Medium level community order
Starting point based on £12,500	Category range 26 weeks' – 2 years 6 months' custody	Category range Medium level community order – 15 months' custody	Category range Band C fine – High level community order

[18] There was no evidence at trial as to the value of the air bed and deep fryer (the dutiable items for which no duty was paid) but this does not preclude this Court from finding that the duty payable would have fallen at the lowest end of the table

below. At the sentencing hearing, the crown called a Mr. Elmar Martinez, the Assistant Comptroller of Customs. Mr. Martinez's evidence was that duties and taxes totaling EC\$215.00 were due and payable on the air bed and deep fryer. This sum of EC\$215.00 was calculated on the value of the goods as at May 2017 and was the sum which the defendants failed to pay.

[19] In the UK Guideline, category 7 is the lowest category and covers instances where the sums defrauded from HM Revenue and Excise are less than £20,000.00. The defendants' offending thus falls into the least serious harm category having regard to the sums not paid. Conversely, the defendant's offending falls into the high culpability category, that is to say, the most serious category for the reasons set out at paragraph 17 above.

[20] The UK Guideline for this offence category prescribes a 15-month sentence of imprisonment as a starting point. Even making allowance for the difference between the maximum penalties (5 vs 7 years imprisonment), this Court is of the view that a custodial sentence is the appropriate starting point for this offence. This Court is fortified in its position by the fact that the high culpability category and even the medium culpability categories attract custodial sentences as their starting point, even when the value of the harm caused is in the lowest category.

[21] It is accepted that there is a considerable gap between the starting point of £12,500.00 and the value of a deep fryer and air bed (according to Martinez, these items were valued at US\$150.00), but this gap could not suffice to remove the prospect of a custodial sentence altogether. Moreover, in determining whether the custody threshold has been passed, this Court is required to consider whether the offence and a combination of the other offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified.

[22] This Court is disinclined to agree with the submissions by counsel for the defendants that a fine and/or community sentence is appropriate for this offence.

The offence is serious and the fact that the defendants acted contrary to the specific duties imposed on them as Customs Officers while in uniform and at their work stations was significant. I can do no better than to quote verbatim from the social inquiry report for Karim Maynard, which would apply with the same force to Romain Tota.

“.....where the main duty and responsibility is to manage the security and integrity of the country’s borders. At the Customs and Excise Department they cooperate in the fight against illegal activities with local, regional and international agencies to detect and deter unlawful movement of goods, people, vessels and aircraft across the border. His involvement in these crimes goes completely against what he should have upheld after taking an oath.”

[23] It is for all of the foregoing reasons that this Court arrives at a starting point of 12 months’ imprisonment. The defendants’ offending is aggravated by the fact that the evasion of liability was closely related to the other offences for which the defendants were convicted. These offences are thus taken into consideration as aggravating the defendants’ offending.

[24] Their offending is mitigated by the fact that they had no previous convictions. The UK Guideline makes a distinction between no previous convictions and good character and/or exemplary conduct as mitigating factors. There was no dispute that both Tota and Maynard had no previous convictions and this fact was accepted as a mitigating factor.

Good Character/Exemplary Conduct

[25] The issue of whether they were also men of good character and/or exemplary conduct and as such be entitled to credit for this additional mitigating factor engaged this Court’s attention. In the case of Mr. Tota, the social inquiry report characterized him as a leader in his community who had devoted his time to church and young people. His offending was described as being out of character

by those who knew him and there was clear and demonstrable evidence of his community involvement, leadership qualities and his contributions to his community. As a result, this Court has no difficulty in finding that Mr. Tota is also a man of good character in addition to his absence of previous convictions.

[26] In the case of Mr. Maynard, the social inquiry report described him as having lived an exemplary life as highlighted by his character references. His counsel submitted that Mr. Maynard was a hardworking, dependable, reliable and compassionate individual who cared for his daughters. In this Court's view, a review of Mr. Maynard's character references did not meet the threshold of an exemplary life. It is accepted that Mr. Maynard did not have any previous convictions and he will receive credit for this fact. All the same, there was no demonstrable community involvement, leadership or other considerations in the case of Mr. Maynard. In this Court's view, something more than the virtues extolled by his counsel, laudable they may be, is required before he can be deemed as a person of good character. Exemplary conduct was not made out and in this Court's view, Mr. Maynard cannot properly be deemed as a man of good character.

Sole/Primary Caregiver

[27] In assessing the mitigating factors, this Court was also required to consider whether the defendants were the sole or primary caregivers for dependent relatives. The social inquiry reports for all three accused, indicate that Maynard and Isaac are the fathers of two children each, while Tota is the putative father of a child that should be born any day now and renders assistance in the care of his terminally ill grandmother.

[28] Counsel for the defendants submitted that while the defendants were not the primary caregivers, they provided substantial assistance (both financial and moral) to the children and in the case of Tota, his grandmother. The children did not live

with the defendants Isaac and Maynard and the defendants contributions to their upkeep and well-being do not suffice to mitigate their offending.

[29] In this Court's view, the fact that the defendants provided financial and moral assistance for their children and relatives, does not meet the threshold for mitigating their offending. They are not the primary caregivers for dependent relatives and as such cannot point to any harm or detriment that their relatives are likely to suffer over and above the normal consequences of their incarceration.

[30] This Court is fortified in its decision by the learned authors of Blackstone's Criminal Practice [2020] at paragraph E 1.21¹ that the serious and adverse impact of a custodial sentence on persons other than the offender (such as young children of a single parent) may be taken into account at the discretion of the court. The defendants have not established that a custodial sentence is likely to seriously and adversely impact the lives of their children such as to require the exercise of this Court's discretion in their favour.

[31] Further support for this Court's approach is derived from the decision of the Court of Appeal for England and Wales in **R v Attuh-Benson** [2004] EWCA Crim 3032. In **Attuh-Benson**, the Court of Appeal reduced the 10-year sentence imposed on Mrs. Attuh Benson, to one of 8 years imprisonment as an 'act of mercy' because of the particular facts of her case. In their view, the 10-year sentence imposed on her was well within the range of appropriate sentencing for her offending but that for the reasons outlined at paragraph 23² of their judgment, they were prepared to reduce the sentence by two years.

¹ See (*Petherick* [2012] EWCA Crim 2214, [2013] 1 WLR 1102; *Humphries* [2013] EWCA Crim 1748; *Vincent* [2017] EWCA Crim 333).

² These included the fact inter alia, that she was a foreign national, separated from her family and a long way from home. She had to give birth in prison, her baby had been taken from her and her children and her husband in Ghana were also suffering considerably. Her children were also seriously ill with a potentially fatal disease and it was difficult to obtain medical treatment for them and her husband was unable to ensure that the children received a proper education.

[32] **Attuh-Benson** is cited as an example of the type of scenario in which the court is prepared to exercise its discretion and consider the impact on dependent relatives as a mitigating factor. It is accepted that **Attuh-Benson** is an extreme example, but that case clearly demonstrates the facts which will engage the court to exercise its discretion in favour of a defendant who relies on the plight of dependent relatives to mitigate his offending.

[33] This court is not unsympathetic to the plight of the defendant's children but is moved to endorse the view of the Court of Appeal in **Attuh-Benson**, that it is often the innocent who suffer from crime. The likely harm to be suffered by the defendants and their children is not over and above the consequences that flow from incarceration.

[34] The defendant's offending is also aggravated by the fact that it appears to have required some advance planning. That is to say, the offending was not spontaneous. This factor of aggravation is juxtaposed with the fact that there was little prospect of success, since a cursory examination of the boxes would have revealed their contents.

[35] The jurors by their verdict were satisfied of the differing roles played by each accused in the commission of the offences for which they were convicted. In this Court's view, their respective roles were integral to their efforts and as such there is no scope for a lesser sentence commensurate with a lesser role/culpability on the part of each defendant.

[36] In their written skeleton argument, the crown contended that the defendant's offending was prevalent, to wit, the drug and firearm offences. At the sentencing hearing, the crown withdrew this submission. The crown accepted that there was no statistical analysis or expert evidence of the kind which Ellis J in **R v Raymond Harrison** (at paragraphs 31 to 38 of her decision), had indicated was required in order to establish prevalence.

[37] The defendants have been in custody since February 26th, 2020 and the period of 4 months and 4 days will be deducted from any custodial sentence that is imposed.

Suspended Sentence

[38] Counsel for the defendants submitted that this Court would be empowered to suspend any custodial sentence it was minded to impose for the fraudulent evasion of liability offence.

[39] In determining whether to suspend any sentence of imprisonment, this Court is guided by the ECSC Practice Direction 8C which addresses the issue of when to impose a suspended sentence. In particular, the said Practice Direction posits the following questions:

- (i) Can appropriate punishment only be achieved by immediate custody?
- (ii) Does the offender present a risk or danger to the public or victim?
- (iii) Has there been a history of poor compliance with court orders?
- (iv) Is there a realistic prospect of rehabilitation?
- (v) Is there strong personal mitigation?
- (vi) What will be the impact of an immediate custodial sentence on dependent relatives, employees, and the community?

[40] The issue of suspension is overtaken by the court's finding that an immediate custodial sentence is warranted for the firearm offence. Once the totality principle is included, it would be otiose to impose a suspended sentence for the Customs Act offence, when a custodial sentence is warranted by the Firearms Act offence.

Any custodial sentence for the Customs Act offence would run concurrently with the Firearms Act offence and is appropriate in the circumstances.

[41] For the avoidance of doubt, this Court is of the view that a suspended sentence would not have been a realistic sentencing option for the Customs Act offence. While the defendants (Tota and Maynard) do not pose a danger to the public and there is some prospect of rehabilitation, there is no strong personal mitigation and having regard to the aggravating features of this offence, immediate custody is the only appropriate punishment.

Possession of a Controlled Drug with Intent to Supply and Importation of a Controlled Drug – “The Drug Offences”

[42] In SKBHCV-0057/2019 – **Shakespeare Southwell and Kauesi Henley v Attorney General** for St Christopher and Nevis et al, Ventose J considered the constitutionality of Section 15 (1) of the Drugs Act. Section 15 (1) provides as follows:

“15. Drug trafficking.

(1) A person who commits a drug trafficking offence or of being in possession of a controlled drug for the purpose of drug trafficking is liable,”

.....

(b) upon conviction on indictment, to imprisonment for life but which shall not be less than fifteen years.

[Amended by Acts 3/1993 and 4/1996]”

[43] Ventose J also considered Section 2 of the Abolition of Minimum Punishments Act (“AMP Act”) which provides as follows.

“2. Judge, in passing sentence may reduce prescribed minimum penalties.

It shall be lawful for any Judge of the High Court when passing sentence upon any person convicted under any enactment which prescribes for the offence of which such person is convicted a minimum term of imprisonment or a minimum fine, notwithstanding any enactment to the contrary, to reduce the prescribed term of imprisonment, and, in case of a fine, to reduce the prescribed amount thereof, and to sentence such

person to such less term of imprisonment, or to pay such less fine, as to the presiding Judge shall appear right.”

[44] At paragraph 38 of his judgment, Ventose J was of the view that Section 2 of the AMP Act allows a High Court judge to reduce the mandatory minimum sentence, since in his view, the Drugs Act should be read subject to the AMP Act. If the Drugs Act was thus read subject to the AMP Act, a High Court judge (although not a magistrate) would be entitled to sentence according to the circumstances of the case.

[45] Counsel for the crown and the defence invited this Court to adopt a similar approach which this Court had no difficulty doing. In this Court’s view, but for the decision of Ventose J, there may have been scope for an argument that the Drugs Act had impliedly repealed the AMP Act, particularly since the Drugs Act came after the AMP Act. The resolution of this issue is a moot point in view of Ventose J’s ruling, but this Court has no doubt that this issue will again be raised as mandatory minimums are the punishment *du jour*.

[46] It is important to note that Section 15 of the Drugs Act applies to drug trafficking offences. Drug trafficking offences include the offences of importation and possession with intent to supply but does not include the offence of simple possession under Section 6(2) of the Drugs Act. No issue as to the constitutionality of Section 6(2) arises as there is no prescribed mandatory minimum penalty for this offence.

[47] The ECSC has established guidelines for Drug Offences and it was agreed by all concerned that these guidelines which came into force as at September 17th, 2019 would apply in the instant case. The cannabis in the instant case amounted to 838 grams and thus falls into Category 4 of the said Guideline.

[48] The court’s next task was to determine whether the defendants played a leading, significant or lesser role. The crown submitted that the defendants operated as a group, with each member playing a significant role in the importation of the

cannabis and its subsequent possession. Counsel for the defendants argued that Tota played a lesser role, Maynard fell between lesser and significant role and Isaac played a significant role.

[49] In determining the role played by the defendants, this Court is of the view that the jurors must have convicted the defendants because they had some awareness and understanding of the scale of the operation. It has not escaped this Court's attention that abuse of a position of trust is highlighted in the Guidelines, as a feature of a leading role. Abuse of trust would clearly apply to the case of Maynard and Tota.

[50] Tota's counsel sought to argue that his function was a limited one performed at the direction of others but there was no evidence to this effect. The position would have been different if Tota had given evidence at trial to this effect or if any evidence had been adduced in order to establish this. The submission that Tota's role was a lesser one because he lacked an understanding or awareness of the scale of the operation suffers from the same defect.

[51] In this Court's view, the fact that the defendants appear to have operated as a group, may have been motivated by financial advantage, had some awareness of the scope of the operation and abused their position of trust (Tota and Maynard), point inexorably to a finding that they equally played a significant role and this is borne out by the facts.

[52] The offending is aggravated by their attempt to avoid distinction and the presence of a firearm while it is mitigated by the lack of sophistication as to the nature of the concealment. The defendant Isaac's offending is aggravated by his previous convictions for both drug and firearm offences and this will require separate consideration.

[53] The issue of whether the defendants expressed remorse also occupied this Court's attention. In this Court's view, the defendant Isaac clearly expressed his

remorse in the social inquiry report submitted on his behalf. The defendants Maynard and Tota in their social inquiry reports expressed their regret. This distinction is important and I can do no better than rely on the words of Probation Officer Tivanna Wharton (the author of Tota's social inquiry report), that remorse means an acceptance of responsibility. Both Maynard and Tota regretted the consequences of their offending but they were not remorseful and as such, remorse cannot be considered as a mitigating factor. For the avoidance of doubt, the presence of remorse (post-conviction) would mitigate a defendant's offending, its absence does not aggravate the offending. The defendant Isaac is thus credited with remorse but the weight that this remorse will carry is limited when balanced against his previous convictions for drug and firearm offences.

[54] All the same, the ECSC Sentencing Guideline for this offence provides that a non-custodial sentence with a medium level fine is the appropriate disposition. Counsel for the defendants submitted that a fine of EC\$10,000.00 and allowing the defendants 12 months to pay same would be entirely appropriate.

[55] At the sentencing hearing, the crown called Superintendent Travis Rogers for the purpose of establishing the street value of the cannabis. Superintendent Rogers testified that 838 grams of cannabis was valued at EC\$20.00 per gram. The value of the cannabis was thus EC\$16,760.00. The street value was arrived at by multiplying this figure by 3 and thus amounted to EC\$50,280.00. Superintendent Rogers when cross-examined by counsel for Maynard, was at pains to explain the choice of a multiplier of 3 and not 2 or 1 or any other numerical figure. It was his evidence that this was the formula that he had encountered in his many years as a police officer thus warranting its application.

[56] This Court is not required to opine on the appropriateness of the formula for the purpose of this sentencing exercise but is moved to comment that any multiplier chosen should be rational and clearly explained. The multiplier should bear some relation to the expected profit since that would be of some assistance to the court.

If it is that the multiplier has not been revised or considered and has been applied by rote, then this may require review so that sentencing courts can receive the assistance they require on the likely profit to be realized from the sale of dangerous drugs.

[57] The ECSC Guideline does not indicate what amounts to a 'medium level' fine. In **Desmond Baptiste and others v The Queen**, the Court of Appeal considered the case of **Kenton Roberts v The Commissioner of Police**. Kenton Roberts was sentenced to pay a fine of \$2,000.00 or 6 months imprisonment for possession of 537 grams of cannabis. Making allowances for the fact that Mr. Roberts' offending took place in November 1999 and inflation, it is this Court's view that a fine of EC\$12,500.00 with 12 months to pay is entirely appropriate. In default of payment the defendants are to serve a 6-month term of imprisonment consecutive to any other sentences of imprisonment imposed in this judgment.

[58] This fine is imposed on each of the drug offences concurrently, since there is considerable overlap between the importation, possession and possession with intent to supply offences. A global fine of EC\$12,500.00 is thus imposed on count 3. In this Court's view, importation is the most serious offence and no further penalty is imposed on counts 4 and 5.

Firearm Offence

[59] In view of this Court's finding above that it is empowered to read the AMP Act in conjunction with the Drugs Act, the issue of whether the mandatory minimum penalty applies under Section 4(1) of the Firearms Act is a moot point.

"4. Restriction on importation, exportation and transhipment of firearms and ammunition.

(1) A person shall not import into, export from or tranship in Saint Christopher and Nevis any firearm or ammunition except under and

in accordance with the terms of a Firearm Import Permit, Firearm Export Permit or Firearm Transshipment Permit, as the case may be.

(2) Every person who contravenes subsection (1) commits an offence and shall be liable,

(a) in the case of an offence relating to a prohibited weapon,

.....

(ii) on conviction before the High Court, to imprisonment with or without hard labour for a term of not less than ten years;

[Amended by Acts 11/1996 and 19/2006]”

[60] The issue had occupied significant argument before the court at the sentencing hearing on June 26, but this Court derives comfort from Ventose J’s ruling in **Shakespeare Southwell** that the AMP Act could be read alongside the Drugs Act. There is no bar to a similar approach being taken with regard to the Firearms Act and as such this Court finds that it is empowered to impose a sentence other than the mandatory minimum prescribed by the Firearms Act.

[61] In assessing the sentence to be passed for this offence, this Court’s attention was drawn to the ECSC Guidelines for Firearm Offences. These Guidelines are not yet in force and thus cannot be applied. Counsel for the crown submitted that a 5-year starting point was appropriate and submitted that the defendant’s offending was aggravated by the breach of trust (Maynard and Tota), the fact that the offence was planned and the offenders operated in a group. The well-known approach of the late Lord Chief Justice Bingham in **Avis** [1998] 1 Cr. App Rep 420 on how Courts were to approach sentencing for firearm offences is instructive. In **Avis**, Lord Bingham posited the following four questions (“the Avis criteria”):

“(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.

(2) What if any use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specified criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

(4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearm offence or other crimes of violence."

[62] Counsel for the Crown also accepted that the **Avis** criteria as set out above were tilted in favour of the defendant save for the defendant Isaac whose previous convictions told against him. In their view, an application of the **Avis** criteria in favour of Maynard and Tota warranted an 8-month reduction in the starting point. In their view, Mr. Maynard's offending was mitigated by his lack of previous convictions while Mr. Tota's offending was mitigated by his lack of previous convictions, demonstrable good character/exemplary conduct and in the case of Mr. Isaac by his remorse.

[63] Counsel for Maynard argued that a starting point of 18 months was appropriate with a 6-month discount for the application of the **Avis** criteria in his client's favour. In his submission, his client's offending was aggravated by the breach of trust and the seriousness of the offence and mitigated by his relative youthfulness (24 at the time), his lack of previous convictions and good character.

[64] Counsel for Tota also argued for an 18-month starting point with a 6-month reduction for the application of the **Avis** criteria in her client's favour. It was her submission that her client's offending was aggravated by the abuse of trust, the attempt to conceal the firearm and the seriousness of the offence. Counsel for Tota submitted that her client's offending was mitigated by the lack of

sophistication, his lack of previous convictions and good character, his remorse and his role as the primary caregiver for dependent relatives.

[65] Counsel for Isaac argued that an 18-month starting point was appropriate but that only a 3-month discount was warranted in view of the **Avis** criteria. Counsel accepted that her client's offending was aggravated by his previous convictions and the attempt to conceal the firearm. Counsel submitted that his offending was mitigated by his remorse, his role as the primary/sole caregiver for dependent relatives, the lack of sophistication and his post offending conduct in having contributed to the surrender of 6 weapons in 2018-2019 to the authorities and his efforts to facilitate and maintain 'peace' in the Federation.

[66] Firstly, this Court's ability to read the AMP Act in conjunction with the Firearms Act does not detract from the seriousness of the defendant's offending. The mandatory minimum clearly confirms that Parliament intended that firearms offences were to be taken more seriously than had hitherto been the case. A starting point of 5 years imprisonment is thus entirely appropriate.

[67] An application of the **Avis** criteria leads to a 12-month reduction in the starting point (Tota and Maynard) since it creates a concomitant reduction in the seriousness of the defendant's offending. There was no ammunition available for the firearm and no use had been made of it as it was a component part of a firearm. Their offending is aggravated by the breach of trust reposed in them as Customs Officers and the fact that they operated as a group. The fact that the firearm appeared to be closely connected to the supply of drugs is relevant, but the application of the totality principle would mitigate the extent to which this can be considered as an aggravating feature.

[68] The defendant's offending is mitigated in the case of Tota by his lack of previous convictions and demonstrable good character and in the case of Maynard by his lack of previous convictions. For the reasons previously discussed (see paragraphs 25-33 and 53 above), this Court is not persuaded that Tota and

Maynard are remorseful nor primary caregivers for dependent relatives. Counsel at the Bar were agreed that differing sentences were required and it is for this reason that this Court is minded to impose a sentence of 3 and half years imprisonment on Mr. Tota and 4 years imprisonment on Mr. Maynard for this offence.

Leon Isaac

[69] This defendant requires separate consideration in view of his previous convictions as set out below:

- (i) Carrying abroad an offensive weapon – March 1999
- (ii) Carrying abroad an offensive weapon – January 2002
- (iii) Carrying abroad an offensive weapon – May 2002
- (iv) Possession of firearm and ammunition – October 2004
- (v) Possession of cocaine with intent to supply and possession of cannabis – February 2009
- (vi) Possession of cocaine, possession of cocaine with intent to supply and possession of cannabis – July 2009
- (vii) Possession of firearm and ammunition – September 2011

[70] The presence of multiple previous convictions for related offences, mandates that any sentence imposed on Mr. Isaac is greater than that to be imposed on Tota and Maynard, even with the presence of three **Avis** factors in his favour. **Avis** makes it clear that the seriousness of the defendant's offending is greater when he has previous convictions. In the same vein, Mr. Isaac's previous convictions for carrying abroad an offensive weapon (knives and a machete) though relevant, did

not carry as much weight with this Court as his two previous convictions for firearm offences.

[71] It is clear that Mr. Isaac has a well-established propensity to commit the offences for which he has been convicted. This Court is prepared to find that Mr. Isaac's offending is mitigated by the fact of his remorse and his post-offending role in the surrender of six firearms in 2018 to 2019 and his role in the "Peace Initiative Programme". Only time will tell whether his laudable efforts to dissuade others from criminality in 2018 onwards and expressions of remorse are well founded. A sentence of 6 years imprisonment is thus appropriate when this Court considers the mitigating and aggravating factors.

Time Spent in Custody

[72] It is trite law that the defendants are to have credit for the time spent in custody. Therefore, the period of four months and four days that they have spent in custody is to be deducted from their respective custodial sentences.

Totality

[73] The totality principle requires the court to pass a total sentence which requires the court to take into account all of the offending behavior. That sentence should be just and proportionate and may thus lead to a longer concurrent sentence since it would not be appropriate to simply add up the sentences to be imposed for each count. The court should also consider the circumstances of each offender in arriving at its sentence. The UK Sentencing Council Guideline on Totality is particularly instructive.

[74] In this Court's view, the firearm offence is the most serious of the offences for which the defendants were convicted and the starting point of 5 years was chosen with due regard for the totality principle. The defendant's offending can be distilled into one criminal transaction, that is to say, the importation of a package

containing the component parts of a firearm and 838 grams of cannabis and the fraudulent evasion of duty on that package and the possession of that cannabis with intent to supply. The following sentences are thus expressed to run concurrently and are arrived at with due regard for the totality of the defendant's offending and without any double counting.

[75] The defendants are sentenced as follows:

- (i) Count 1 – Maynard – 9 month's imprisonment
- (ii) Count 1 – Tota – 6 month's imprisonment
- (iii) Count 2 – Maynard – 4 years imprisonment
- (iv) Count 2 – Tota – 3 and a half years imprisonment
- (v) Count 2 – Isaac – 6 years imprisonment
- (vi) Count 3 – A fine of EC\$12,500.00 payable within 12 months from today's date, failing which 12 month's imprisonment consecutive to the terms of imprisonment set out above. No penalty is imposed on counts 4 and 5 so that the Defendants are only required to pay the global fine of EC\$12,500.00.

[76] The terms of imprisonment on counts 1 and 2 are expressed to run concurrently with each other.

Patrick Thompson Jr.
High Court Judge (Ag.)

BY THE COURT

REGISTRAR