

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

MONTSERRAT
MONDAY 4TH JULY TO THURSDAY 7TH JULY 2022

JUDGMENTS

Case Name: **Mathis Alson Woodman**

v

The Queen

[DOMHCRAP2016/0006]

Date: **Monday 4th July 2022**

Coram: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant: **Mrs. Zena Moore-Dyer**

Respondent: **Ms. Marie Louise Pierre Louis**

Issues: **Criminal appeal – Rape – Incest – Indecent assault – Appeal against conviction – Whether conviction unsafe or unsatisfactory – Multiplicity of charges – Whether the indictment, conviction and sentences are erroneous in law where the offences all arise out of the same facts**

and circumstances – Alternative offence – Whether judge erred in law or failed to direct the jury with regard to the ingredients of the charges – Recent complaint – Whether judge misdirected the jury and/or failed to adequately direct the jury on the law and application of evidence on recent complaint – Corroboration – Abuse of process – Consent – Section 12 of the Sexual Offences Act – Whether a Lucas direction was necessary – Application of the proviso – Whether the jury, if they had been properly directed, would inevitably have come to the same conclusion upon a review of all the evidence – Section 28 of the Sexual Offences Act

Result:

IT IS HEREBY ORDERED THAT:

- 1.The appeal against the conviction for indecent assault is allowed.
- 2.The appeal against the conviction for incest and rape is dismissed and the sentences affirmed.

Reason:

Although both rape and incest require proof of sexual intercourse, the essence of the two offences differ. An essential element of the offence of rape is the absence of consent. For the offence of Incest, sexual contact and knowledge on the part of the accused person that the other party cannot consent to sexual intercourse because they are related to them by blood, meaning they are either a parent, child, brother, sister, grandparent, grandchild, uncle, niece, aunt or nephew. Therefore, the offences of rape and incest are distinct, and the commission of incest does not in law, constitute commission of the offence of rape. The Director of Public Prosecutions is empowered to charge either incest or rape or both incest and rape. The appellant's contention that charging both incest and rape resulted in an abuse of process, deprivation of a fair trial, a loss of the chance of a complete acquittal, and vitiated the convictions, was flawed. The

learned Director of Public Prosecutions' decision to charge both incest and rape was not plainly wrong such that the convictions should be invalidated.

Sections 3 and 6 of the Sexual Offences Act, Chap 10:36, Revised Laws of Dominica 2017 applied; Commissioner of Police v Stephen Alleyne [2022] CCJ 2 (AJ) BB applied.

It is the duty of the judge to impress upon the jury in every case where the evidence of a recent complaint is given, that they are not entitled to make use of the complaint as any evidence of the facts in reference to which it was made. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told in the witness box. Additionally, evidence of recent complaint is admissible only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and when it is made at the first opportunity which reasonably offers itself. In this case, there was no persistent questioning, and a review of the learned judge's summation reveals that the learned judge gave adequate directions on the issue. The learned judge directed the jury that the complaint went to the consistency of the account given by the virtual complainant and invited the jury to look at all the circumstances, including the reasons the virtual complainant gave for not having complained at the time she said the incident occurred. The evidence of recent complaint was properly received, and the judge gave adequate directions on the issue.

Kilby v R [1973] HCA 30 applied; R v Lillyman [1896] 2 QBD 167 considered; R v Osborne [1905] 1 KB 551 considered; White v The Queen [1998] UKPC 38 considered.

Corroboration is not required for a conviction where a person is charged with a sexual offence under the laws of the Commonwealth of Dominica. Further, the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. The judge has a discretion however, under section 28 of the

Sexual Offences Act to direct the jury that if they believe the testimony given by one witness, it is sufficient for the proof of any fact but before finding any fact to be proved solely by the testimony of a single witness, they should carefully review all the testimony upon which the proof of the fact depends. Whilst the learned judge did not give the direction as stated by section 28 at the trial, an appellate court should not lightly interfere with the exercise of a discretion entrusted to the first instance judge. The virtual complainant gave very detailed and compelling evidence that the appellant had sexual intercourse with her by the river and she did not consent. The facts were not complicated. The appellant denied having sex with her and denied being by the river. Given the facts of the case, the learned judge clearly felt that there was no need to give the direction. It cannot be said that the judge was plainly wrong in the exercise of his discretion in not giving this direction.

Section 28 of the Sexual Offences Act Chap 10:36, Revised Laws of Dominica 2017 applied.

A lies direction given to the jury is not appropriate in every case and it is plainly within the discretion of the trial judge. The learned judge directed on the core of the Lucas direction, and the directions were adequate to convey to the jury that if they found that the appellant lied, that by itself does not prove guilt and he must not be convicted simply because he lied about the pending case.

R v Lucas [1981] 3 WLR 120 applied; R v Burge and Pegg [1996] 1 Cr. App. Rep 163 applied; Rahming v The Queen [2002] UKPC 23 applied, R v Wainwright [2021] EWCA Crim 122 applied.

The test for whether a miscarriage of justice has occurred is not simply whether the appellate court is itself persuaded of guilt. The test is whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. The more minor the error, the easier it is likely to be for the appellate court to address and answer the question of whether any jury must inevitably have convicted, if the error had not occurred. Upon examination of the facts, it is clear that the jury assessed the reliability and

credibility of the virtual complainant set against the appellant's own account and denial of intercourse. There was no miscarriage of justice, and this is an appropriate case to apply the proviso.

Section 38 (1) of the Eastern Caribbean Supreme Court (Dominica) Act Chap 4:02, Revised Laws of Dominica 2017 applied; Cassell and another v R [2016] UKPC 19 applied.

Case Name:

**George Thomas
v
The Queen
[ANUHCRA2018/0018]
consolidated with

Joel Seraphine
v
The Queen
[ANUHCRA2018/0006]**

Date:

Monday 4th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Andrew O'Kola

Respondent:

Mr. Anthony Armstrong, Director of Public Prosecutions

Issues:

Criminal appeal — Appeal against conviction and sentence — Murder — Whether the witness statement of Mr. Nibbs was inadmissible and/or ought to have been excluded — Whether the learned judge erred in

directing the jury on how to treat the hearsay statement of Mr. Nibbs — Whether the learned judge failed to direct the jury on how to treat evidence of bad character — Whether the learned judge failed to direct the jury properly on how to treat the interview of Mr. Seraphin — Whether there was a failure to call relevant alibi evidence — Whether the summing up on credibility was unbalanced resulting in unfairness to Mr. Thomas — Whether the sentence was excessive as the learned trial judge took too high a starting point in calculating the sentence — Whether the learned trial judge failed to state what, if any, mitigating and aggravating factors he considered in arriving at the sentence — Whether the learned trial judge, in arriving at the sentence, considered things which he ought not to have taken into account — Whether the learned trial judge did not take into account the issue of the pre-trial delay in arriving at the sentence — Whether the learned trial judge failed to take into account the conditions of detention at Her Majesty's Prison in arriving at his decision — Whether the learned trial judge failed to take into account Mr. Thomas' conduct while on remand at Her Majesty's Prison as a mitigating factor in arriving at the sentence — Whether the learned trial judge failed to take into account Mr. Thomas' time spent on remand — Whether the disparity in the sentences of the two (2) appellants warrants a reduction in Mr. Thomas' sentence — Whether the sentence of Mr. Seraphin was given on the wrong factual basis — Whether the learned judge took irrelevant matters into account in sentencing Mr. Seraphin — Whether the learned judge failed to take relevant matters into account in sentencing Mr. Seraphin — Whether the conditions of Her Majesty's Prison breached Mr. Seraphin's right to human dignity and subjected him to cruel, inhumane and degrading punishment — Whether the sentence of twenty-five (25) years imprisonment was manifestly excessive considering the circumstances as a whole — Whether the disparity of sentence between Mr. Seraphin, Mr. Nibbs and Mr. Chapman was too great and thereby disproportionate.

Result/Order:

IT IS HEREBY ORDERED THAT:

1.The appeal against conviction by Mr. George Thomas is dismissed.

2. The appeal against sentence is allowed to the extent that his sentence is reduced by two (2) years for the delay in his trial and a further six (6) years and eleven (11) months to account for his time spent on remand.

3. The appeal against sentence of Mr. Joel Seraphin is allowed to the extent that his sentence is reduced by two (2) years for the delay in his trial and further reduced by five (5) years and nine (9) months representing his period of pre-trial custody.

Reason:

It is a matter of the discretion of the learned judge as to whether a deposition or witness statement should be tendered in evidence. However, this discretion only arises after the statutory conditions have been satisfied. Given the evidence led by the prosecution prior to its application for Mr. Nibb's evidence to be read into the record being made, the learned judge was entitled to conclude that Mr. Nibbs was indeed beyond the jurisdiction of the court. Furthermore, there was sufficient evidence before the learned judge to support his ruling that the requirements of section 37 of the Evidence (Special Provisions) Act 2009 had been satisfied. Accordingly, the learned judge did not err in the exercise of his discretion in allowing the evidence of Mr. Nibbs to be read into the record.

Section 37(c) of the Evidence (Special Provisions) Act, 2009 Act No. 5 of 2009, Laws of Antigua & Barbuda applied; Henriques and Carr v R (1991) 39 WIR 253 followed; Knights (Donnason) v R (1998) 53 WIR 125 followed.

A trial judge has a duty to direct or inform the jury that they have not had the benefit of hearing the witness give their evidence nor have they had the opportunity to observe the witness give their testimony, where applicable. The jury must also be warned that the evidence has not been tested by way of cross-examination and the need to take that into

consideration when assessing how much reliance can be placed on the evidence contained in the witness statement. The judge gave a truncated but proper direction as to how the jury ought to have treated with Mr. Nibb's witness statement and there was no element of unfairness with his directions in this matter.

Henriques and Carr v R (1991) 39 WIR 253 followed.

A jury must have an appreciation of all the relevant surrounding circumstances of a crime. A jury cannot come to a conclusion in a vacuum, that is without knowing what the prosecution alleges led to the commission of the crime. The learned judge brought to the attention of the jury the circumstances surrounding the commission of the offence, as he was required to do. He fully explained the background to the commission of the offence and placed all the evidence in context so as to ensure that the jury would have an appreciation of the circumstances in which the Crown alleged that the offence was committed. Therefore, the learned judge's directions cannot be faulted in this regard.

D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: Blackstone's Criminal Practice 2017, Oxford University Press, 2017 considered; R v Pettman [1985] Lexis Citation 1520, (2 May 1985, unreported) followed.

It is a well-established principle of law that where a confession of a co-defendant is admitted into evidence, it is only evidence against the maker of the statement. Where the admission of evidence which was admissible against one defendant but not against his co-defendant, resulted in the real risk of prejudice to the co-defendant, the judge should ensure that the interests of the co-defendant are protected by explicit directions to the jury to the effect that the statement of one co-defendant was not evidence against the other. The learned judge ought to have stated clearly and unequivocally that the statement of Mr. Seraphin was evidence against Mr. Seraphin alone and not against Mr. Thomas, this he failed to do. However, the summation in its entirety, the directions relative to the offence, the burden and standard of proof and other salient aspects of the

summation, as well as the strength of the prosecution's evidence against Mr. Thomas, all taken together lead to the conclusion that there was no miscarriage of justice in this case. A jury properly directed would have inevitably arrived at the same verdict of guilty.

Lobban v R [1995] 2 All ER 602 followed; D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: Blackstone's Criminal Practice 2017, Oxford University Press, 2017 considered; Roger Jelliseau et al v The Queen Grenada Criminal Appeals 10, 6, 11 of 1995 followed; Jevone Demming v The Queen [2020] ECSCJ No. 1 (delivered 14th January 2020) followed.

There is nothing in the record to suggest that the judge deprived Mr. Thomas of the opportunity to call his alibi witness. Indeed, the judge adjourned the matter in order for the proper arrangements to be made to accommodate the witness. It is through no fault or error of the judge that the witness failed to attend court on the adjourned date to give her evidence.

Having regard to the judge's summation, the complaint that he failed to sum up the defence fairly cannot be sustained. All of the issues which were vital to the defence, the arguments, the evidence and the alibi were properly placed before the jury and addressed by the learned judge.

Deshawn Stoutt v The Queen BVIHCRAP2009/003 (delivered 21st November 2011, unreported) followed.

An appeal court does not alter a sentence merely because it might have passed a different sentence. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene. In examining the facts associated with this murder, the judge was entitled to take into account all of the surrounding circumstances. Having regard to the totality of the evidence it was open to the judge to conclude that the starting point for sentencing Mr. Thomas was life imprisonment.

R v Ball (1951) 35 Cr App Rep 164 followed; Newton Spence et al v The Queen St. Vincent & the Grenadines

Criminal Appeal No. 20 of 1998; St. Lucia Criminal Appeal. No. 20 of 1997 followed; R v Sargeant (1974) 60 Cr App Rep 74 followed; Desmond Baptiste v The Queen St. Vincent & the Grenadines Criminal Appeal No.8 of 2003 followed.

The learned judge, at the completion of his analysis, concluded that the aggravating factors outweighed those tendered in mitigation and concluded that a life sentence was appropriate. The learned judge also stipulated a minimum period which Mr. Thomas must serve before being eligible for review. This fulfils the objectives of punishment and deterrence but also allows for rehabilitation. No fault can be found in the reasoning of the learned judge in this regard.

Renaldo Anderson Alleyne v The Queen (2019) CCJ 06 (AJ) followed; Nicholas et al v The State Cr. App. Nos. 1-6 of 2013 (delivered 17th December 2013, unreported) considered; Mervyn Moise v The Queen [2005] ECSCJ No. 52 (delivered 15th July 2005) followed; Section 6 of the Offences Against the Person (Amendment) Act, 2013 Act No. 13 of 2013, Laws of Antigua and Barbuda applied.

The learned judge had the advantage of seeing and hearing Mr. Grant Beggs testify and was able to assess his credibility. Mr. Thomas has not shown this Court that the learned judge did not take advantage of having seen and heard this witness or that the finding of the learned judge that he attached little credibility to Mr. Beggs was a wrong conclusion or an erroneous exercise of his discretion.

Betteto Frett v Flagship Properties Limited BVIHCVAP2009/026 (delivered 27th September 2011, unreported) followed.

Disparity by itself can never be a sufficient ground for overturning a sentence. The question which must be answered is whether the sentence given by the court is wrong in principle or manifestly excessive. In the case of Mr. Thomas, there were significant differences in the level of participation with respect to his co-defendants as well as the guilty plea of Mr. Seraphin which were factored in to justify a disparity in sentence.

R v Rameka [1973] 2 NZLR 592 at 594 considered; Re: Attorney General's Reference (Nos. 62, 63 and 64 of 1995) [1996] 2 Cr App Rep (S) 223 followed.

In the case of Mr. Thomas, the delay has been a considerable one, being eight plus (8+) years, and the learned judge ought to have considered the issue of delay as a material mitigating factor allowing for a reduction in sentence. This Court has the discretion to take this delay into account as this is a serious offence, and clearly a custodial sentence was appropriate. Having considered all the circumstances, a reduction of two (2) years for the delay is in order.

Violet Hodge v The Commissioner of Police BVIMCRAP2015/0005 (delivered 27th February 2018, unreported) followed.

Harsh conditions in a prison do not automatically give rise to a reduction in sentence and the sentencing judge would need to examine all relevant factors in determining whether in the exercise of their discretion, to reduce the sentence they intend to give. The court being fully aware of the prison and its conditions, and having considered the representations of counsel, concluded that a life sentence was appropriate in all the circumstances. No fault can be found with the learned judge's reasoning in this regard.

Darrin Roger Thomas and Haniff Hilaire v Cipriani Baptiste (Commissioner of Prisons) and others PC Appeal 60 of 1998 followed; Regina v Elton Charles ANUHCR2017/0025 (delivered 14th May 2019, unreported) followed; The State of Western Australia v O'Kane [2011] WASCA 24 considered.

In the absence of unusual circumstances, a judge should fully credit a prisoner for pre-sentence custody not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence. The learned judge failed to specify the period of pre-trial incarceration for Mr. Thomas. Mr. Thomas is entitled to credit for the six (6) years and eleven (11) months he spent on remand.

Shonovia Thomas v The Queen [2012] ECSCJ No. 249, (delivered 27th August 2012).

Mr. Seraphin:

Neither Mr. Seraphin nor his counsel at trial disputed the facts of the matter as set out by the prosecution. No rebuttal nor contrary explanation was put before the learned judge on which he could have properly called for a Newton hearing. There was no need for a Newton hearing in the circumstances.

R v Oakley [1998] 1 Cr. App. Rep (S) 100 followed; R v Tolera [1999] 1 Cr. App. Rep 29 followed.

An appellate court will not override the exercise of the discretion of a trial judge who has seen and heard a witness give evidence without more. In Mr. Seraphin's case, there is no basis for this Court to interfere with the judge's findings with respect to the witness Mr. Grant Beggs.

While the learned judge gave reasons as to why he did not consider delay in this case as warranting a reduction in sentence, the delay in this case was too long and in the circumstances a reduction in sentence is warranted. In this matter, even though the learned judge found that the delay was due largely to the fault of Mr. Seraphin, a reduction of two years is just in the circumstances.

**Violet Hodge v The Commissioner of Police
BVMCRAP2015/0005 (delivered 27th February 2018, unreported) followed.**

While it is accepted that the conditions of the prison fall short of the required or accepted standard, it cannot be said that they violate the constitutional rights of Mr. Seraphin to the extent that would warrant a reduction in sentence.

Darrin Roger Thomas and Haniff Hilaire v Cipriani Baptiste (Commissioner of Prisons) and others PC Appeal 60 of 1998 followed; Alcedo Tyson v The Queen BVIHCRAP2013/0008 (delivered 20th November 2017, unreported) followed.

The learned judge took into account all the necessary factors which he was obliged to take cognisance of in arriving at the appropriate sentence in this matter and no fault can be found in his approach to the sentencing of Mr. Seraphin. The sentence was therefore not manifestly excessive in the circumstances.

Mervyn Moise v The Queen [2005] ECSCJ No. 52 (delivered 15th July 2005) followed; Steve Gurrie v The Queen GDAHCRAP2013/0004 (delivered 5th April 2022, unreported) followed.

The learned judge in his remarks clearly stated and considered what role Mr. Seraphin played in the murder of Mr. Mannix and this was based on facts presented to the court. In the circumstances, this Court cannot detect any disparity of sentence in relation to Mr. Seraphin and his former co-defendant Mr. Nibbs.

R v Stroud [(1977) 65 Cr App Rep 150 followed.

Any time spent in custody prior to sentencing should be fully taken into account, not simply by means of a form of words, but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing. The learned judge failed to specify the time Mr. Seraphin spent on remand in arriving at the twenty-five (25)-year sentence. Mr. Seraphin's period of pre-trial custody, being five (5) years and nine (9) months is also to be deducted from his twenty-five (25)-year sentence.

Callachand and another v State [2008] UKPC 49 followed; Romeo Da Costa Hall v The Queen [2011] CCJ 6 (AJ) followed.

Case Name:

**The Attorney General of the British Virgin
Islands**

v

Partnerselskabet Parsifal

[BVIHCVAP2018/0001]
Territory of the Virgin Islands

Date: Tuesday 5th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant/Cross Respondent:	Ms. Maya Barry
Respondent/Cross -Appellant:	Mrs. Hazelann Hannaway-Boreland

Issues: Cross Appeal- Costs- Exercise of judicial discretion – Rule 64.6 of the Civil Procedure Rules 2000- Appellate court’s interference with judge’s discretion in relation to the award of costs- Whether judge erred as a matter of principle in depriving the cross-appellant of its costs despite its claim being successful - Costs follow the event- Whether circumstances of the case justify a departure from the general rule that costs follow the event

Result:

1. The cross-appeal is allowed and the order of the learned judge in relation to costs is accordingly set aside.
2. The cross-appellant shall have one-third of its costs below to be assessed by a judge of the High Court, if not agreed by the parties within 21 days and costs on the cross appeal, which shall not exceed two-thirds of the amount awarded in the court below.

Reason:

In making a costs order, the general rule is that costs follow the event. This means that the unsuccessful party must pay the successful party’s costs. The court, in its discretion, may depart from the general rule but must exercise its discretion judicially, having regard to

all the circumstances of the case and considering, in particular, the factors set out at CPR 64.6(6).

Rules 64.6(1), (2) and (6) of the Civil Procedure Rules 2000 considered; *Throne Capable Investment Limited v Agile Star Group Limited* BVIHCP2020/0014 (delivered 14th January 2021, unreported) followed.

The principles governing the appellate court's interference with the exercise of the judge's discretion in relation to an award of costs is closely reflective of the principles that inform an appellate court's interference with the exercise of a judge's discretion generally. Therefore, the appellate court will not interfere with a trial judge's discretion on costs unless it is satisfied that the trial judge erred in principle in her approach or has failed to consider some relevant matter or has taken into account some irrelevant matter or has plainly not balanced the various factors fairly, so as to make her decision clearly wrong.

Dufour and Other v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied; *Throne Capable Investment Limited v Agile Star Group Limited* BVIHCP2020/0014 (delivered 14th January 2021, unreported) followed; *A.E.I. Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507 considered; *Scherer and another v Counting Instruments Ltd and another* [1986] 2 ALL ER 529 considered.

In the case at bar, it cannot be said that, in the circumstances, the judge's reasons for depriving the successful party of its costs, justify a departure from the general rule. In relation to first reason, namely, the partial success of both parties in the claim, while the judge was correct to have regard to whether the cross-respondent had succeeded on particular issues, even if the cross-respondent had not been successful in the whole of the proceedings, as a factor affecting the costs order, this did not in itself mean that the cross-appellant

should be deprived of the whole of its costs. As it pertains to the reasons of the eleventh-hour concessions by the cross-appellant on several aspects of the claim and the manner in which the claim was prosecuted, there was nothing in the judge's judgment to indicate that she considered the concessions or the timing of them to have been unreasonable and which ultimately resulted in the claim being prosecuted in a manner which unduly aggravated costs and constituted 'misconduct'. The court is therefore constrained to conclude that depriving the cross-appellant of its costs on these bases, was not a proper exercise of the judge's discretion and produced a decision which was plainly wrong.

In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 considered; Throne Capable Investment Limited v Agile Star Group Limited BVIHCMAP2020/0014 (delivered 14th January 2021, unreported) considered.

Case Name:

[1] Jason Stickings

[2] Sharon Allen

v

**RBC Royal Bank of Canada
(now doing business as ACB Caribbean)**

[ANUHCVP2021/0023]

Antigua and Barbuda

Date:

Wednesday 6th July 2022

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant: Dr. David Dorsett instructed by Hill and Hill

Respondent: Ms. Jenell Gibson of Dentons Delaney

Issues: Civil appeal - Default judgment - Setting aside judgment in default of acknowledgement of service - Exercise of a master's discretion - Whether the master erred in the exercise of his discretion by dismissing the application to set aside the default judgment - Part 12 of the Civil Procedure Rules 2000 -Rule 13.3. – Whether the application fell to be considered under the discretionary provision of Rule 13.3 - Service of the originating claim – Rule 5.15 of the Civil Procedure Rules 2000 – Proof of Service – Whether there was proof of service upon the appellants in accordance with Rule 5.15 and 12.4 (a) - Failure to file acknowledgment of service - Whether there was a valid obligation to acknowledge service as specified under the rules or by order of the court - Part 7 and Rule 13.2 of the Civil Procedure Rules 2000- Service out of the jurisdiction

Result: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the master's decision and order dismissing the application to set aside the judgment in default of acknowledgement of service is set aside.
2. The appellants are awarded costs of the appeal in the sum of \$1000.00, to be paid by the respondent Bank.

Reason: (per Baptiste JA and Blenman JA):

The purpose of service of the originating process is to seek to ensure that the defendant(s) in a civil claim are given proper notice of the claim brought against them

and is given a reasonable opportunity to put forward any defence to the claim. When service is properly effected it is only then that the defendant is subject to the court's jurisdiction. CPR 13.2 mandates that the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered. In this present case, it cannot be said that service of the claim form at an address at which the appellants were not residing for about 8 years, could have constituted service in accordance with the court's order. Service at the given address could not reasonably be expected to have brought the proceedings to the attention of the appellants. It follows therefore that the learned master ought to have set aside the default judgment since time for filing the acknowledgment of service had not begun to run.

Part 12 of the Civil Procedure Rules 2000; Rule 13.2 of the Civil Procedure Rules 2000; Barton v Wright Hassall LLP [2018] UKSC 12 applied; Dubai Financial Group LLC v National Private Air Transport Services Company (National Air Services) Ltd [2016] EWCA Civ 71 applied; Personal Management Solutions Limited and Others v Gee 7 Group Limited and Another [2016] EWHC 891 (Ch) applied; Canada Goose UK Retail Ltd & Another v Persons Unknown and another [2019] EWHC 2459 (QB) applied; Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6 applied.

Where a defendant has not been served with the originating process, to deprive him thereafter of any period during which he can acknowledge service is unfair and unjust. CPR 7.5(1)(c) provides that an application to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating where the defendant may probably be found. In this case, the Bank had to prove service of the claim at the appellants' usual place of residence in England. A bald assertion as to the usual residence is not sufficient, there must be a nexus with that address. The learned master found that the appellants were not aware of the claim as they did not reside at the address

at which the claim was served. The master's finding that this was a good explanation for failure to file an acknowledgement of service, cannot, in the circumstances, be divorced from the important issue of lack of service of the originating process. It cannot be said that the appellants were under a valid obligation to acknowledge service, either as specified under the CPR or by order of the court. Accordingly, the default judgment entered in those circumstances ought to have been set aside.

Part 7 of the Civil Procedure Rules 2000 applied.

Per Webster JA [Ag.] (dissenting):

Where either the CPR or an order of the court provides the method of service and that method is followed, but the claim does not come to the attention of the defendant, his remedy is to either apply to set aside the order granting permission to the applicant to serve the claim out of the jurisdiction or apply under CPR 13.3 to set aside the default judgment. In this case the amended claim form and amended statement of claim were served in accordance with the order of Henry J dated 23 September 2016 for service on the appellants outside the jurisdiction by FedEx. The appellants did not apply to set aside the order for service. Instead, they applied under CPR 13.3 to set aside the default judgment.

Rule 13.2 of the Civil Procedure Rules 2000 applied; Rule 5.15 and 12.4 of the Civil Procedure Rules 2000 considered; Barton v Wright Hassall LLP [2018] UKSC 12 distinguished; Dubai Financial Group LLC v National Private Air Transport Services Company (National Air Services) Ltd [2016] EWCA Civ 71 distinguished; Abela and others v Baadarani [2013] UKSC 44 distinguished.

The court may set aside a default judgment if it is satisfied that the applicant has met the three conditions in CPR 13.3. A failure to satisfy any one of the three

conditions is fatal unless the defendant brings himself within CPR 13.3(2) by demonstrating that there are exceptional circumstances warranting the setting aside of the default judgment. The learned master found that the appellants did not satisfy the third condition in CPR 13.3(1), namely, that they had a real prospect of successfully defending the claim, and that there were no exceptional circumstances attending the application. Therefore, he dismissed the application to set aside the default judgment. An appellate court will disturb the exercise of a master's discretion only where it finds that the master erred in principle in his approach or has left out of account some aspect that he should have considered, or considered some matter that he should not have, and as a result his decision exceeded the generous ambit within which reasonable disagreement is possible, or the decision is wholly wrong. If it cannot be said that the master, in exercising his discretion, acted improperly or erred in principle, there is no basis upon which this Court can properly interfere with the exercise of his discretion to dismiss the application.

Rule 13.3 of the Civil Procedure Rules 2000 applied; Public Works Corporation v Matthew Nelson DOMHCVAP2016/0007, (delivered on 29th May 2017, unreported) applied; Yates Associates Construction Co Ltd v Brian Quammie BVIHCVAP2014/0005 (delivered on 5th May 2005, unreported) applied.

APPLICATIONS AND APPEALS

Case Name:

Denzil Edgecombe

v

[1] The Premier
[2] The Honourable Attorney General

[MNIHCVAP2016/0007]

Date: Monday 4th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant/ Respondent:	In person
Respondents/ Applicants:	Ms. Renee Morgan

Issues: Application to strike out the notice of appeal - Abuse of process - Failure to file written submissions within required time - Failure to file record of appeal and submissions - Undue delay

Type of Order: Oral Decision

Result / Order & Reason: IT IS HEREBY ORDERED THAT:

1. The application to strike out the notice of appeal is granted and the appeal is accordingly dismissed.

2. There is no order as to costs.

Reason:

The respondents filed an application on to strike out the notice of appeal. The Court listened to the submissions of Mr. Edgecombe and indicated that it had read the several documents filed in the matter including submissions, affidavits and other documents filed by the respondents/applicants.

The Court was of the view that the application by the respondents/applicants to strike out the notice of appeal should be granted. In coming to this conclusion, the Court had regard to the fact that (i) the notice of appeal in this matter was filed on 26th May 2016 against a judgment of the High Court dated 21st April 2016, which judgment itself arose from a dispute between the parties in 1994 and which led to proceedings being instituted in the High Court in 2013; (ii) the notice of availability of the transcript was given to the parties by the Registrar of the High Court since 16th January 2019; (iii) the matter came before the Chief Registrar for status hearing on 21st May 2019, whereupon an order was made for the filing of written submissions by the appellant/respondent in support of his appeal by 22nd July 2019 and nearly 3 years later, no submissions have been filed by the appellant/respondent; (iv) six years after the filing of a notice of appeal concerning a 1994 dispute, the appellant has taken no steps to progress his appeal.

Consequent upon the application to strike out the notice of appeal being granted; the appeal was also dismissed.

Case Name:

Oris Sullivan

v

Dagriee Wilson

[MNIHCVAP2021/0009]

Date: Monday 4th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Sylvester Carrott
Respondent/ Applicant:	Mr. Jean Kelsick

Issues: Application to strike out notice of appeal - Whether the appellant had taken steps to progress appeal - Abuse of court process- Non-Compliance with Civil Procedure Rules – Unfairness – Extension of time - Delay – The overriding objective - Failure to prosecute appeal - Costs - Unless order

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to strike out the notice of appeal is denied.
2. Unless the appellant files the skeleton argument and record of appeal by Monday 11th July 2022 the notice of appeal filed on 6th September 2021 shall be deemed to have been struck out and the appellant shall be liable to the respondent for costs to be assessed unless agreed by the parties within 21 days.
3. Costs of this application to strike out the notice of appeal are to be paid by the appellant to the respondent in the sum of \$2000.00.

Reason:

The Respondent/Applicant filed an application to strike out the notice of appeal filed on 6th September 2021, or alternatively for an order that unless the Appellant/Respondent files his skeleton argument and the record of appeal by dates to be determined by the court, his notice of appeal will be deemed as struck out and that he pays costs either way. The Respondent/Applicant indicated that since the filing of the notice of appeal, the Appellant/Respondent has not taken steps to progress the appeal.

Counsel argued that the Appellant/Respondent has demonstrated a pattern of delay that started in the court below which has continued in the appeal. The court noted that the notice of appeal was not filed in time and the court on extended the time to file the notice of appeal and deemed the notice of appeal. The notice of availability of the transcript was issued on 10th December 2021. The court noted that due to the recent filing of the appeal an unless order would be more appropriate in the circumstances.

Case Name:

**Karen Allen
Steven Fagen
Marie Carole Lidbetter**

v

**[1] Registrar of Companies
[2] Government of Montserrat
[3] Krys Global, Greig Mitchell & Kenneth Krys
(Joint Liquidators)**

[MNIHCVAP2020/0021]

Date:

Monday 4th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellants: In person

Respondents: Ms. Renee Morgan for the first respondent

Issues:

Civil appeal - Application to set aside decision made in party's absence - CPR 62.22 - Whether the 2nd and 3rd named appellants have a good reason for failing to attend the hearing - Whether the court would have made a different decision had the 2nd and 3rd named appellants been present

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application made by the appellants to set aside the order of the court striking out the two notices of appeal is denied.
2. There is no order as to costs.

Reason:

On 26th July 2021, upon applications by the respondents in appeals MNIHCVAP2020/0019 and MNIHCVAP2020/0021, this Court struck out the notices of appeal as being nullities; no leave having been granted to file the appeals.

On 10th August 2021, Marie Carole Lidbetter, the 3rd named appellant in appeal MNIHCVAP2020/0021 applied to set aside the decision of this Court on the basis that it was made in a party's absence. The set aside application was grounded in Rule 62.22 of the Civil Procedure Rules 2000 ("CPR") which enables a party to an appeal, who is not present at the appeal when the decision was made or when the appeal was struck out, to apply to set aside the order of the Court. The application must be supported by affidavit

evidence showing: 1.) good reason for failing to attend the hearing and 2.) that it is likely had the appellant attended, some other decision might be made. The application was supported by an affidavit sworn to by Ms. Lidbetter. In her affidavit, Ms. Lidbetter alleged that she and her husband, the 2nd named appellant in both appeals, were the subjects of police action which prevented the two of them from being present at the hearing of the appeal when their notices of appeal were struck out.

On 1st February 2022, the appellants filed a document titled “Final submission for application to set aside decision made in party’s absence for MNIHCVAP2020/0021”. The document, signed by all three appellants, stated that the three appellants, as opposed to just Marie Carole Lidbetter, were applying for an order that the application to set aside the decision made in a party’s absence be granted. The final submission document repeats the three grounds of the set aside application which merely reproduced rule 62.22 of the CPR and adds a fourth ground which only reproduced rule 62.13 of the CPR.

Also on 1st February 2022, the respondents filed an affidavit and submissions in opposition to the application to set aside the decision of the Court of Appeal. In the affidavit sworn to by Ms. Sophia Bruno, PC, she alleged that she and other officers of the Royal Montserrat Police Service, executed a search warrant at the home of the 2nd and 3rd named appellants on 26th July 2021, but denied several of the allegations contained in Ms. Lidbetter’s affidavit of 10th August 2021, including the allegation that Mr. Fagen was prevented from attending Court at 9:00 a.m. on that day or that he was prevented from taking any of the documents to attend Court with.

The essence of the respondent’s submission is that on 26th July 2021, this Court heard applications filed by the appellants to strike out appeals MNIHCVAP2020/0019 and MNIHCVAP2020/0021 together and struck out both appeals because they were interlocutory appeals filed without the leave of the Court. The respondent submitted that there was no evidence on the record that leave to appeal had been granted or even applied for.

The respondents did not deny that Ms. Lidbetter was detained on the morning of 26th July 2021 and was not at liberty to attend court that morning but denied that Mr. Fagen was prevented from attending court at the appointed time or from taking with him whatever documents he wished apart from some bank statements which PC Bruno said that she took from a pile of documents.

The respondents submitted that in any event, any documents which the appellants intended to rely on to defeat the strike out application would have to be filed before the date of the hearing. They also submitted that Ms. Karen Allen, the 1st named appellant, appeared at the hearing on 26th July 2021 as representing all three appellants as she had in fact done at previous hearings of this and other related matters and that the presence of Ms. Lidbetter at the hearing would have made no difference to the outcome of the appeal.

On 4th February 2022, the appellants filed a document titled “Final submission opposing submissions opposing application to set aside decision made in party’s absence for MNIHCVAP2020/0021 filed 1st February 2022”. The Court considered that while the application said a lot of things, it did not say anything that was relevant to the application before the Court. The Court was of the view that the net effect of the document is to continue to advance the appellants’ version of what transpired on 26th July 2021 whilst being of no assistance to the Court on the basis of which the appeals were struck out and more particularly, why it is likely that the Court of Appeal would have made some other decision if Ms. Lidbetter and Mr. Fagen had attended the hearing.

The Court considered that even if it accepted the appellant’s version of the events of 26th July 2021, the Court was not persuaded by what it has read before or what it heard at the hearing, that it is likely that if Ms. Lidbetter and Mr. Fagen had been present at the hearing on 26th July 2021, some other decision would have been made on the application to strike out the appeals against interlocutory orders or judgments filed without leave. The applications before the Court on 26th July 2021 were applications to strike out two appeals on the

ground that the notices of appeal were filed without leave of the High Court or the Court of Appeal. The Court considered that all the issues which the appellants sought to raise before the Court and which they evidently intended to raise with the Court on 26th July 2021 were completely irrelevant to the issues which the Court was required to address. The Court was of the view that there was nothing in what was said to the Court by all three of the appellants which show that it is likely had the 3rd appellant, Marie Carol Lidbetter and for that matter the 2nd appellant, Steven Fagan been present in court on 26th July 2021, some other decision might have been made.

In all the circumstances, the application to set aside the order of the Court striking out the two notices of appeal was denied.

Case Name:

Keston Riley

v

The Honourable Attorney General

[MNIHCVAP2021/0011]

Date:

Monday 4th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant: In person

Respondent: Ms. Sherasmus Evelyn

Issues:

For Report

**Type of
Order:**

Adjournment

Result:

IT IS HEREBY ORDERED THAT:

**The hearing of the appeal is adjourned to Thursday 7th
July 2022.**

Reason:

**The appellant indicated that he has retained new
counsel in the matter and that counsel is ready to
prosecute the appeal before the Court at the sitting on
Thursday, 7th July 2022.**

Case Name:

Ivor Greenaway

v

Oslyn Greenaway

[MNIHCVAP2021/0002]

Date:

Monday 4th July, 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of
Appeal**

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

Ms. Chivone Gerald

Issues:

For Report

**Type of
Order:**

Adjournment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The application on behalf of the appellant for an adjournment of the matter is granted.**
- 2. The hearing of the matter is adjourned to the next sitting of the Court for the Territory of Montserrat during the week commencing 23rd January 2023.**

Reason:

Counsel on record for the appellant is unavailable and incarcerated and the appellant has recently obtained new counsel. In the circumstances, the appellant seeks an adjournment of the hearing of the appeal to the next sitting of the Court. The respondent did not object to the request for an adjournment.

Case Name:

Jonathan Edward

v

The Queen

[SLUHCRA2022/0004]

Date:

Tuesday 5th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

**Appellant /
Applicant:**

Mr. Leslie Prospere with Ms. Britney Barnard

**Respondent /
Respondent:**

Mrs. Tanya Alexis- Francis

Issues: Application for leave to adduce medical notes, Application for bail pending the hearing and determination of the appeal - exercise of court's discretion - Whether special or exceptional circumstances exist to warrant the grant of bail- Whether conviction for dangerous harm was plainly wrong - Whether appeal has a prospect of success - Whether procedural irregularities during the trial prejudiced the jury - Adverse comments - Fairness and integrity of trial - Failure of disclosure by prosecution - Whether the non-disclosure of the medical notes prejudiced the appellant/applicant in advancing his defence - Whether the medical notes constituted independent evidence on the issue of location of the incident

Type of Order: Oral Decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application for bail is dismissed as the Court is not satisfied that the applicant has demonstrated exceptional circumstances for the grant of such bail.
2. The application in respect of adducing medical records is referred to the court conducting the hearing of the appeal.

Reason: This is an application for bail pending the hearing of the appeal. The grounds of the application are that the transcripts amply establish that the appellant's conviction and sentence were plainly wrong, and the appeal has a reasonable prospect of success having regard to the numerous incurable procedural irregularities that occurred during the trial. This includes the prosecution's failure to comply with two orders of the trial judge to serve the medical notes upon the appellant and the making of highly prejudicial

adverse comments on the appellant's defence and self defence to the jury. The appellant is not a flight risk and will comply with his bail conditions.

The Court has a discretion to grant bail pending appeal, conferred by section 41 (2) of the Eastern Caribbean Supreme Court Act. The court may, if it seems fit, on the application of the appellant/applicant, admit the appellant/applicant to bail pending the determination of his or her appeal. The circumstances must be exceptional to grant bail to a person convicted by a jury. If on the face of the papers before the court, the conviction appears plainly wrong so that his appeal has every prospect of success, this would be a factor which would make the case exceptional.

Counsel for the appellant/applicant submitted that the conviction was plainly wrong having regard to the several grave irregularities in his trial, the abundant evidence of self defence and the powerful grounds of appeal. Counsel further argued that the appeal, has every prospect of success, so bail should be granted pending the hearing of the appeal.

Grounds 1 and 2 of the grounds of appeal dealt with the prosecutions failure to disclose medical records; and ground 3 asserted that the judge wrongly exercised his discretion to continue the trial without the medical notes. Ground 4 dealt with adverse references made by the prosecutor. Ground 5 asserted that the closing comments of the prosecution prejudiced the applicant. Ground 6 stated that the conviction is against the weight of the evidence.

The appellant/applicant asserted that the medical notes would have assisted the jury in determining the credibility of the evidence of the Crown and the appellant's witnesses in the trial on the following crucial issues (i) the location where the stabbing incident had occurred; and (ii) the virtual complainant's considerable aggression / belligerence towards the appellant during and after the stabbing incident.

The court was of the view that a critical factor here is that the jury had the benefit of visiting the locus in quo,

where certain things would have been pointed out by the witnesses. The jury, as fact finders, would have made their determination having heard all the evidence, inclusive of where the incident occurred.

Learned counsel alleged that the prosecutor made adverse comments on the non – calling of two – witnesses by the defendant. Counsel argued that the appellant has a sacrosanct right to silence which was completely undermined at the trial, resulting in the jury having a wrong impression of self defence.

In resisting the application for bail, the respondent submitted that exceptional circumstances have not been proved by the applicant to warrant bail pending the appeal. The grounds advanced do not show manifest error, and the grounds of appeal, though arguable, do not show that the conviction was plainly wrong. Further, arguable grounds of appeal do not constitute exceptional circumstances. The Court herein agreed with the respondent's submissions.

The court has considered the grounds of the application and the grounds of appeal. We are of the view that nothing has been advanced which shows that the conviction was plainly wrong. The grounds, arguable as they are, could go either way and do not constitute exceptionality, and do not show that the conviction was plainly wrong.

The appellant/applicant's counsel made much of issue of the non - production of medical notes. As noted earlier, he asserted that the medical notes would address the precise location as to where the incident occurred and (ii) the belligerence of the virtual complainant in the aftermath of the incident. The court noted that the defence raised was one of self defence. No issue was raised with respect to the trial judge's direction on that issue. The court had already commented on the fact that the jury visited the locus in quo and from the evidence tendered, plus their view at the locus, would have made a determination as to the location of the incident. With respect to the arguments of counsel relating to the belligerence of the virtual

complainant in the aftermath of the incident, the court noted the defence advanced.

Other issues raised in the appellant/applicant's skeleton submissions concern the fact of the appellant/applicant having to wait until November for the hearing of the appeal. This does not constitute an exceptional circumstance. Given that the applicant was sentenced to 8 years imprisonment in June of this year, there is not a risk that he would have served his sentence before the hearing of the appeal. Further, not being a flight risk and having adhered to all previous bail conditions, do not constitute exceptional circumstances.

Having read the submissions of both counsel and having heard their oral submissions and paying regard to the applicable law, the Court was of the view that no exceptional circumstance has been advanced and thus cannot conclude that the conviction was plainly wrong, warranting bail pending appeal.

For the reasons given the application for bail pending appeal was dismissed as the court was not satisfied that the applicant had demonstrated exceptional circumstances for the grant of such bail.

Case Name:

Kayoy Jarett

v

The Queen

[MNIHCRAP2021/0001]

Date:

Tuesday 5th July 2022

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Kenroy Hyman

Respondent: Mr. Oris Sullivan Director of Public Prosecutions

Issues:

Criminal appeal – Appeal against conviction - Section 138 (1) of the Penal Code of Montserrat - Unlawful sexual intercourse with a girl under the age of 13 - Whether learned trial judge made improper comments in his summing up to the jury which went beyond the proper bounds of judicial comment - Watson Direction - Whether learned judge erred in combining Watson Direction with Majority Direction - Whether the learned trial judge erred in not allowing defence counsel the opportunity of follow up questions of the virtual complainant during cross-examination.

Type of Order:

N/A

Result / Order & Reason:

**IT IS HEREBY ORDERED THAT:
Judgment in this matter to be delivered on Wednesday 6th June 2022.**

Reason:

N/A

Case Name:

Ashel Bramble

v

The Queen

[MNIHCVAP2020/0013]

Montserrat

Date:

Tuesday 5th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:
Appellant: In person
Respondent: Mr. Oris Sullivan

Issues: Criminal appeal- Appeal against sentence

Type of Order: Adjournment

Result / Order: The hearing of the appeal is adjourned to Thursday 7th July 2022.

Reason: Due to time constraints the Court adjourned the hearing of the appeal to Thursday 7th July 2022.

Case Name: D'Iar Selah Kunter

v

Commissioner of Police
[MNIMCRAP2020/0012]

Date: Tuesday 5th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:
Appellants: In Person
Respondent: Mr. Oris Sullivan

Issues: Appeal against sentence - Whether the sentences of twelve months and 3 months to run concurrently having plead guilty for the offences of common assault and using threatening language was excessive - sentencing guidelines and principles - excessive sentence- credit or early guilty plea

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal against the sentence of twelve [12] months and three [3] months imprisonment to run concurrently for the offences of common assault and threatening language respectively is allowed.
2. The appellant is sentenced to time served.

Reason: The Crown conceded the appeal. The sentences imposed by the magistrate where the appellant had plead guilty at the earliest practicable opportunity were excessive given all the circumstances of the case and should be reduced. There was nothing in the Magistrate's sentencing order that suggested that account was taken of, and credit given for the early guilty plea.

Case Name: Kayoy Jarett

v

The Queen

[MNIHCRAP2021/0001]

Date: Wednesday 6th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Sylvester Carrott holding papers for Mr. Kenroy Hyman

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions

Issues:

Criminal appeal - Appeal against conviction - Section 138 (1) of the Penal Code of Montserrat - Unlawful sexual intercourse with a girl under the age of 13 - Whether learned trial judge made improper comments in his summing up to the jury which went beyond the proper bounds of judicial comment - Watson Direction - Whether learned judge erred in combining Watson Direction with Majority Direction - Whether the learned trial judge erred in not allowing defence counsel the opportunity of follow up questions of the virtual complainant during cross-examination- WhatsApp messages -Application of the proviso - Section 283 (1) of the Criminal Procedure Code of Montserrat.

Type of Order

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The Appeal is dismissed.**
- 2. The conviction for unlawful sexual intercourse with a girl under 13 is upheld and the sentence of eleven years imprisonment is affirmed.**

Reason:

Four grounds of appeal have been advanced in this appeal. Ground 1 alleges that the judge made improper comments in his summing up to the jury which went beyond the proper bounds of judicial comment. The complaint here is that during the summation on the issue of WhatsApp messages, the judge told the jury that the messages show that the appellant had sex with the virtual complainant already: The judge stated that

“Overall it is common sense the messages show she had, had sex with him already.”

Mr. Kenroy Hyman, the appellant’s counsel, argued that the learned judge was expressing his views as to the effect of the WhatsApp messages. Learned counsel noted that the case advanced by the prosecution was that the intercourse took place prior to the WhatsApp messaging. When the intercourse took place, it was the first and only time the virtual complainant had had sexual intercourse; and on that occasion, it was the appellant who had sexual intercourse with her. The appellant, however, denied ever having sexual intercourse with her.

Mr. Hyman further contended that the jury were entitled to consider for themselves, the nature and effect of those WhatsApp messages, and to attach whatever weight, if any, to them, since they formed part of the facts which fell within their remit as finders of fact. The task of determining what the evidence shows, is not one for the judge; it falls squarely within the remit of the jury. Mr. Hyman submitted that the judge’s comment must have weighted heavily against the appellant and clearly usurped the jury’s function.

Mr. Oris Sullivan, the learned Director of Public Prosecutions, posited that the appellant took the judge’s comment out of context. He contended that the learned judge was summarizing the prosecution’s case and was speaking to the Crown’s evidence’ rather than expressing his views on the matter, when he said that it is common sense that the virtual complainant had sex with the appellant already. Mr. Sullivan’s fallback position was that the comment was well - intentioned although improper. Learned counsel invited the court to apply the proviso.

The court did not agree that the appellant took the learned judge’s comment out of context. The judge made his comment during his review of the prosecution’s case. He expressly told the jury that “it is common sense that the messages show, she had sex with him already.” The comment was certainly

improper. This was a matter which fell squarely within the remit of the jury.

Ground 2 asserted that the leaned judge placed improper pressure on the jury when in directing them during the majority verdict direction, spoke to the possibility of another trial if they could not agree on a verdict. In support of that ground, Mr. Hyman referred to the occasion when the jury were invited back into the courtroom around 5:13 p.m. for a second time during their deliberation. The judge told the jury:

“It is also a case which involved evidence from a child in respect of which there was substantial difficulty in getting her to talk to the court and it is a matter of some concern for the court that there might be the prospect at some point of having to try this case again , with the consequence that this child will have to give evidence again and it is only right that a verdict can be achieved in a case there has been three weeks and the child gave evidence after so much effort ... every effort is made to secure a verdict whichever way it goes.”

The judge continued:

“We have conducted a lengthy trial in which a child aged 11 having some difficulty giving evidence has been presented to you. If it is at all possible, I want a verdict and you have only been deliberating for three hours and forty minutes.”

Mr. Hyman submitted that the judge’s reference to the possibility of another trial taking place if the jury could not agree, may have the effect of placing pressure on them to agree, when otherwise they might not have done. Further, on a close scrutiny of the passages, it is clear that the judge was demanding a verdict in order to avoid the inconvenience of another trial, mainly

because of the daunting prospects of the child having to testify again, especially in light of the difficulties in getting her to speak. This, Mr. Hyman asserted may have, and most likely placed improper pressure on the jury, with the result that they may have felt that it was incumbent on them to express agreement with a view they did not truly hold, thereby compromising their oaths. The appellant referred to R v Boyes [1991] Crim LR 717 at 718, where the court stated:

“When giving a majority direction, it is not permissible to refer the jury to the possibility of another trial having to take place if they could not agree, as this might have the effect of putting pressure on the jury to agree when otherwise they might not have done.”

The court was of the view that a direction to the jury about the trouble and expense of a retrial should they be unable to reach agreement was capable of placing improper pressure on them. “A jury should be free to deliberate without any form of pressure being imposed upon them, whether by way of promise or threat or otherwise. They must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so ...” Per Lord Lane in R v Watson [1988] QB 690 at 700. See also “R v Brown [2016] EWCA Crim 523 para 21.

The fact that the judge mentioned a re-trial, while capable of placing improper pressure on a jury, would not ab initio, produce such a result. One has to examine the facts and circumstances of the particular case.

Ground 3 asserted that the trial judge erred in combining the Watson direction with the majority verdict direction. Mr. Hyman considered this to be a material irregularity which has the potential effect of putting undue pressure on the jury. Counsel posits that

a Watson direction should only be given after the majority direction has been given and after some time has elapsed.

Mr. Hyman submitted that the prospect of a retrial, and combining a majority direction with a Watson direction, cumulatively had the effect of imposing improper pressure on the jury, rendering the trial unfair and the conviction unsafe.

Mr. Sullivan argued grounds 2 and 3 together. Counsel stated that he accepted that a Watson direction was given and should not have been given the way it was given. He submitted however, that giving the direction was not fatal to the conviction. All the circumstances should be looked at. Mr. Sullivan also submitted that there was no error on the part of the learned judge as it is left to his discretion as to when a Watson direction should be given.

The authorities suggest that there will usually be no need for a Watson direction. While the decision is one for the judge's discretion, he or she should normally invite submissions from counsel as to the way in which the discretion is exercised. Circumstances in which the Watson direction is given will therefore be rare. They will not arise unless and until the jury have been deliberating for a significant time in the context of the particular case and after they have been given a majority direction and have had further time in retirement. The judge should avoid putting the jury under pressure or creating any perception that he is doing so.

In *Arthur v R* [2013] EWCA Crim 1852 at paragraph [44] the court stated:

“... if complaint is made about the trial judge's words of explanation, encouragement or exhortation, the question for this court is whether the words used were appropriate in the circumstances or carried with them the risk that jurors would feel under pressure

to compromise their oaths, the verdict is likely to be unsafe. ... No juror should feel under pressure to reach a verdict if to do so would require any one of them to compromise their oath. The danger is that all jurors, particularly the minority, would feel pressure to return a verdict unanimously or by an acceptable majority at the expense of conscientious consideration of the evidence. The closer the jury is to unanimity or to an acceptable majority the greater is the pressure to which the minority may feel exposed.” Each case must be considered on its own facts.

The court was of the view that the jury were placed under pressure to return a verdict. An examination of the chronology of events show that the jury retired about 1:47 p.m. They returned to court at 4:21 p.m. and further directions were given. At 5:13 p.m. the jury returned to court and the majority verdict direction and the Watson direction were given. At that stage, the jury had been out deliberating for 3 and a half hours. The jury’s verdict was rendered at 10.10 p.m. after deliberating for almost five hours after the direction was given.

The court agreed with the Director of Public Prosecutions that a major consideration has to be the length of time taken by the jury to reach a verdict after the direction had been given. In circumstances where the jury deliberated for almost five hours before arriving at a verdict, and were only able to reach a majority verdict, the idea that they were pressured to reach a verdict, is clearly not sustainable.

Ground 4 alleged that the judge erred in not allowing defence counsel the opportunity of follow -up questions of the virtual complainant during cross -examination. Mr. Hyman submits that this deprived him of exploiting inconsistencies in the evidence of the virtual complainant, thus rendering the trial unfair.

This complaint has its root in the appointment of an intermediary for the purpose of the cross-examination of the virtual complainant, she being a vulnerable witness. The issue of such an appointment was raised by the prosecution. The learned judge discussed the matter with both counsel, then judge ruled on the use of the intermediary and the procedure to be adopted during that process. The judge ruled that there would be no follow up questions by defence counsel. Mr. Hyman submits that the refusal of the trial judge to allow defence counsel the opportunity to follow up questions, was a fundamental error, rendering the trial unfair.

Mr. Hyman further submitted that notwithstanding that the judge directed the jury that defence counsel was not allowed to ask to follow up questions in an attempt to undermine the answers given by the virtual complainant, that direction could not cure the prejudice caused to the appellant. Learned counsel further submitted that the judge's ruling made the trial unfair, especially in light of the obvious inconsistencies in the child's evidence. Mr. Hyman also submits that the inconsistencies could not be challenged and exploited before the jury by the defence. In counsel's view, this must have left the jury to believe the child was a credible witness, when on the evidence, as the judge pointed out, there were inconsistencies in her evidence, albeit her video recorded interview with the police.

Mr. Sullivan invited the court to dismiss this ground of appeal on the basis that there was nothing done or said in contravention of the special measures direction and there was no unfairness or impropriety in the proceedings. The special measures directions were agreed beforehand. The questions to be put to the witness were all agreed in advance between defence counsel and the court. These questions were submitted by counsel. The Director of Public Prosecutions argued that the need to ask for follow up questions or the likely answers should have been considered and built into the questions crafted, to take into account the eventuality

of follow up questions. Notwithstanding this, Mr. Sullivan submits that the trial was not rendered unfair.

The court noted that the law with respect to the use of intermediaries is provided for in section 283 (1) of the Criminal Procedure Code of Montserrat. Chapter 4.01 Revised Laws of Montserrat. It is considered one of the special measures within the court's jurisdiction with respect to vulnerable witnesses. Section 283 (1) provides that: "A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purpose of this section ("an intermediary"). The intermediary's function is to put questions to the witness; and to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers as far as necessary to enable them to be understood by the witness or person in question: section 283 (2), (a) and (b).

The learned judge clearly had concerns about follow-up questions and specifically addressed that issue with Mr. Sullivan. The judge stated: "You are right to say you can have a script as to what the questions are, but the problem is going to be whether any follow up is called for." Mr. Sullivan responded that the judge has a discretion to allow those and quite properly pointed out there may be limitations on the approach, but the court has to bear in mind that what is required is fairness for both sides. The court noted that Mr. Hyman, in interacting with the judge on the issue of the intermediary, specifically stated that "our objection is really to ensure that whatever position is taken, it does not affect the fairness of the trial."

While of the view that the learned judge had a discretion to allow or not to allow follow up questions, the exercise of such discretion up front in favour of a blanket prohibition, particularly where no reasons are advanced, necessarily raises concerns about the proper exercise of that discretion and the fairness of the proceedings. It cannot be disputed that the judge has the overall responsibility for the fairness of the trial.

This responsibility has not been altered because of the increased availability of intermediaries, or the wide band of possible special measures now enshrined in statute: R v Cox [2012] EWCA Crim 549 paragraph 29.

It is undoubtedly the duty of a trial judge to manage the criminal trial in a fair and effective manner. This extends to the nature and extent of cross - examination allowed, but always ensuring that there is no unfairness. The learned judge established the parameters for the intermediary to ask questions and specifically said that there will be no follow up questions. The judge advanced no particular reason for that prohibition. The critical question here is whether the limited restraint placed on the defence in not allowing follow - up questions was unfair.

In advancing the position that the prohibition on follow up questions was unfair, Mr. Hyman specifically complained that the prohibition disabled the appellant from exploiting inconsistencies in the child's evidence before the jury, leading the jury to believe that she was a credible witness and rendering the trial unfair. Interestingly, in his written submissions, Mr. Hyman did not condescend to particulars concerning these inconsistencies or their possible effect on the fairness of the trial. Further, learned counsel makes no complaint about the trial judge's treatment of inconsistencies.

In his summation, the learned judge stated that there were conflicts in the evidence about the size of the bed, whether the sex was in the bedroom or the living room, what snacks were bought, were they combos and Doritos, were they from Ashok's. There was no mention in the first interview of the supermarkets. The virtual complainant told the doctor there was no fingering or no fondling of her tities. In our judgment, if the jury found that these matters constituted inconsistencies, it could hardly be that the jury considered them matters of such substance undermining the credibility of the child's evidence that the appellant had sexual intercourse with her. The prosecution presented a strong case that the appellant had sexual intercourse

with the child. The child's evidence was that she had sex once and this was with the appellant in July. The sex took place in the middle of July. It occurred at the appellant's home. The evidence of the child that the appellant had sexual intercourse with her was not undermined.

Section 39 of the Montserrat Supreme Court Act (Ch. 2.01) states that an appeal against conviction is to be allowed if the Court of Appeal thinks that the verdict of the jury should be set aside on the ground (inter alia) that it is unsafe or unsatisfactory, but subject to the proviso;

“Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has occurred.”

The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. That the appellate court is satisfied of guilt is certainly necessary but is not by itself sufficient. The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the appellant if the flaws in the proceedings had not occurred. Ordinarily, the whole point of the proviso is that it falls to be considered precisely because there has been some significant defect, which may include unfairness to the defendant, in the trial: *Cassell v the Queen* [2016] UKPC 19 at 27 and 28.

Although of the view that there were some irregularities in the trial concerning the giving of the Watson direction at the same time as the majority direction; the comments of the learned judge with respect to a retrial, and the prohibition on the follow up questions, the court was of the view that this would be an appropriate case to apply the proviso, being satisfied

that any jury acting properly must inevitably have convicted the appellant.

Case Name:

[1] Karen Allen
[2] Steven Fagan
[3] Marie Carole Lidbetter
v
[1]Registrar of Companies
[2]Financial Services Commission

[MNIHCVAP2019/0006]

Date: Wednesday 6th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. Renee Morgan

Respondents: In person

Issues: Application for extension of time to comply with order granting conditional leave to appeal- Application for final leave to appeal to Her Majesty in Council- Certification of record of appeal- Whether the applicant was required to settle the record of appeal with the respondents within the time stipulated before it was certified- Whether the applicant failed to fulfill the conditions in the order dated 10 February 2022 for the grant of final leave to Her Majesty in Council

Type of Order: Oral Decision

**Result / Order
& Reason:**

IT IS HEREBY ORDERED THAT:

The 1st respondent not having complied with the terms of the order granting conditional leave to appeal to the Judicial Committee of the Privy Council, the application for final leave to appeal is accordingly denied.

Reason:

The court noted that what was before the Court was an application in Montserrat civil appeal no. 6 of 2019 filed on 13th June 2022 by the Registrar of Companies (“1st respondent/the applicant”), for final leave to appeal to the Privy Council against a decision of this Court made on 14th January 2022.

Conditional leave was granted by the Court on 10th February 2022. The order of 10th February 2022 as amended and re-issued on 10th May 2022, required the applicant to comply with the following conditions:

- 1) The applicant shall within 90 days of the date of the order lodge with the court office the EC dollar equivalent of £500.00 as security for the prosecution of its appeal to the Privy Council.
- 2) Within 90 days of the conditional leave order, take the necessary steps for the purpose of procuring the preparation of record of appeal, the settling of the record with the respondents and the certification of the record by the Registrar of the Court of Appeal.
- 3) Prepare the record in accordance with Rules 18-20 of the Judicial Committee Appellate Jurisdiction Rules 2009 and applicable practice directions.
- 4) The applicant shall apply to the Court for final permission to appeal to the Privy Council supported by the certificate of the registrar that the security for cost order has been given within the time prescribed by the order granting conditional leave.

As to the first condition, from a document exhibited by the applicant, it appeared as though the security deposit was lodged by two payments, one made on 3rd

May 2022 and the other 10th May 2022, although as advanced by Ms. Karen Allen, the money was not lodged in the court office but at the treasury department. As to the second condition, counsel for the applicant said that the record was prepared and certified by the Registrar of the Court of Appeal within 90 days but was not settled with the respondents or even provided to them within that time. As to the fourth condition, the 1st respondent/applicant applied to the Court for final permission to apply to the Privy Council, but the application was not supported by a Certificate of the Registrar that the security for costs had been given within the time prescribed to the satisfaction of the Registrar. The Certificate of the Registrar was only filed on 6th July 2022 (the date of the hearing). The Court refrained from addressing the third condition as to compliance with the rules of the Judicial Committee of the Privy Council.

From the Court's recitation of the pertinent facts and circumstances, the Court was of the view that the applicant did not comply with all the conditions laid down in the order of the Court made on 10th February 2022. In particular, the 1st respondent/applicant did not file any Certificate of the Registrar together with the application now before the Court for final leave to appeal to the Privy Council. Instead, the 1st respondent/applicant exhibited a document titled "Journal Voucher" filed at the treasury department on 10th May 2022 and only filed the Certificate on the day of the hearing which ought to have been filed together with the application on 13th June 2022.

The 1st respondent/applicant also did not attempt to settle the record of appeal with the respondents within the stipulated time, giving the unacceptable excuse that although they had prepared the record and had it certified in time, it did not realise until the time had passed that it had to settle the record of appeal with the respondents. The Court was therefore of the unanimous view, that particularly, these two latter incidents of non-compliance by the applicant, with the very specific requirements of the order of this Court, could not be made right by granting an extension of time to the applicant, after the fact, to comply with the obligations. The applicant therefore not having

complied with the terms of the order granting conditional leave to appeal to the Privy Council, the application for final leave to appeal was accordingly denied.

Case Name:

**[1] Steven Fagan
[2] Marie Carole Lidbetter
[3] Karen Allen**

v

Registrar of Companies

[MNIHCVAP2019/0006]

Date:

Wednesday 6th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Applicants: In person

Respondent: Ms. Renee Morgan

Issues:

Application to appeal refusal of notice of motion for leave to appeal to Her Majesty in Council- Jurisdiction of the court to address its previous decision refusing leave to appeal to Her Majesty in Council

Type of Order:

Oral Decision

Result / Order & Reason:

IT IS HEREBY ORDERED THAT:

The application by Ms. Karen Allen, Mr. Steven Fagen and Ms. Marie Carole Lidbetter for leave to appeal the decision of this Court refusing the previous application by the appellants for leave to appeal to the Privy Council is one that the Court has no jurisdiction to entertain having refused the previous application for leave to appeal to the Privy Council and the application is accordingly dismissed.

Reason:

The Court heard an application by the applicants for leave to appeal the decision of this Court refusing the previous application by the applicants for leave to appeal to the Privy Council. The Court had no jurisdiction to entertain such an application having already rendered its decision and was functus officio.

Case Name:

Bank of Montserrat

v

Owen Rooney

[MNIHCVAP2018/0007]

Date:

Wednesday 6th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Sylvester Carrott

Respondent: No appearance

Issues:

Application to strike out notice of appeal - Application for adjournment

**Type of
Order:**

Adjournment

**Result /
Order:**

IT IS HEREBY ORDERED THAT

- 1. The application by the respondent, Mr. Owen Rooney for an adjournment of the application to strike out the notice of appeal is granted.**
- 2. The hearing of the application is adjourned to the next sitting of the Court of Appeal for the Territory of Montserrat during the week commencing 23rd January 2023.**
- 3. The respondent, Mr. Owen Rooney shall file a medical certificate on his medical condition or conditions within one (1) month of today's date.**

Reason:

The respondent, a litigant in person, made an application for an adjournment of the hearing of the application due to his illness. There was no medical certificate filed in support. In the circumstances the court granted the application for an adjournment to the next sitting of the Court.

Case Name:

Keston Riley

v

Honourable Attorney General

[MNIHCVAP2021/0011]

Date:

Thursday 7th July 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Hugh Marshall
Respondent: Ms. Sherasmus Evelyn

Issues: Civil appeal - Compensation - Damages

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application by the appellant for an adjournment of the matter on the ground of counsel for the appellant being recently instructed is granted, there being no objection from the respondent.

2. The hearing of the application is adjourned to the next sitting of the Court of Appeal for Montserrat during the week commencing 23rd January 2023.

Reason: Counsel for the appellant indicated that he had recently been retained. Counsel for the respondent did not object to the request for adjournment.

Case Name: Ashel Bramble

v

The Queen

[MNIHCVAP2020/0013]

Montserrat

Date: Thursday 7th July 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions

Issues:

Criminal appeal- Appeal against sentence- Possession of Cannabis sativa with intent to supply- Whether, according to the Eastern Caribbean Sentencing Guidelines the offence of possession of cannabis sativa with intent to supply attracts a custodial sentence- Whether judge erred in imposing a term of imprisonment - Previous conviction as juvenile- Whether judge erred by taking into account a previous conviction in the United States of America while the appellant was a juvenile - Section 21 of the Evidence Act of Montserrat, Cap 2.08 - Whether the procedure in section 21 of the Evidence Act for proving a previous conviction was followed - Aggravating factors- Whether learned judge erred by taking into account material put forward by the Crown suggesting that the appellant had been involved in similar conduct even though they did not form part of the 2 counts of intent to supply- Effect of appeal, if successful, on the appellant who has already served his term of imprisonment

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The sentence of 11 months imprisonment on each count is set aside.**
- 2. In the circumstances of this case, the Court declines to impose any alternative sentence.**

Reason:

On 19th December 2019, the appellant was arraigned on indictment No. MNIHCR2019/0020 and pleaded guilty to two counts of possession of cannabis sativa with intent to supply. Count 3, alleged that the appellant on 23rd February 2019 at Barzey's in the Overseas Territory of

Montserrat, had in his possession portions of the plant cannabis sativa with intent to supply to another being 13.97 grams. On Count 4, the allegation was that on 24th February 2019 at Happy Hill, Salem in the Overseas Territory of Montserrat had in possession portions of the plant cannabis sativa with intent to supply to another totalling 97.29 grams and 377 seeds. The appellant appealed against the sentence of 11 months imposed in respect of each count which was ordered to run concurrently.

Five grounds of appeal were advanced by the appellant. The first is that the learned judge erred in imposing a term of imprisonment having pleaded guilty to two counts of possession of cannabis sativa with intent to supply, less than 1 kilogram, which according to the provisions of the Eastern Caribbean Supreme Court Sentencing Guidelines (“the Sentencing Guidelines”), should not attract a custodial sentence. Ground 2 was that the learned judge erred in that having deemed as spent, a conviction in 1994 for drug offences in the United States of America, went on to impose concurrent terms of imprisonment on both counts of possession with intent to supply, to run consecutively with the sentence imposed on two counts of prostitution, making the overall sentence excessive.

Ground 3 was that the learned judge erred when he took into account, material of a conviction in 1994 in the United States of America as a juvenile without complying with the requirements of section 21 of the Evidence Act Cap 2.08 of the laws of Montserrat, which mandates that a certified copy of the conviction must be produced to the Court from the person having custody of record where such conviction took place.

Ground 4 of the appeal was that the sentencing judge erred in taking into account material put forward by the Crown in the summary of facts following the guilty plea, which suggested that the counts on the indictment merely represented a sample of a course of conduct of dealing with drugs.

Ground 5 alleged that the sentencing judge erred in treating as an aggravating factor, material put forward by the Crown in their summary of facts suggesting that

the appellant had been involved in similar conduct although this did not form part of the two counts of possession with the intent to supply, which the appellant pleaded guilty to.

In considering grounds 2 to 4 the court indicated that these grounds essentially challenged the basis on which the learned judge determined that the custody threshold had been reached and also the matters which the judge considered aggravated the offences thus warranting a custodial sentence. The judge firstly took into account a spent conviction for offences committed in the United States of America, while the appellant was a juvenile. Before the Court, the learned Director of Public Prosecutions properly conceded that section 21 of the Evidence Act provided a mechanism by which such a conviction was to be proved before a Court and he further conceded that that the procedure was not followed in this case.

There was no record of the conviction properly proved. In the face of those concessions, it is clear that the learned judge did not have before him any admissible evidence of those convictions. He therefore erred when he factored them into the shaping of the sentence for the drug offences. The judge also erred when he determined that the appellant was not of good character on account of those convictions. This determination was based on the improper use of the unproved and inadmissible United States of America convictions. Had the judge not done so, the appellant would have been entitled to be treated as a person of good character and entitled to an appropriate discount.

As it related to ground 4 and 5, the complaint was that the judge took into account information provided by the Crown in opening the facts which bore no relevance to the counts to which the appellant had pleaded guilty. Mr. Sullivan, Director of Public Prosecutions, conceded in answer to a question from the Court, that the judge's reference to the appellant having imported drugs into Montserrat was inappropriate and irrelevant because it bore no relation to the counts which the appellant had pleaded guilty. It followed that the learned judge erred in taking cognisance of that information and treating it as an aggravating factor.

The appellant had pleaded guilty to possession with intent to supply on two specific occasions particularised in count 3 and 4, thus the judge was not entitled to take cognisance of extraneous matters. The judge seemed to have determined therefore that those matters constituted aggravating circumstances warranting an uplift in the sentence into a custody threshold, but he seemed at the same time to have acknowledged that but for those factors, the appellant would have been sentenced to a non- custodial sentence in accordance with the Sentencing Guidelines.

According to the Sentencing Guidelines on drugs and firearms offences, re-issued 8th November 2021, the expression 'drug offences' is used to cover, inter alia, all types of trafficking and possession with intent to supply. The Sentencing Guidelines stipulate that the Court must apply the relevant guideline unless to do so would not be in the interest of justice. It is only permissible to depart from the Sentencing Guidelines in exceptional circumstances where such departure can be justified.

Clear reasons must be given for not applying the guidelines when passing sentence. The judge's reasons, as articulated, for departing from the Sentencing Guidelines, were improper- he having taken into account of matters impermissible. It followed therefore that in arriving at a custodial sentence, the judge erred in principle having taken into account irrelevant matters and treating them as aggravating factors.