REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 23 of 2011

BETWEEN

URAZ MOHAMMED

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

P. Weekes, JA

A. Yorke-Soo Hon, JA

R. Narine, JA

APPEARANCES:

Mrs. P. Elder, S.C. and Mr R. Mason for the Appellant

Mr. G. Peterson, S.C. and Mr. G. Busby for the State

DATE DELIVERED: **May 20th 2014**

JUDGMENT

Delivered by PM Weekes JA

1. On November 2, 2011 the appellant, Uraz Mohammed, was convicted of possession of a dangerous drug, namely, cocaine for the purpose of trafficking contrary to ***s 5(4) of the Dangerous Drugs Act (The Act)*** [1]. On December 7, 2011, after hearing the plea in mitigation on behalf of accused, the judge concluded that ***s 5(5) of the Act***, mandated a minimum sentence of 25 years and imposed the sentence of 25 years imprisonment with hard labour. He also ordered the appellant to pay a fine of $100,000, and in default, serve an additional term of imprisonment of 15 years to commence at the expiration of the term of 25 years[2]. The sentence was ordered to run from the date of conviction.

THE PROSECUTION CASE

2. On June 30, 2002 Constables Bonnett and Baptiste, in the company of other police officers, were travelling in an unmarked police vehicle driven by PC Bonnett Curepe in the vicinity of Monarch Drugs. PC Bonnett stopped behind a vehicle, registration number PAT 6446, which was parked in front of Monarch Drugs. Constables Bonnett and Baptiste, among other officers, alighted from the police vehicle and approached PAT 6446. The driver, and sole occupant, was the appellant. PC Bonnett identified himself and the other officers to the appellant as police officers and the appellant gave his name as Uraz Mohammed.

3. PC Bonnett advised the appellant that he had information that he was transporting cocaine. The appellant alighted from the vehicle and PC Bonnett cautioned and searched him and found nothing illegal on his person. PC Bonnett then asked the appellant if he was in fact transporting anything illegal and he replied *"Boss, you done know."* The officers conducted a search of PAT 6446 and found two feed-type bags containing transparently wrapped packets on the front passenger seat. PC Bonnett removed 10 packets from each bag and showed them to the appellant and Constable Baptiste. He then made an incision into each packet and conducted a field test. Each packet tested positive for the drug cocaine. When shown the

[1] Chap 11:25.
[2] Ruling at p12 lines 26-40.

packets the appellant remained silent. He was arrested and taken to the Woodbrook Police Station where he was formally charged.

4. At the Woodbrook Police Station, PC Bonnett placed his initials, those of the appellant and the date on the exhibits in the presence of the appellant. He cautioned him and advised him of his legal rights and privileges.

5. PC Bonnett submitted the packets to the Forensic Science Centre. Rean Maharaj, a scientific officer, examined the contents of the packets and confirmed them to be cocaine. The total weight of the cocaine was 12.98 kilograms.

CASE FOR THE DEFENCE

6. The appellant's defence was that the police fabricated the case against him as he was never in possession of the bags containing the packets of cocaine. He went to Monarch Drugs that evening to purchase items, but did not park in front of the drug store. He was in motion going east when the police officers intercepted his vehicle. The appellant denied ever uttering the words, *"Boss, you done know"*.

7. The appellant had no previous convictions. No other witnesses were called for the defence.

THE APPEAL

8. Written submissions were filed in respect of thirteen grounds of appeal. At the hearing counsel for the appellant made further oral submissions on all the grounds except Ground 13.

9. It was agreed between counsel and the Court that the outcome of ***Francis and Hinds v The State***[3], (which was already engaging the attention of the Court of Appeal), another case in which a minimum mandatory sentence had been imposed in relation to an offence under the Act, would determine the outcome of Ground 13 which addressed the constitutionality of the minimum mandatory sentence in ***s 5 (5) of the Act.***

[3] Cr. App. 5 & 6 of 2010

GROUND 1 **Misdirection on Oral Statement**

A miscarriage of justice occurred by the failure of the judge to give the jury adequate directions on the appellant's oral statement.

10. Mrs. Elder, for the appellant, submitted that the judge in directing the jury that the oral statement was significant in establishing possession and knowledge of the nature of the two bags, gave the oral statement unwarranted prominence. She contended that the judge ought to have highlighted to the jury certain matters in order to provide a safeguard for the credibility of the appellant. These matters included the inherent dangers with which oral statements are fraught; the difficulty faced by an accused of disproving oral statements; the need to exercise caution before placing reliance upon such an unrecorded oral statement; the significance of the police failure to make contemporaneous records of the oral statement; that the material contradictions, discrepancies and inconsistencies in the police officers' evidence with respect to the making and nature of the oral statement were to be considered as weakening factors which adversely affected the creditworthiness of the police officers and were thus relevant to the critical issue of whether indeed the appellant made the oral statement; and the significance of the failure of the police to comply with the Judge's Rules and the Police Service Standing Orders which governed their conduct in respect of the recording of oral statements. She further submitted that the judge should have directed the jury that they were entitled after a consideration of these weakening factors to disregard the oral statement and the evidence that the drugs were found in the appellant's vehicle.

11. In support of this ground, counsel relied on the Court of Appeal decision in ***Frankie Boodram v The State***[4] in relation to the application of the Judge's Rules and Standing Orders to oral admissions. In ***Boodram***, Sharma CJ said:

> *"We would suggest that where the State's case depends substantially or exclusively on oral admissions, that it would be advisable for the police officers investigating to make contemporaneous notes of them which should be read to the appellant and then ask him to sign."*[5] *"...when the question of oral admission arises,* ***judges must give a robust direction pointing out the heavy burden that is cast on the State, in order to secure a conviction on oral admission alone*** *and*

[4] Cr. App. No 17 of 2003.
[5] Ibid., p.16.

directing their attention to the inherent dangers of such evidence and how difficult it is to disprove."[6] *[Emphasis ours]*

12. In response, Mr Peterson S.C. submitted that ***Boodram*** can be clearly distinguished as the prosecution in the instant case did not depend substantially or exclusively on the oral admission, "*Boss you done know*" to secure the conviction. The admission was a minor part of the case and of little importance. The main evidence was that the packets of cocaine were found in a vehicle which was under the control of the appellant. He further submitted that as such there was no need for the judge to give a special warning about the dangers of relying on the admission as a basis for conviction. He adverted to the comments of Lord Kerr in the case of ***Benjamin and Deochan Ganga v The State of Trinidad and Tobago***[7]:

> *"...The question whether a warning is required about the dangers of relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the appellant. But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains."*[8]

13. In respect of the matters raised under this ground, the judge directed the jury as follows:

> *".....The issue that you have to determine is whether those words were uttered. The point remains the same, whether it is "boss you done know" or officer you done know". If those words were uttered you may think that they represent two things as I have indicated before. Firstly, an acknowledgment of the finding of the bags and secondly, a concession as to the knowledge of the contents of those bags.... If you think that there is no significant difference between "boss you done know" or officer you done know" bearing in mind that the defendant contends that whether it be one or the other of those utterances neither of them or nothing was made a note of, was written down anywhere...., not in the Station Diary, not in the pocket diary of Officer Bonnett. The expectation, as the Defence puts it...an utterance such as that, that amounts to an acknowledgment of the presence of the bags, ought to have been noted somewhere. The Defence, therefore, asks you to disbelieve the evidence of the two police officers when they say that the defendant made that utterance.*
>
> *Let us bear in mind at all times when we discuss this issue about "boss you done know" or officer you done know" that the accused testified that he never made that utterance, further he testified that he doesn't use that kind of language, he*

[6] Ibid., p.20.
[7] [2012] UKPC 8.
[8] Ibid., para [26].

> *doesn't speak like that.... Bear in mind always that it is the responsibility of the State or the Prosecution to satisfy you so that you feel sure that the accused said those words. The defendant bears no burden to prove to you that he did not say those words."*[9] *[sic]*

14. We are of the view that the foregoing adequately addresses the issue. Any appreciation of the case for the prosecution makes it clear that the statement, *"Boss, you done know"*, did not form a significant or exclusive basis for conviction. If the jury did not believe or were doubtful that the appellant was found with the dangerous drug in his vehicle in the circumstances described by the police, they were unlikely to be so convinced by any statement he is alleged to have made. The sole import of the alleged statement was whether it was suggestive of knowledge of the contents of the packets, and since the deeming provision in the legislation fixed the appellant with possession once it was proven that he was in control of a vehicle in which were found dangerous drugs and cast on him the burden of proving otherwise, the statement was of little importance in the case. This rendered the need for any special direction in the terms of ***Boodram***, unnecessary.

15. We pause to note that the judge treated the alleged statement as a possible admission. In our view, the utterance was at best equivocal and the trial judge should have been cautious in inviting the jury to accept it as an admission of the offence if they believed that the words had been uttered by the appellant. The inconsequential nature of this item of evidence coupled with the deeming provision established by ***s 21(1) of the Act***[10] which reads *"Without limiting the generality of section 5(1) or (4), any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, aircraft, enclosure or place in or upon which a dangerous drug is found shall be deemed to be in possession thereof unless he proves that the dangerous drug was there without his knowledge and consent"* negates in our view any adverse effect that this approach by the judge may have had on the appellant.

16. This ground does not succeed.

[9] Summation p.45 lines 26-50 to p.46 lines 5-10 and lines 16-20.
[10] Chap 11:25.

GROUND 2 **Directions on Lie on Oath**

The judge failed to direct the jury on the impact of the proven lie by the arresting/charging officer, Constable Lincoln Bonnett, on oath in the Magistrate's Court.

17. Mrs. Elder pointed out that at the Magistrate's Court, PC Bonnett testified that he had his pocket diary and made a note of the oral statement therein but at the trial he testified that he did not have a pocket diary made no note of the oral statement. She submitted that the judge should have directed the jury that this lie impaired PC Bonnett's credibility and reliability and made him a perjured witness, and required a caution be given above and beyond the usual direction on inconsistencies.

18. The respondent answered that for an inconsistency to be established as a proven lie, it must be shown that such inconsistency arose as a result of a deliberate intention to mislead, as opposed to being the result of an error or a mistake arising from frailty of human memory, and that a deliberate intention to mislead had not been established.

19. At the preliminary inquiry, PC Bonnett under cross-examination said,

> *"I would have had my pocket diary that day...On 30th June 2002 I would have made records in my pocket diary. I would have made records of how the events would have unfolded. I would not have made the records not at the time of the seizing, but it would have been at the Woodbrook Police Station." [sic]*

20. The judge drew to the attention of the jury this inconsistency and reminded them that when PC Bonnett was shown the record of his testimony at the preliminary inquiry he acknowledged that he saw the words but said that *"he couldn't remember saying that"*.[11]

21. The judge gave directions to the jury in relation to previous inconsistent statements generally and advised them to consider the following three questions in determining whether the inconsistency was an honest mistake or whether it was for a *"sinister reason"*:

> *"(1) is the contradiction or prior inconsistency on a major issue in the case or is it on a minor issue? (2) What brought about that prior inconsistent statement or contradiction, how did it come about, is it an innocent mistake on the part of the witness caused perhaps by faulty memory of recollection? (3) Is there a*

[11] Summation at p.41 lines 11-12.

reasonable or plausible explanation for the contradiction or inconsistency, or is the reason that has been offered unreasonable and implausible?"[12]

22. The jury was later directed that if they found that the witness did not make a mistake but that *"the witness has not been a forthright and truthful witness before you, especially on an issue which is important in the case, then, that has the potential to contaminate all of that witness's evidence.*[13]

23. Mrs. Elder relied on the Canadian Case of ***R v. Duong***[14] for the argument that the jury should have been directed in a clear and robust manner to approach PC Bonnett's viva voce evidence with caution. In ***Duong***, the witness under consideration had been established as a perjured witness having been discovered to have told a proven lie in previous testimony. Additionally, the suspect evidence was fundamental to the case for the prosecution. Based on those considerations the Court found that particularly strong directions would have had to be borne in mind when considering that witness's testimony.

24. The facts in ***Duong*** are clearly distinguishable from the instant matter. In the instant matter PC Bonnett, was indeed a critical witness, however, his testimony about whether or not he made entries in his pocket diary could not possibly have been central to the issues in the case. That would have been a matter to consider in determining his overall credibility. Additionally, we are of the considered opinion that the evidence of PC Bonnett with respect to the pocket diary does not fall into the category of a "proven lie". It was therefore necessary for the judge to draw the jury's attention to the effect that a finding that PC Bonnett was an untruthful witness based on this inconsistency would have on the whole of his evidence. There would also have been the option of their finding that the inconsistency had been caused by human frailty which would have left his evidence unaffected.

[12] Summation at p.39 lines 22-28.
[13] Summation at p.39 lines 40-44.
[14] 1998 CanLII 3585 (ON CA)

25. We are satisfied that the judge gave proper directions to the jury to assist them in their determination of whether the evidence about the pocket diary was an inconsistency occasioned by human error or whether it amounted to a deliberate lie and the practical effect of each finding. There was no need for any special direction or caution.

26. We find this ground to be without merit.

GROUND 3 **Previous Inconsistent Statement**

The judge misdirected the jury that a previous inconsistent statement is not evidence of its truth but merely goes to the credibility of the witness.

27. The judge's direction to the jury on previous inconsistent statements has been criticised by counsel for the appellant. The impugned direction came at the beginning of his treatment on previous inconsistent statements. The judge directed the jury as follows:

> *"It is important, Madam Foreman and Members of the jury that you understand that what the witness had said on a prior occasion is not evidence, it is not truth unless the witness accepts that it is true."*[15]

At the time, he was not referring to any specific evidence.

28. It was further submitted that as a consequence of the error, the judge misdirected the jury when he failed to direct them that if they concluded that the witness had been inconsistent on an important issue or matter, they were to treat both accounts with considerable care.

29. The judge's direction reflected the former common law position on previous inconsistent statements which has now been abolished by ***s 15H of the Evidence Act***[16]. This section provides:

> *"Where in criminal proceedings a person gives oral evidence and— (a) he admits making a previous inconsistent statement; or (b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7, the statement is* ***admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible****."[Emphasis ours]*

[15] Summation at p.39 lines 10-12.
[16] Chap 7:02 as amended by Act No. 16 of 2009.

30. The judge, therefore, fell into error and thereby improperly limited the use to which the jury could put their findings on the issue.

31. The respondent readily conceded that the judge had erred and acknowledged the law as stated in ***R v Billingham and another***[17] that a previous inconsistent statement made by a witness is evidence of any matter of which oral evidence by him would be admissible. The respondent submitted however, that since the essential evidence of which the jury had to be sure was the finding of the two feed-type bags on the front passenger seat of the appellant's vehicle, the failure of the judge to give the correct direction on previous inconsistent statements was immaterial and not fatal to the conviction. The omission of a direction in keeping with ***s 15H*** was inconsequential and did not make the conviction unsafe.

32. In order to determine the effect of the judge's error on the fairness of the case afforded to the appellant, it must be determined whether there was any previous inconsistent statement that had the potential of being material to the findings of fact and eventual verdict. If there were inconsistencies in respect of material matters, in which the previous inconsistent statement might have been of benefit to the appellant, and the jury was prevented from accepting that previous evidence to be the truth, then the judge's misdirection might have been prejudicial to the appellant. If, however, any matter which was the subject of a previous inconsistent statement was *de minimis*, and did not go to the real issues of the case, then the judge's error, though regrettable, would not have resulted in a miscarriage of justice.

33. There were two instances of previous inconsistent statements, both during the evidence of PC Bonnett. The judge dealt with them as follows:

> *"(i) Constable Bonnett gave two inconsistent statements concerning when the accused made the utterance "Boss you done know". He first testified that when he approached the accused and asked him if there was anything illegal in the car the accused uttered those words. Constable Bonnett later testified that he found the*

[17] [2009] EWCA Crim 19.

bags and brought them into the presence of the accused and then asked the accused what was in the bags and he testified that the accused remained silent.

(ii) Constable Bonnett also gave two inconsistent statements in court about his pocket book. At the preliminary inquiry in the Magistrate's Court, Constable Bonnett said in answer to a question from counsel that he did have his pocket diary with him and did make notes in it. Constable Bonnett later testified in court here that he did not have his pocket book with him on the 30th June and that he did not make a note of the utterance that the accused allegedly made."

34. There were other inconsistencies addressed by the judge in summation but these arose between witnesses at trial and were therefore not subject to directions on previous inconsistent statements by a witness.

35. It is quite clear that in neither of the above instances would it have been of any possible benefit to the appellant for the jury to find that the earlier statement made at the Magistrate's Court was in fact the truth. Neither statement goes to any issue in the case. They both are relevant only to PC Bonnett's credibility. We find that although the judge made an error in respect of previous inconsistent statements, that error did not result in any prejudice to the appellant.

36. This ground of appeal must fail.

<u>GROUNDS 4 and 5</u> are related and will be dealt with together.

Comments by prosecutor
Judicial treatment of prosecutor's comments

A miscarriage of justice occurred when the prosecutor told the jury during her closing address that the appellant's testimony as to where he was parked was not true and he had made it up as his trial attorney did not put such to the witnesses. The prosecutor further stated that if the appellant had given his attorney instructions as to whether he was parked she would have put it to the witnesses. [sic]

The learned trial judge failed to instruct the jury on the improper and prejudicial comments made by the prosecutor in her closing address. Rather these comments received judicial endorsement when they were referred to without correction by the learned trial judge in his summation.

37. There is no record of the closing address by the prosecutor. We therefore, must look to the relevant portion of the trial judge's summation.

38. Mrs. Elder took issue with the content of the closing address of prosecuting counsel, submitting that it was improper and unfairly prejudicial to the appellant. This content was reproduced essentially in the summation of the judge as follows:

> *"Counsel for the State asks you to look to the fact that it was not put to any of those two police witnesses that, no, the accused wasn't parked there the accused was parked on the other side of the road' so that, what you say about him being parked facing north, all of those things, none of that is true, it had not been put to the two factual witnesses for the State. In fact, the accused testified that when the police came to him he was heading east, his car was in motion, the police car drove in front of his car and then he stopped. Now, there is a significant difference, you may think, between those two versions of the events and if there is that significant difference you may think that it is the type of thing that counsel might wish to challenge the police witnesses about... If the accused is saying that he was not parked where the State says that he was parked, counsel for the State's suggestion is that you should not be believe the accused on that point. Counsel for the State is suggesting that he is not being truthful and that he made that up. Counsel for the State is suggesting that if he had previously told his lawyer that he was parked in that left-hand side position that she would have put it to the witnesses for the State."*[18] *[sic]*

39. She submitted that it was not put to the appellant in cross-examination that he was lying or that he failed to give his attorney relevant instructions, merely that his attorney did not raise the relevant issues with prosecution witnesses and this deprived the appellant of his right to lead evidence to rebut an allegation of recent fabrication. She argued that this could have led the jury to believe that the appellant was not telling the truth and therefore to give little or no weight on his evidence. She further argued that the failure to observe this procedural requirement of *"putting your case to the witness"* amounted to a trial by ambush and violated the well-known rule in ***Browne v Dunn***[19] in which Lord Herschell made the following observations:

> "*...if you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him,...that is not only a rule of professional practice in the conduct of a case, but is essential to fair*

[18] Summation at p.43 lines 17-24.
[19] H.L. (1893) 6 R 67.

> *play and fair dealing with witnesses…a cross examination of a witness which errs in the direction of excess may be more fair to him than to leave him without cross-examination and afterwards to suggest that he is not a witness of truth...upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.*"

40. Mr. Peterson responded that the prosecutor did no more than she was entitled to do, which was to give a strong and direct challenge to the evidence of the appellant and to criticise him based on the evidence, or absence of evidence, before the court. He relied on the case of ***Randall v The Queen***[20] in support of his argument. In ***Randall***, the appellant made several complaints as seen in the following excerpt:

> "*...it is complained that prosecuting counsel repeatedly interpolated prejudicial comments while examining prosecution witnesses, repeatedly interrupted the cross-examination of prosecution witnesses, often with prejudicial comment, repeatedly interrupted the examination-in-chief and re-examination of the appellant, interpolated prejudicial comment in the course of his cross-examination of the appellant and interrupted the judge in the course of his summing-up."*[21]

41. The behaviour of trial counsel in ***Randall*** was far more extreme than that complained of in the instant appeal. The *dictum* of Lord Bingham of Cornhill on the subject is relevant and worth repeating. He said,

> *"While* ***the duty of counsel may require a strong and direct challenge to the evidence of a witness, and strong criticism may properly be made of a witness or a defendant so long as that criticism is based on evidence or the absence of evidence before the court****, there can never be any justification for bullying, intimidation, personal vilification or insult or for the exchange of insults between counsel. Any disparaging comment on a witness or a defendant should be reserved for a closing speech."[Emphasis ours]*

42. Mr. Peterson also contended that comments of prosecuting counsel could only vitiate a conviction where they engendered such prejudice as to make the trial as a whole unfair and the jury's verdict unsafe and that in the instant matter, prosecuting counsel was well within the acceptable limits outlined in ***Mantoor Ramdhanie v The State***[22]. In ***Ramdhanie***, the appellants argued that closing speech of the prosecutor had been "improper" and had

[20] [2002] UKPC 19.
[21] Ibid., para [12].
[22] [2005] UKPC 47.

"engendered prejudice", in breach of the established duty of a prosecutor to be impartial. The Privy Council, allowing the appeal, held that:

> *"When considering the language used, its style and robustness, allowance must be made for context and environment; nevertheless there were fundamental limits which prosecuting counsel as a minister of justice should observe whatever the context and environment (in particular, when prosecuting counsel's final speech follows that of defence counsel) the standards expected of prosecuting counsel are not dependent upon the compliance of defence counsel with the rules governing conduct of the defence. Accordingly, in a case where prosecuting counsel's final speech included passages in which counsel (in effect) told the jury (or strongly implied) that there was incriminating evidence which had not been put before them, and also contained emotive and unjustified comments on the defence case and evidence (or on defence counsel) and a number of passages in which counsel improperly vouched for the soundness of the prosecution case, the tenor and content of the speech were capable of having a significant impact on the jury (despite the fairness of the trial judge's summing-up) and this constituted a material irregularity and unfairness in the trial process and the jury's verdicts could not be regarded as safe*."[23]

43. Mr. Peterson submitted that the prosecutor in the instant matter did not violate any of the established principles which circumscribe a proper closing address. She had not implied that there was incriminating material which had not been put before them; used emotive and unjustified comments on the defence case and evidence or on defence counsel; improperly vouched for the soundness of the prosecution's case; used inflammatory and vindictive language against the appellant or express a personal opinion that the appellant is guilty;[24] cast aspersions or made improper imputations as to the integrity of opposing counsel;[25] or referred to inadmissible and irrelevant material.[26]

44. All of these principles can be traced back to the case of ***Boucher v The Queen***[27], in which it was held that the duty of Crown Counsel is to be impartial and excludes any notion of winning or losing. That duty is violated when inflammatory and vindictive language against an accused is used or when a personal opinion is expressed that an accused is guilty or when

[23] Ibid., para 26
[24] Boucher v The Queen (1954) 110 CCC 263.
[25] Johnson (Gregory) v R (1996) 53 WIR 53.
[26] Benedetto v The Queen [2003] UKPC 70 para [55].
[27] (1954) 110 CCC 263.

it is stated that the Crown investigators and experts are satisfied of to his guilt. Such language and opinions cannot help but influence the jury and colour their consideration of the evidence and amount to a miscarriage of justice.

45. In the Court of Appeal case of ***Cunningham v The State***[28], the prosecutor in his closing address referred to the accused as a "hard-back man". The Court of Appeal found that in circumstances where the accused was arrested on a charge of having sex with an underage female, that term did not so imperil the safety of this conviction. The Court held:

> *"It is clear that prosecuting counsel should always conduct him/herself as a minister of justice and this would include during closing addresses. It is further the duty of the trial judge to control the proceeding and enforce proper standards of behaviour by counsel. It is all a matter of degree. Counsel may comment forcefully and even colourfully where appropriate but must be careful never to cross the line and act in a manner calculated to or capable of appealing to the emotions of the jury. The vernacular and colloquialism have their place in addressing a jury but their use must never result in unfair prejudice against an accused. Where counsel seems to be straying into forbidden territory the trial judge must put an immediate stop to it and, where necessary, attempt to ameliorate any wrong in his summation."*

46. We are of the view that a prosecutor in closing address is allowed to draw the jury's attention to the possible inferences which flow from the existence or absence of evidence at a trial. While this does not give a prosecutor the freedom to become an impassioned protestor for the prosecution's cause, he may highlight, with a balance of robust criticism and courteous restraint, the evidence or lack thereof on a particular issue. Having considered the complaint of the appellant, we are of the view that the prosecutor did not exceed her limits in the instant matter. We now turn to a scrutiny of the judge's direction on this issue.

47. The impugned section of the judge's direction is as follows:

> *"Counsel for the Defence responds that the decision is hers as to what to put or not to put to a witness. Counsel for the Defence responds that it is the accused who is on trial and not her and that he should not be blamed for a decision that his counsel has made with regard to the asking of questions. Now, Madam Foreman and Members of the Jury, that may be so but it nevertheless is necessary for you to consider the fact that something such as that, if you consider it to be*

[28] Cr. App. No. 18 of 2005.

important, had not been suggested to the police witnesses. If you consider that it is important and is the sort of thing which, had it not been so, it would have been suggested to the police witnesses that the defendant's car was not parked facing north in front of Monarch Drugs, then you have to consider any possible explanations why it was not put and what you make of it.

Now, perhaps counsel for the Defence forgot to put it to the witnesses, perhaps the defendant omitted to tell his lawyer those things... Remember that the defendant is saying that the two bags were never in his car. He is suggesting that the police witnesses have not demonstrated the position front seat of the car. He is suggesting that he had been set-up by the police. You may think that if he had not been parked where the police testified that he had been parked that his attorney would have put to the police witnesses and would have laid that before you as another reason why you should doubt the Prosecution's case as well."

48. The respondent rejected the submission that the comments of the prosecutor received judicial reinforcement or endorsement and submitted that a careful reading of the impugned passages in the summing-up would reveal that the judge fairly compiled the evidence for both sides. In effect, the judge merely outlined the submissions of counsel on both sides and then suggested possible reasons that certain matters may not have been put by defence counsel and left all those matters for the jury's consideration.

49. On this issue, Mrs. Elder referred the Court to the case ***Jackson v The State***[29] in which trial counsel omitted to cross-examine prosecution witnesses on matters which went to the case for the accused, particularly, that the deceased was the aggressor and the appellant had been merely defending himself.

50. The judge in ***Jackson***, in his directions on the issue said,

"Now the rules of procedure require an attorney to put material things to an opposing witness to give the witness an opportunity to say yes or no to explain. Now, is it important, is it material, for the accused to have told his attorney that the deceased attacked him and he was defending himself?"[sic]

No doubt since that is the defence of the accused, he would have told his attorney that the deceased had attacked him and he was defending himself. If that is so, then it was the duty of Mr. Pantor to put to Moorgan that in addition to these

[29] [1998] UKPC 44.

things, didn't he tell you that the deceased had attacked him and that he was defending himself? [sic]

Perhaps Mr. Pantor forgot; perhaps the accused didn't tell him that, but I am merely telling you what the rules of procedure require because this may turn out to be very important in your consideration. Here was a man who just killed another person. He comes to the very first person after incident and merely tells him, I just killed Carly. And further on, I have nothing to explain to you. I will explain to the judge and jury.

Would you have expected him to say in the circumstances, well, the man attacked me and I was defending myself...

So these are matters for your consideration. Of course, Mr. Pantor didn't challenge what Moorgan says. He didn't put to Moorgan that the accused didn't tell him these things, to give Moorgan a chance to say yes or no as the case may be. So up to that point in the trial Moorgan's evidence went in unchallenged so to speak. But in spite of that, you will have, when you are deliberating, to look at the totality of the evidence and come to the finding of facts in the case because you have seen both sides...

On the other hand, it could be that the accused gave his attorney certain instructions, his attorney perhaps forgot to put it. Or that he didn't give his attorney the instructions and he came in the witness box and said something new which surprised even his attorney. So you look at it from both sides so to speak.

Again, as I make the point, while I just mention these rules of procedure, you bear them in mind. You do not fault people for omissions. You do not fault an attorney because he omits to do something. You do not fault an accused person because he may have forgotten something. You look at the evidence which is before you and come to your finding of facts on that evidence so do speak."[Emphasis ours]

51. Mrs. Elder also made reference to the case of ***Crosdale v R***[30], a Privy Council decision from Jamaica, in which the Board allowed an appeal on grounds including the unfairness of comments made by the judge on discrepancies between the appellant's evidence and the matters put by his counsel to the prosecution witnesses. The Board noted at paragraph 46 of their judgment in ***Jackson*** that the comments in ***Crosdale*** *"were very different from those in the present case"*. The judge in ***Crosdale*** told the jury to *"ask yourselves the question, why is the defence so insincere, putting one thing to the prosecution and you don't hear anything about it again in the case"?...So you can use your common sense as members of the jury and*

[30] [1995] 2 All E.R. 500.

say where you find the truth lies". Clearly, where there is a discrepancy on material matters between what was put to opposing witnesses and the evidence led by the other side, such a matter is not to be glossed over. It cannot be suggested or intimated that the discrepancy is caused by some lack of credibility or deceptiveness on the part of the witness without other possible and plausible reasons being put into the balance so that the question can be considered in the round. It would then be for the jury, as far as it is able to decide, what effect, if any, the discrepancies have on its assessment of the witness's credibility.

52. We have read the impugned passages and find ourselves unable to agree with Mrs. Elder's submission that the judge reinforced or endorsed the statements of the prosecutor. Several of the questions posed by the judge for the jury's consideration are similar to those endorsed by the Board in ***Jackson***.

These grounds fail.

GROUND 6 **Failure to give Lucas Direction**

The judge failed to give the jury an adequate Lucas direction. Such a direction was necessary as the prosecutor had advanced to the jury that the appellant had lied and fabricated evidence. Moreover, the judge had asked the jury to consider whether the appellant, by failing to testify that an officer pointed a gun at him, was attempting to mislead them.

53. The judge directed the jury that, in assessing the evidence and issues they should consider that:

> "*a person may tell a lie or make up a false defence for reasons that are not necessarily inconsistent with innocence, such as fear, nervousness or he may think it is necessary to bolster or to prop up a genuine defence.*"[31]

54. The appellant argued that this direction presented a real danger to the jury regarding his evidence about the position of the car and his omission to testify that a gun was pointed at him as being probative of his guilt.

[31] Summation at p.48 lines 4-8.

The respondent submitted that the mere assertion that the appellant has lied is not an automatic trigger for a *Lucas* direction.

55. In ***R v Burge and R v Pegg***,[32] Kennedy LJ stated that:

> *"the Lucas direction will be sufficient if it makes two points, firstly that the lie must be admitted or proved beyond a reasonable doubt and secondly, that the mere fact that the defendant has lied is not of itself evidence of guilt since defendants may lie for innocent reasons and as such it is only if the jury is sure that the defendant did not lie for an innocent reason can a lie be used to support the prosecution's case."*

56. He outlined the circumstances in which a *Lucas* direction is to be given: *(1) Where the defence relies on alibi; (2) Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant; (3) Where the prosecution seek to show that something, said either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; (4) Where although the prosecution has not adopted the approach in which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so. If a Lucas direction is given where there is no need for such a direction (as in the normal case where there is a straight conflict of evidence), it will add complexity and do more harm than good."*[33]

57. Neither the issue of the position of the car nor the omission to testify about the gun fall into or resemble any of the above categories. The first was a straight question of which evidence the jury accepted on the issue, that of the prosecution or that of the appellant. The second was not a matter that the prosecution sought to rely on as proof of guilt and there could hardly be said to be danger that the jury would use it as proof thereof. The issue in this case was clearly joined and what each side said about the relevant matter i.e. the finding of the cocaine in the appellant's car, was unequivocal and dispositive of the matter.

[32] (1996) 1 Cr. App. Rep 163.
[33] Ibid., p.173.

58. We are of the view that this ground of appeal is entirely misconceived. In most cases in which an appellant has pleaded 'not guilty' at his trial, unless his defence is mistaken identification, there will be diametrically opposed evidence on issues of fact. It is for the jury to then decide which version of the account they believe or disbelieve, or leaves them in doubt. These are not matters which attract or require a *Lucas* direction. If the jury rejects the evidence of the appellant on that issue, then they put aside the defence account and turn their attention to the case for the prosecution to decide whether they are satisfied beyond reasonable doubt that the vital evidence concerning the issues at bar is the truth. If this were not so, then, a *Lucas* direction would be required in most criminal trials.

59. In the instant case, the matters under consideration were for the jury to consider in finding where the truth lies. Nothing on the evidence gave rise to the circumstances which warrant a *Lucas* direction. Of course, the jury was entitled to, as they seem to have done, reject the evidence of the appellant on these issues, but there was no lie on the evidence that was admitted or proved. The trial judge also alerted the jury to the fact that if they found that the appellant had lied to them, there might have been an innocent reason.

60. We pause here to repeat what we have said in previous cases, a *Lucas* direction, where unwarranted, may be adverse to the interest of an accused. See ***Fabien v La Roche***[34].

61. In the above premises, this ground is without merit.

GROUND 7

The judge misdirected the jury that the failure of the appellant to testify that an officer pointed a gun to his head when this was put by his attorney constituted an omission which the jury should consider in determining his credibility and whether he was attempting to mislead them.

62. We consider this ground to have been addressed for the most part under Ground 5. The trial judge had advanced to the jury the possibility of an inconsistency between attorney's suggestions to prosecution witnesses and the evidence of the appellant arising for innocent

[34] Cr. App. No. 32 of 2009 para [67].

reasons. In this ground the situation arose in the reverse. Counsel had put certain specific instructions to the witnesses which were not substantiated by the evidence of the appellant.

63. The judge directed the jury as follows:

> *"Now, there may be occasions on which the inconsistency relates not because of the fact that two different things were said but because of the fact that something was not said. Now, you will recall that when Bonnett was being cross-examined it was put to him that one of the party of the police officers entered through the passenger door of the vehicle and pointed a gun to the head of the accused. You will recall that Bonnett responded, that would never happen, that is not our modus operandi. Now, what was being suggested and put to Bonnett was that the police came up to the accused man and put this big gun, this MP5, to his head on the occasion when the police came to him. The questions that you must ask yourself is whether that is something significant. The question that you must ask yourself is whether it is something that the accused is likely to speak about when he gave evidence, because when the accused testified he didn't mention that. In his relating of the events he didn't say anything about the police opening this passenger door and pointing a gun to his head. Now, the defendant didn't speak of this. You must ask yourselves whether this is the type of thing you would expect the accused to mention in relating the events of that day while explaining what happened that Sunday evening outside of Monarch Drugs. The questions that you must ask yourselves are the same three questions. Is it significant? Is there an explanation? Is it that the witness was attempting to mislead you?"*[35] *[sic]*

64. The nub of the ground is that this direction might lead the jury to believe that the appellant's omission had its genesis in an attempt to mislead them and that would suggest that he was guilty of the offence. The appellant further submitted that the judge should have given limited directions on this issue to the effect that what is put to opposing witnesses is not evidence unless the witness accepts it.

65. The respondent argued that prosecuting counsel was entitled to comment on discrepancies between the case as advanced in cross-examination and the evidence of the appellant. The respondent also submitted that the judge's treatment of the issue was fair to the appellant as the judge advised the jury to treat with discrepancies on either side of the case in the same manner.[36]

[35] Summation at p.42 lines 15-43.
[36] Summation at p.41 lines 2-17.

66. We find the judge's direction on this issue to be unexceptionable. It was indeed open to the jury to find that the omission was as a result of a desire to mislead. Once they were alerted that there might well have been other "innocent" reasons for the discrepancy by omission, and that they were to bear this in mind, there can be no valid complaint on the issue.

67. This ground must fail.

GROUND 8 **Counsel's Failure to Put Instructions**

A miscarriage of justice occurred by the judge giving the jury several misdirections about the failure of the appellant's trial attorney to put to the witnesses that the appellant was not parked in the position as they had testified.

68. This ground is a further particularisation of ground 5 and has been sufficiently dealt with thereunder.

GROUND 9 – Recall of Witness

The Judge failed to ensure that the accused had a fair trial, in that he should have consulted with counsel, in the absence of the jury, and invited her prior to the start of the addresses to recall the police witnesses to put the defence version of where the appellant's vehicle was parked.

69. Counsel for the appellant submitted that the judge did not secure the appellant's right to a fair trial in that he failed to consult with trial counsel, in the absence of the jury, to inform her about the possibility of adverse comments being made in his summation on her failure to put certain instructions. She further submitted that the judge should have invited trial counsel, prior to the addresses, to recall witnesses in order to put relevant instructions which had been previously omitted.

70. We find this submission beyond curious. Trial counsel was an experienced attorney-at-law. It would be passing strange, and in fact objectionable, for a trial judge to usurp the function of trial counsel by suggesting what should be put to opposing witnesses. That is a matter subject of client-attorney confidentiality and based on the client's instructions and the

attorney's professional opinion. It would be a matter entirely for counsel, on her own volition, to apply to recall witnesses if she appreciated that there were some fundamental inadvertent omission on her part.

71. Given the "state of play" after addresses the trial judge did his best, and in our view sufficiently, to deal with the discrepancy in a manner that ensured that fair consideration was given to the case for the appellant. He is required to do no more than that.

72. This ground is entirely without merit.

GROUND 10 **Unchallenged Evidence**

The judge misdirected the jury that the evidence of the witnesses as to the position of the appellant's vehicle was unchallenged as it was not put to them that the appellant was not so parked.

73. The appellant contended that the judge misdirected the jury when he told them that the evidence with respect to the position of his car was unchallenged. The judge directed the jury as follows:

> *"These are matters for your consideration, Madam Foreman and Members of the Jury. Of course, counsel for the Defence didn't challenge Bonnett and Baptiste on the position of the defendant's car. Counsel didn't put to them that the defendant was never parked in the carpark in front of Monarch Drugs to give them the chance to say yes or no as the case may be. So, that, the evidence of those two witnesses on that issue went before you unchallenged, so to speak."*[37]

74. Mrs. Elder submitted that this direction was wrong, as the appellant's testimony on this issue amounted to a direct challenge to the evidence of the prosecution witnesses. The fact that the appellant's version was not put to them was a matter affecting only the weight of his evidence on this issue.

[37] Summation at p.45 lines 8-16.

75. The respondent submitted that the direction which the judge gave was identical with that in ***Jackson v R***[38] where the judge said,

> *"So these are matters for your consideration. Of course, Mr. Pantor didn't challenge what Moorgan says. He didn't put to Moorgan that the accused didn't tell him these things, to give Moorgan a chance to say yes or no as the case may be. So up to that point in the trial Moorgan's evidence went in unchallenged so to speak".*

76. The Privy Council in ***Jackson*** found the direction to be unobjectionable. The issue in the instant matter is similar. It is not difficult to understand why the direction causes no injustice. The expression "unchallenged so to speak" puts the direction in context, clearly meaning that it was unchallenged in the sense that the witness was never confronted with it being untrue. In both matters the judge, at the appropriate time, laid out the case for the defence in which there was evidence that opposed the prosecution on the issue. The jury would have been left in no doubt whatsoever that on the issue the prosecution was saying one thing and the defence was diametrically opposed. There could have been no confusion that the evidence of the prosecution was the only evidence on the issue or the only true evidence.

77. Accordingly, this ground also fails.

<u>GROUNDS 11 AND 12</u> are related and will be dealt with together.

Imbalanced Summation

Inadequate Analysis of Evidence

78. Mrs. Elder submitted that the summation was imbalanced and unfair because the judge was critical of the defence case and not similarly critical of the testimony of the two police officers.

79. Counsel relied on the Privy Council decision in ***Mears v R***.[39] We find that case to be singularly unhelpful. In ***Mears*** the strongest point of the appellant's case, that the evidence of the main prosecution witness and the evidence of the pathologist were inconsistent, was

[38] *Supra* Para. 39
[39] [1993] 42 WIR 284

diluted by the trial judge's direction, which in effect said that that was unimportant. In the instant case there is no complaint that the trial judge, by his direction, diluted the nature and the essence of the case for the appellant.

80. Mrs. Elder also submitted that the judge failed to analyse the evidence as his summation was a mere repetition of the evidence interspersed with some of what was advanced by counsel in address. The trial judge directed the jury, she contended, in a perfunctory manner to *"look at all of the issues that I have discussed with you which may or may not have a bearing on the credibility of those officers, depending entirely on the view that you take of the evidence of those officers after a careful analysis."*[40]

81. The respondent submitted that the summation was balanced and carefully delivered : The judge first rehearsed the case for the prosecution by dealing with the evidence given by each of the witnesses; he then went on to point out such weaknesses as they were especially those elicited in cross examination[41]. He also rehearsed the case for the defence and fairly and adequately put before the jury all the important evidence given by the appellant in particular his version of where his car was parked[42]. Throughout the entire summation the judge analysed the evidence in that he posing questions to alert the jury to the issues raised and to help them analyse the evidence and assess the witnesses. Finally, he left the issues joined between the parties squarely for the jury's consideration and determination.[43]

82. We have perused the entire summation and take notice that directly after the impugned passage, the judge then went on to say this: *"If having done so you find yourselves saying no, the police officers are not speaking the truth, then your verdict must be not guilty. If you say to yourselves that you are not sure the police officers might probably be speaking the truth but you are not sure, then the prosecution or the State will not have discharged its burden of making you sure of the guilt of the accused. If you are not sure of the evidence of the police officers then the benefit of any reasonable doubt must go to the accused and in such a case*

[40] Summation at p.48 lines 13-18.
[41] Summation at pp.20-24.
[42] Summation at pp.35-38.
[43] Summation at p.48.

you must find the accused not guilty. But if you are sure that the police officers are speaking the truth then it will be your duty to find the accused guilty.[44]"

83. It is clear that the excerpt which was taken from the judge's summation was merely introductory to a later part and certainly not definitive of its the general style and content. We find that the judge placed and analysed the arguments and submissions of both parties equally and left the factual considerations squarely within the domain of the jury.

84. Accordingly, this ground is without merit.

GROUND 13 **Unlawful or Excessive Sentence**

85. The appellant submitted that: (1) the judge erred in law by ruling that *section 5(5) of the Dangerous Drugs Act* created a mandatory minimum sentence; (2) *section 5 (5) of the Act* is unconstitutional as it constitutes cruel and unusual treatment or punishment contrary to *section 5 (2) (b) of the Constitution*; and (3) the sentence imposed is excessive in all the circumstances.

86. The decision of this court in ***Francis and Hinds***[45] provides a comprehensive analysis on this ground which we will not rehearse herein. A summary of the decision will suffice.

> (i) Section 5(5) of the Act is not ambiguous. It imposes for the crime of possession of a dangerousdrug for the purposes of trafficking, a mandatory minimum penalty of a fine of one hundred thousand dollars ($100,000.00) and twenty-five years imprisonment with a further term of fifteen years imprisonment in the event of default of payment of the fine, to be served after the twenty-five year term of imprisonment is completed.
>
> (ii) The creation by section 5(5) of the Act, of a mandatory minimum penalty, does not violate the separation of powers. The fixing of a mandatory minimum penalty is a valid exercise of the legislative powers of Parliament.
>
> (iii) Section 5(5) of the Act in conjunction with section 61, by removing the judicial discretion, imposes or authorises the imposition of a mandatory minimum penalty which is a

[44] Summation at p. 48 lines 19-31
[45] *Supra*

breach of sections 4(a) and 4(b) of the Constitution. It breaches section 4(a) because it imposes or authorises the imposition of a penalty which is arbitrary, capricious and oppressive. It is arbitrary because, in this case, there is no rational relation of the penalty to the actual offence committed. It is capricious because the judicial discretion to adapt the penalty to the nature of the crime is removed. It is oppressive because, in this case, the mandatory minimum, of itself, is excessive and wholly disproportionate to the crime committed. It is also a direct breach of the prohibition in Section 5(2)(a) and 5(2)(e) of the Constitution.

It breaches the right to the protection of the law in section 4(b) of the Constitution, in this case, by authorising the imposition of cruel and unusual treatment or punishment by permitting the imposition of a mandatory minimum penalty which is grossly disproportionate and inordinately excessive and which bears little or no relation to the crime committed. It is also a direct breach of section 5(2)(b) of the Constitution.

(iv) The removal of the judicial discretion, by the conjoint effect of sections 5(5) and 61 of the Act, results in serious hardship to offenders because of the Court's inability to apply a sentence appropriate to the nature of the offence, to the part played by the offender and to circumstances in mitigation. Such considerations are fundamental to the proper exercise of justice in a democracy, whatever the system of law. They are founded in fairness and respect for the dignity of the human person which is one of the bases upon which our nationhood was proclaimed.

The removal of such considerations from the sentencing process erodes the fundamental right to liberty and cannot be justified in any society which has a proper respect for the dignity of the human person and the inalienable rights with which we all, as human beings, are endowed. Thus, a provision which indiscriminately applies a mandatory minimum penalty to all offenders, irrespective of the nature of the offence, the degree of culpability of the offender and the mitigating circumstances affecting him, resulting in the offender serving a total of forty years imprisonment for one point one six kilogrammes (1.16kg) of marijuana, is so grossly unfair and offensive of the fundamental principles of justice and the rule of law, that it cannot be reasonably justifiable in a society which has a proper regard to the rights and freedoms of the individual.

This ground therefore succeeds.

SENTENCE

87. We have received submissions in writing from both the appellant and the respondent. The appellant has put forward as mitigating factors, the age of the appellant (26 at time of offence); previous unblemished record; marital status and family responsibilities; occupation and education; religion and community and charitable activities. The State's view is that the only mitigating factor is the appellant's previous unblemished record. Given the nature of the offence and the circumstances of its commission, we are also of the view that the other factors advanced by the appellant, do not at all serve to mitigate a proposed sentence. The

appellant was a man of mature years in the eyes of the law. The fact that he is married with children and the attendant responsibilities cannot be taken into consideration in determining sentence. These matters, which arose after the commission of the offence, in no way ameliorate its severity or address any of the considerations which the Court must bear in mind in this sentencing phase. The testimonials, in our view, do nothing more than reaffirm the appellant's good character.

88. We agree with Counsel for the appellant that the time that the appellant spent in custody awaiting the determination of his appeal must be taken into account in imposing the appropriate sentence. As correctly observed by the State, this will automatically happen when the sentence is, as it must be, ordered to run from the date of conviction. We are also of the view that, as submitted by both the appellant and the respondent, it would be wholly inappropriate to impose a fine on the appellant in all of the attendant circumstances.

89. The objectives of sentencing as outlined in the case of ***Benjamin v R (1964) 7W.I.R. 495*** are applicable here and we are required to consider the five principal objects. First, the punitive, second, deterrent in respect of the appellant, third, deterrent in respect of potential offenders, then, the risk of the appellant reoffending and the rehabilitation of the appellant. As observed in the case of ***Farfan v R Cr App No. 34 of 1980 (unreported)*** in any particular sentencing exercise, some factors may be given more prominence than others. As in most offences of this nature, the object of general deterrence must be a weighty consideration given the prevalence and potential injury to the society of narcotic offences. Additionally, the issue of punishment must be carefully considered. Parliament in its wisdom has provided a minimum sentence of 25 years for this offence and this is a significant factor that must be considered alongside any other relevant matters.

90. We do not consider either of the two cases cited by counsel for the appellant on the issue of parity of sentencing to be of assistance. In the first, ***Charles Alfonso v PC Samuel Bullen Mag. App. 198/2000***, the matter was dealt with in 2002 when circumstances and realities in respect of drug trafficking were far different from today. In the second, ***The State v Victor***

Sylvester & Otrs (now under appeal), the circumstances were far removed from those under consideration here and in any event, the minimum sentence was differently considered.

91. The appellant was found to be in possession of 12.98kg of the dangerous drug, cocaine. It has been the common, and one may find quite reasonable, the practice to consider that particular drug somewhat differently from marijuana. Given identical weights, the possession of cocaine for the purpose of trafficking attracts a more severe sentence than that of marijuana. We consider this to be a correct approach.

92. Taking into consideration all that has been advanced, we are of the view that a sentence of 20 years imprisonment with hard labour is appropriate in the circumstances of this case and we so order. Sentence is to run from the date of conviction, 2nd November 2011.

P. Weekes,
Justice of Appeal

A. Yorke-Soo Hon
Justice of Appeal

R. Narine
Justice of Appeal