In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 47

CLARENCE JAMES
-and-
DELROY DUNCAN

Appellants

-v-

LYNDON RAYNOR
(Police Sergeant)

Respondent

JUDGMENT
(In Court)

Date of Hearing: December 13, 2012
Date of Judgment: January 25, 2013

Ms. Elizabeth Christopher, Christopher's, for the Appellant Duncan
Mr. Kenville Savoury, Savoury & Associates, for the Appellant James
Ms. Cindy Clarke, Deputy Director of Public Prosecutions (Litigation), for the Respondent

Introductory

1. Following a trial before the Magistrates' Court (the Worshipful Khamisi Tokunbo) the Appellants, both former cruise ship employees, were on June 4, 2012 convicted of:

(1) conspiring between a date unknown and August 8, 2011 in Bermuda and elsewhere to import cocaine with an estimated $52,000 street value into Bermuda; and

(2) importation of the same prohibited drugs into Bermuda on August 8, 2011.

2. On June 19, 2012, the Appellants were each sentenced to 9 years imprisonment, one year beneath the maximum 10 year term permitted to be imposed in the Magistrates' Court. The Prosecution had submitted that 7 ½ years was the appropriate custodial term.

3. James appeals against sentence only. Duncan appeals against both conviction and sentence. At trial the Appellants ran a "cut-throat" defence, each claiming the other was primarily responsible for the offence. They were separately represented at trial and on appeal. James' appeal against sentence sought special credit for cooperation with the authorities said to have been afforded by him after his conviction and sentence. Duncan not only challenged his conviction but raised the distinctive complaint that it was unclear on what factual basis his sentence was imposed.

4. In these circumstances it is appropriate to deal with each Appellant's appeal on an individual basis.

Duncan's appeal against conviction-the no case submission

The evidence, no case arguments and Ruling

5. Ms Christopher submitted, without distinguishing between the separate offences, that her no case submission which was summarily rejected by the Learned Magistrate ought to have been accepted.

6. I find that the Prosecution case against Duncan (ignoring his co-Defendant's evidence against him later in the trial) was supported by the following key pieces of admissible evidence:

(a) James brought the drugs ashore and was found in possession of Duncan's cell phone together with his own cell phone;

(b) Duncan's cell phone called a Bermuda cell number that appeared to be linked to the conspiracy on several occasions;

(c) shortly before James brought the drugs ashore, a text was sent to the Bermuda cell number in terms that suggested that it had been sent by a person other than James and who (based on its phonetics) was (like Duncan) a Jamaican: "*My boy coming out in a shart* [sic] *time. Stay close*";

(d) in a bag which Duncan admitted was his a piece of paper on which the Bermuda cell number had been written was found. He also admitted when interviewed under caution that the handwriting was his i.e. that he had written the number;

(e) Duncan's explanation when interviewed for having the number in his possession was incoherent and inherently unbelievable. It appears to be was that he deleted numbers he found on his phone after he lent it to James which he did not recognise and wrote down the incriminating number in case James asked him for it later.

7. Based on the Magistrates' notes, the main thrust of Ms Christopher's no case submission was that proof that her client's phone, which he said he lent to James whenever he asked for it, was used as part of the smuggling scheme was not proof that he gave James the shoes in which the latter imported the drugs. What James told the investigating authorities out of court was not admissible against his co-accused. She appears to have sensibly conceded that the paper with the phone number found in Duncan's possession was potentially incriminating in the absence of any explanation. These submissions did not appear to distinguish between the two offences or to point to any specific element of the offences charged which the evidence failed to establish.

8. Crown Counsel (Ms Clarke did not appear below) also adopted a broad-brush approach to the Crown's case against Duncan. However, she rightly submitted that the piece of paper on which Duncan admitted he had written the Bermuda cell phone number and which was found in his possession was "damning". She also appears to have relied heavily on the fact that based on Duncan's admissions either he or James had the phone when the incriminating text message was sent on the day the ship arrived in Bermuda. But this did not to my mind take the case against Duncan much further.

9. The Court adjourned from March 21 to April 4 when the following Ruling was given:

> "*Having reviewed the evidence in this case together with the submissions from counsel I am satisfied that there is evidence before the Court of a conspiracy to Import Controlled Drugs and of Importation of a Controlled Drug and that both Duncan and James were party to both the Conspiracy and Importation. I am also satisfied that such evidence is not so tenuous or weak that no Trier of law and fact, properly directed on the law and facts could not properly convict either Defendant of either of the offences. In the circumstances the applications of No Case to Answer by both Defendants are rejected.*"

10. Ms Christopher, conceding that no detailed reasons are customarily given in relation to no case submissions, complained in effect that this Ruling merely recited the appropriate test without adequately explaining the basis of the Ruling in any particularised way. This

is a fair criticism in general terms, having regard to the seriousness of the charges and the penalty ultimately imposed. But in the present context this criticism is, to use the colloquial phrase, "a bit rich" as counsel's submissions do not appear to me have assisted the Learned Magistrate to explicitly analyse the evidence in a more detailed manner. Be that as it may, the elements of both offences are somewhat simple and uncomplicated in the drugs importation context for reasons which are set out below.

The elements of conspiracy to import a controlled drug

11. The Prosecution was simply required to prove that Duncan agreed with James and others not before the Court to import cocaine into Bermuda. This was essentially the direction given by the trial judge in *James-v-R* [1991] Bda LR 4 (Court of Appeal)[1]. Implicit in the charge was the allegation that the agreement was formed outside of Bermuda because the offence of importation is completed when the illegal drugs are brought within the territorial limits of Bermuda, not when they are brought ashore: *Fox-v-R* [2001] Bda LR 11 (Court of Appeal for Bermuda) at page 8.

12. Such an agreement can be proved by circumstantial evidence as illustrated by *Flood-v-R* [2006] Bda LR 45 (Court of Appeal for Bermuda) where the elements of the conspiracy were more elaborate than in the present case. Nazareth J described proof of the existence and nature of the agreement as "*an obvious and inescapable inference from the circumstantial evidence*" (paragraph 9). Nevertheless, the evidence in that case clearly demonstrated that the accused must have entered into and acted in furtherance of the conspiracy outside of Bermuda.

13. In this case an important plank of the Prosecution's case was the schedule of telephone calls between Duncan's cell phone which James had on his person when he brought the drugs ashore in the early hours of Tuesday morning, August 9, 2011 and the Bermudian cell phone apparently in the possession of the illicit cargo's intended consignee. The ship had arrived in Bermuda at some point on the previous day, Monday August 8, 2012. Prior to James' arrest, there were approximately 40 calls exchanged between the two numbers, from mid-May until August 9, 2011. It appears that the overwhelming majority of calls were made from or received by Duncan's phone while the ship was either in port in Bermuda or shortly before or after[2]. Three text messages were sent from Duncan's phone just after 12.35 pm on the Monday afternoon, the one referred to above ("*My boy coming out in a shart* [sic] *time. Stay close*") followed immediately thereafter by two texts saying "*Nite time*". That night there were three telephone calls from Duncan's phone to the Bermuda number between roughly 9.30pm and 11.30pm.

14. Having regard to the number and timing of calls involved and the fact that Duncan had himself written down the Bermuda contact number on a piece of paper found in his bag, the only reasonable inference is that this Appellant was party to an agreement with others

[1] The direction was not formally approved by the Court of Appeal, which left open the question of what jurisdictional nexus the jury should be directed to take into account.

[2] Calls to Duncan's phone on June 3, 5, 2012 are exceptions, but these lasted one second each suggesting no conversation took place: Senior Customs Officer Bremar's Witness Statement sets out the ship's Bermuda schedule.

not before the Court consummated before the ship arrived in Bermuda with the drugs on August 8, 2011 to import the cocaine in question into Bermuda. There was a case to answer. But the Prosecution alleged that the primary agreement was between Duncan and James. What evidence was there of such an agreement being entered into before the ship and the drugs were actually imported into Bermuda on Monday August 8, 2011 at the end of the Prosecution's case? It is far from clear that, had issue been joined on this point, a *prima facie* case of such an agreement between Duncan and James consummated before the drugs were imported into Bermuda could properly have been found to have been made out.

Conclusion: should the no case submission have been upheld in relation to the conspiracy charge?

15. Perhaps because of the way in which the case was argued at trial (and indeed on appeal), the absence of evidence supporting proof to the criminal standard of this limb of the conspiracy charge was not identified as a specific issue. It was somewhat of a technicality but the conspiracy charge did allege that Duncan and James "*did conspire ...together and with others*", not "together or with others". Had this point been taken as part of the no case submission, the Prosecution could have sought leave to amend the Information to substitute "or" for "and".

16. Neither the Learned Magistrate nor either counsel condescended to approach the no case submission on such a technical basis. In my judgment this was in all likelihood not an oversight; rather it reflected an intuitive sense on the part of a Magistrate and lawyers who routinely deal with such matters that the charge in question should be approached in a more holistic and substantive manner. Such an approach will be appropriate in some cases; in other cases the absence of explicit attention to the elements of a charge may undermine the validity of the relevant judicial decision.

17. In this case the Learned Magistrate arguably erred in law in failing to uphold the no case submission in relation to the conspiracy count against Duncan, albeit on a ground not advanced on his behalf at trial. The argument was not even advanced on appeal. That potentially valid complaint (the lack of sufficient evidence of an agreement between the two defendants before the importation was complete) was a technical one which could and should have been cured by amendment of the Information at the no case submission stage.

18. Had this point been taken on appeal I would have dismissed the appeal against the Appellant Duncan's conviction of the offence of conspiracy to import controlled drugs into Bermuda in any event, applying the proviso to section 18(1) of the Criminal Appeal Act 1952 as in my judgment no substantial injustice in fact occurred.

Elements of offence of importation

19. Section 1(1) of the Misuse of Drugs Act 1973 provides as follows: "*'import' means to bring or to cause to be brought into Bermuda by land, air or water*". This is a broad

definition and clearly encompasses conduct such as directing another person to import controlled drugs. Section 27(1),(2) of the Criminal Code further provides as follows:

> "***Principal offenders***
> *27. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and to be guilty of the offence, and may be charged with actually committing it—*
>
> *(a) every person who actually does the act or makes the omission which constitutes the offence;*
>
> *(b) every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the offence;*
>
> *(c) every person who aids another person in committing the offence; and*
>
> *(d) any person who counsels or procures any other person to commit the offence.*
>
> *(2)In the circumstances mentioned in subsection (1) (d) the person may be charged either with committing the offence himself or with counselling or procuring its commission.*"

20. The Prosecution accordingly had to prove that Duncan either:

    (a) brought the drugs into Bermuda himself;

    (b) caused the drugs to be brought into Bermuda; or

    (c) did some (preparatory) act with a view to enabling the importation to occur;

    (d) aided in the importation process in any way.

21. Does the same circumstantial evidence which supports a *prima facie* case of guilt for conspiring to import the cocaine support a finding to the requisite standard of proof that Duncan at the very least enabled or aided another person to import the drugs? In my judgment it does. There was an irresistible inference that Duncan participated in the importation (before the ship arrived in Bermuda) in some way, based primarily on (1) his possession of the number with which his phone was in contact nearly 40 times in the three months before the offence occurred, and (2) the fact that the person (James) who brought the drugs ashore had this same phone in his possession when he came ashore with the drugs.

22. I find that the Learned Magistrate did not err in law in rejecting the no case submission in respect of the importation charge.

Findings: other grounds of appeal against conviction

23. The Appellant further complained that (1) too much weight was given to his interview, (2) the correct burden and standard of proof were not applied and (3) the verdict was unreasonable. The latter ground was sensibly not pursued in oral argument. But the other grounds are hardly stronger upon a fair reading of the Judgment and on reflection that at the end of the trial the Learned Magistrate could take into account further evidence as strengthening the Prosecution's case:

    (1) Duncan gave evidence and was disbelieved;

    (2) Duncan described lending out his phone to various people as well as James in the witness box which he did not mention when he was interviewed and volunteered an explanation as to the use of his cell phone by James;

    (3) James had his own cell phone on him at the time of his arrest which undermined the lending 'story'. James' phone number was one of Duncan's contacts and James' phone had itself been used to call the Bermuda cell number in July 2011;

    (4) Duncan was found to have lied to the Police when he claimed he wrote down the Bermuda number for the benefit of James;

    (5) James testified that Duncan gave him the shoes in which the drugs were concealed confirming what he said immediately upon his arrest and when interviewed thereafter.

24. A further criticism made by Ms Christopher of the Judgment is that it records no findings as to the specific role played by Duncan, nor indeed any finding to the effect that although no such finding was possible it was clear that he and James essentially played an equal role. One has to extrapolate from the absence of any findings of different levels of culpability and the fact that each received the same penalty the implicit finding that Duncan's role could not be distinguished from James' in terms of culpability. The absence of such explicit findings is not material in all the circumstances of the present case.

25. This was a case where Duncan could properly have been convicted if he had called no evidence in his own defence and at the end of the defence case the Court (faced with an

enhanced rather than diminished Prosecution case) found that the Appellant had failed to raise any doubts about his guilt. The Learned Magistrate clearly took into account the various strands of evidence against Duncan and did not rely to any undue account on his interview record. Moreover it was a case in which it was neither necessary nor fairly possible to distinguish between the respective roles. There is no suggestion that the Prosecution advanced any specific theory as to the respective roles played by either defendant save for the obvious fact that only one of them brought the drugs ashore after the act of importation was itself already legally complete.

26. There is no merit to the appeal against conviction which must accordingly be dismissed.

Appeal against sentence-Duncan and James

Duncan

27. Ms Clarke for the Crown conceded that the concurrent 9 year sentences of imprisonment were excessive and that the appropriate tariff was 7 ½ years as submitted by Crown Counsel at the sentencing hearing. The Learned Magistrate gave no reasons for differing with the Crown's assessment as to the appropriate sentence and it is not self-evident how he arrived at this conclusion. When a convicted person appeals his sentence, this Court is entitled to exercise the original sentencing discretion afresh. Having regard to the sentencing cases reviewed by Mr Savoury on behalf of his client James, I see no basis for differing from the Crown's assessment.

28. However Ms Christopher both below and on appeal raised the awkward question of what the following provisions of the Misuse of Drugs Act 1973 properly required a sentencing judge to do. Section 27B (inserted by way of amendment in 2005) provides:

> "***Controlled drugs and increased penalty***
> *27B. In sentencing a person convicted for an offence involving a controlled drug prescribed under Schedule 5, the court shall have regard to—*
>
> *(a) the street value of the controlled drug; and*
>
> *(b) the destructive effect on society of the controlled drugs prescribed under Schedule 5;*
>
> *and add an increased sentence of fifty per cent to the basic sentence.*"

29. Schedule 5 ("Controlled Drugs and Increased Penalty") lists various drugs to which section 27B applies including cocaine. Section 27B obliges a sentencing judge dealing with an offence involving a Schedule 5 controlled drug to have regard to the street value of the drugs, their harm signified by their inclusion in Schedule 5 and crucially "*add an increased sentence of fifty per cent to the basic sentence*". The conundrum is that neither

section 27B nor any other explicitly applicable provision in the Act defines what the basic sentence is for section 27B purposes. Ms Clarke conceded that there was no consistent or coherent judicial view (as to what the "basic sentence" is for section 27B purposes) presently exists.

30. Enacted at the same time was section 27A of the Act, which provides as follows:

> "**Increased penalty zones**
> 27A(*1)Where a person is being sentenced for an offence under any of sections 5 to 11 of this Act which was committed (whether wholly or partly) in an increased penalty zone, the court shall—*
>
> *(a) first determine the sentence ("the basic sentence") in accordance with established principles but without regard to this section; then*
>
> *(b) where the basic sentence includes a term of imprisonment or a fine, increase that sentence by adding an additional element determined in accordance with subsection (2).*
>
> *(2) The additional element shall be—*
>
> *(a) a term of imprisonment of at least one year but not more than three years, where the basic sentence includes a term of imprisonment of less than seven years;*
>
> *(b) a term of imprisonment of at least three years but not more than five years, where the basic sentence includes a term of imprisonment of seven years or more;*
>
> *(c) a fine of at least $1000 but not more than $10,000, where the basic sentence includes a fine.*
>
> *(3) The court shall not add an additional element under this section where the basic sentence is one of imprisonment for life.*
>
> *(4) For the purposes of this section, "increased penalty zone" means any of the places listed in Schedule 4.*"

31. Section 27A(1)(a)'s definition of "basic sentence" does not according to its terms apply to section 27B. Ms Christopher submitted that the "basic sentence" under section 27B should be determined by reference to the sort of sentence imposed for the most common controlled drug which is not in Schedule 4, namely cannabis. Ms Clarke rightly pointed out that there were a wide range of controlled drugs not listed in Schedule 4 so that utilising cannabis as the normal benchmark made no sense. The most recent Court of

Appeal for Bermuda statement as to how section 27B operates was in *Tucker and Simons* [2010] Bda LR 39 where Zacca P held as follows:

> "16. *The proper procedure would be for the trial Judge to fix the basic sentence. We understand this to mean the appropriate sentence for the offence charged after considering all the circumstances of the case including discounts if any. Having fixed that sentence the section provides that fifty per cent of that figure should be added to the basic sentence.*
>
> *17. The learned trial Judge having referred to s 27 (B) was therefore aware of the section and it is reasonable to assume that the proper procedure was adopted. In any event the Crown submits that the sentence of 5½ years however arrived at was manifestly inadequate. We wish to indicate that the trial Judge should set out the manner in which the sentence is arrived at….*
>
> *24. The position is that the trial Court on the conviction of an offence of Conspiracy to Import Drugs where the drug is included in Schedule 5 should follow the following procedure:*
>
> > *(a) Ascertain the basic (appropriate) sentence for the offence by having regard to the sentence for Importation of Drugs.*
> >
> > *(b) Add an increased sentence of fifty per cent to the basic sentence*"

32. The Court's Judgment did not directly avert to the fact that section 27B provides no explicit guide to how a sentencing judge should arrive at the "basic sentence" to which the 50% uplift is applied. Nor did the Judgment itself explicitly provide any such guidance; their Lordships simply considered, with reference to one Supreme Court sentencing under section 27B and one Court of Appeal decision before the enactment of section 27B, whether the uplifted sentence imposed was manifestly inadequate.

33. The term "basic sentence" was introduced into the 1972 in 2005 by way of the insertion of two new sections. The term was defined for the purposes of section 27A but not for section 27B. It is difficult to believe that the draftsman intended the term to have wholly different meanings in consecutive sections of the same Act. The first usage of the phrase in section 27A (1) is as follows: " *(a)first determine the sentence ("the basic sentence") in accordance with established principles but without regard to this section…*" In that context, the increased penalty zone, the statutory prescription seems straightforward to follow. First decide what sentence would be imposed for the offence in question (and drug in question); then add the prescribed uplift. Is there any reason why that approach should not be applicable under section 27B?

34. The main difficulty under section 27B is avoiding circularity. Seven years on, the sentence "*in accordance with established principles*" for importing cocaine will potentially include sentencing principles incorporating the uplift mandated by that section. Under section 27A, there will always be different tariffs for offences committed

within and without increased penalty zones. The same automatic distinction does not arise under section 27B.

35. Although statutes are usually required to be read as "always speaking", the absence of a definition of basic sentence in section 27B compels one to place oneself in the position of the draftsman in 2005. Doing that, it becomes obvious that "basic sentence" must have been intended to signify the sentence that would have been imposed for the offence in question (applying any applicable discounts for cooperation and/or a guilty plea) under established sentencing principles prior to the introduction of the new uplift requirement. The policy message which underpins (and almost screams out from) these provisions is a clear one: the existing sentences are not severe enough for the circumstances to which sections 27A and 27B apply; where the new sections apply, the sentences which would otherwise have been imposed must be increased to the prescribed extent.

36. Accordingly, in my judgment, the basic sentence for section 27B purposes is to be determined by reference to the level of penalty which would have been imposed prior to August 4, 2005 when section 27A and 27B came into effect.

Conclusion-Duncan's sentence

37. For the reasons set out below in relation to James' sentence appeal, I accept the Crown's submission that the basic sentence in this case ought to have been 5 years imprisonment, the uplift 2 ½ years and the ultimate sentence should be one of 7 ½ years' imprisonment concurrent for each of the charges. The 9 year terms imposed in respect of the conspiracy to import and importation of cocaine charges on which the Appellant Duncan was convicted are set aside and sentences of 7 ½ years substituted in their place.

38. In my judgment the factual matrix in this case made it extremely difficult (if not impossible) to distinguish between the two Appellants in terms of the roles they played in the offences and the degrees of culpability which they accordingly should bear. The most just approach in these circumstances was the one the Learned Magistrate correctly adopted, namely to deal with each offender in the same way.

James

39. Mr Savoury submitted a helpful skeleton argument and authorities which I have relied upon in determining what the basic sentence ought to be in his client's case. The pre-section 27B cases to which he referred included the following:

- *R-v-Jamie Edward Cox* [2005] Bda LR 47: importation of $125,000 worth of cocaine (361g) and cannabis resin (150g)-6 years imprisonment imposed in the Supreme Court following a trial;

- *R-v-Geisha Ann Alomar* [2003] Bda LR 38: importation of $158, 180 worth of heroin. Normal sentencing range for Supreme Court said to be

10-12 years imprisonment; 8 years imposed taking into account guilty plea.

40. He invited the Court that regard should be had to the fact that the value of the illicit drug involved in the present case was less than half the quantity involved in *Cox* and less than a third of the quantity involved in *Alomar*. I am aware of no sentencing principle that requires the Court to have regard to the value of the contraband in a strictly proportionate manner. Even if there was such a principle, it is well settled that the commission of such drugs importation offences by cruise ship employees (or any similar employees whose occupation might be described to be a high risk one) is regarded as an aggravating circumstance.

41. This may be illustrated by the case of *Earl Cousins –v- Police Sergeant Earl Kirby* [1989] Bda LR 67[3] (which was not referred to in argument) where this Court upheld a three year sentence of imprisonment imposed in the Magistrates' Court on a cruise ship employee who imported $5000 worth of cannabis, a mere 10% of the value of the Schedule 5 drug involved in the present case. At that point in time, the maximum summary sentence was 5 years imprisonment and this sentence was imposed following a guilty plea. Wade J (Acting) (as she then was) stated (at page 2):

> "*Bearing in mind that the Appellant is a first-time offender, and taking into account his plea of guilty, he is entitled to some credit for this. His previous unblemished record must be balanced against the aggravating aspect of this offence, i.e. an offence committed by a cruise ship employee who is in an ideal position to conceal drugs and then make an easy drop.*
>
> *In contemplating the sentence to be imposed, the Learned Senior Magistrate is almost duty bound to 'inter alia' consider the effect the passing of a deterrent sentence may have on other cruise ship employees who may be considering this type of activity. Weighing these factors in a careful balance, I have concluded that the sentence of three years is neither harsh nor excessive. I would dismiss this aspect of the appeal and I so order.*" [emphasis added]

42. In all the circumstances of the present case the Crown's concession that the basic sentence of 5 years for the importation of $50,000 of cocaine by cruise ship employees should be 5 years imprisonment is an entirely fair one. The sentence of 9 years imprisonment for each offence imposed on James based on a basic sentence of 6 years plus the requisite 50% uplift is set aside. Absent any further mitigating circumstances, the Appellant James (like Duncan) should properly have been sentenced to 5 years plus 2 ½ years resulting in a final sentence of 7 ½ years' imprisonment, with time spent in custody to be taken into account. The Learned Magistrate gave no reasons for imposing a harsher

[3] Coincidentally, I appeared in this case for the unsuccessful appellant.

penalty than that proposed by the prosecution at the sentencing hearing. Further and in any event, this Court is entitled to form its own view as to the appropriate level of sentence in an appeal by an offender.

43. Mr Savoury submitted that a further reduction ought to be given in light of valuable cooperation given by his client to the authorities after his conviction and sentence. He referred the Court to the case of *Carrie Spencer-v-R* [1989] Bda LR 33. All that case demonstrates is that had James maintained his guilty plea and given evidence for the Crown against Duncan as he initially planned to do, a discount of 30% to 50% of the basic sentence would have been justified.

44. The Crown filed supplementary evidence as to the extent of his cooperation which was clearly minimal. It has not to date resulted in any arrests in Bermuda or abroad. The value (if any) of the information provided is presently not known. On balance based on the presently available information I find no grounds for any further discount for post-conviction cooperation.

45. The relevant authorities are, however, it seems to me at least under a moral obligation to ensure that, should it emerge in the future that assistance rendered by James has in fact been significantly valuable, this fact is drawn to the attention of James and/or his legal advisers who ought in principle be able to reopen the present appeal based on the discovery of fresh evidence.

Conclusion: James' sentence

46. For these reasons, the appeal is allowed only to the extent conceded by the Crown, and the sentences of 9 years are set aside and substituted with sentences of 7 ½ years' imprisonment for each offence, with time spent in custody taken into account.

Summary

47. The appeal against conviction (Duncan only) is dismissed and the appeal against sentence (James and Duncan) is allowed based on the concessions properly made by Ms Clarke in this regard. The sentences for each offence of which the Appellants were convicted of 9 years imprisonment (a basic sentence of 6 years plus 3) are set aside and substituted with sentences of 7 ½ years (a basic sentence of 5 years plus 2/ ½) with time spent in custody taken into account.

48. The correct approach to computing the basic sentence pursuant to section 27B of the Misuse of Drugs Act 1973 is to determine what range of sentence would likely have been imposed before the enactment in August 2005 of the section's new uplift provisions.

Dated this 18th day of January, 2013 _____

IAN RC KAWALEY CJ