In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2017: 21

WALITA BRANGMAN

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

Appeal against Conviction and Sentence – Conspiracy to Import a Controlled Drug- Whether trial Counsel was ineffective – Decision whether Accused gives Evidence Counsel's failure to establish Good Character Evidence

Date of Hearings: 27 February 2018 and 7 March 2018
Date of Judgment: 2 April 2018

Ms. Elizabeth Christopher, (Christopher's) for the Appellant
Mr. Loxley Ricketts, Office of the Director of Public Prosecutions, for the Respondent

JUDGMENT delivered by S. Subair Williams A/J

Introduction

1. The Appellant, a female Bermudian national, was convicted on 7 July 2016 in the Magistrates' Court by Wor. Archibald Warner on Information 15CR00480 for the offence of conspiracy to import the controlled drug cocaine, contrary to section 4(3) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code. Upon conviction, she was sentenced on 26 July 2016 to an immediate custodial sentence of six years of imprisonment. She is currently on bail pending appeal.

Summary of the Facts

2. The learned Magistrate summed up the evidence in delivering his verdict. He stated, without controversy, that the Appellant was arrested by police from the inside of a car where a box of tamarind balls[1] was located from the trunk. The tamarind balls were found to contain a total weight of 69.99 grams of crack cocaine. The Appellant admitted to having made arrangements for the importation of the tamarind balls from a place called Goody's World in Jamaica and to having collected them from Somerset Post Office.

3. The Appellant was intimately involved with a man named Gianni Fenaroli who was also arrested and questioned by police in connection to this matter. While the Appellant was in police custody, Mr. Fenaroli sent the Appellant a text message which read; "*U know bout notten*."

4. In arriving at his verdict, the learned Magistrate stated;

   "*I have carefully considered all the evidence in the case. There is strong evidence from which the Court can infer that the Defendant knew of the conspiracy to import the cocaine and was the principal involved. I find that in light of the Defendant's admitted participation that is her arranging to import to pick up, I agree that the message Chat #63* (from Mr. Fenaroli) *shows that the Defendant knew of the conspiracy and agreed to with Fenaroli to import the cocaine in question. I am satisfied so that I feel sure and convict the Defendant*."

   The Police Caution Interviews:

5. There were two police caution interviews of the Appellant which were admitted into evidence as part of the Crown's case.

6. The police also interviewed Mr. Fenaroli and the Appellant was interviewed, at her request, on third occasion. Neither of these two interviews were evidence at the trial.

7. The Appellant's former attorney in question, Mr. Larry Scott, was present during all of the police interviews in this case as he represented both the Appellant and Mr. Fenaroli.

   The Appellant's First Interview

8. The Appellant's first interview was held on 2 October 2014. She admitted to having arranged for the tamarind balls to be brought in to Bermuda but claimed that she knew nothing about the crack cocaine found inside of them. The Appellant told the police that she had visited Jamaica in 2006 where she first tasted and liked the sweets. On her version of events, she intended to create and profit from local market to

[1] Tamarind Balls are a tropical spicy sweet widely known in many regions of the Caribbean

supplement her revenue. Acting Detective Sergeant Warren Bundy informed her that a WhatsApp text message was discovered on her cell phone which he incorrectly recited as "*Don't say nothing*" (see page 40 of the Record at line 6 of the interview). The Appellant denied knowledge of the text message.

Mr. Fenaroli's Police Interview

9. Mr. Fenaroli made exculpatory statements when he was interviewed on 3 October 2014. He described his relationship with the Appellant as a casual one and denied any involvement in the importation of the tamarind balls. A transcript of the interview was exhibited to the Appellant's affidavit which is summarized further below as this interview was not in evidence at the trial.

The Appellant's Second Interview

10. The second police interview transpired the very next day on 3 October 2014 at 13:47. In that interview the Appellant informed police that Mr. Fenaroli was her lover. When asked if Mr. Fenaroli was aware that she would be collecting the tamarind balls, the Appellant replied; "*I don't know, I don't think so*."

The Appellant's Third Interview

11. On 21 January 2016, the Appellant was interviewed for a third time. On this occasion, the Appellant maintained her innocence but admitted that she had not been forthright in her previous interviews in leading police to believe that Mr. Fenaroli had no involvement in the importation of the drug-filled tamarind balls. She said; "*…he came to me and asked if we can do it, like bring in tamarind balls…I should have known that it was something fishy about it, but still, I was naïve, I was in love, just blind to the fact of what was really happening*." The Appellant also described Mr. Fenaroli as a man who had been violent towards her throughout their relationship.

Notice of Application for Extension of Time within which to Appeal

12. On 14 March 2017, the Appellant filed an application for an extension of time within which to appeal supported by affidavit evidence. In the supporting affidavit from Counsel Taaj Jamal (formerly employed by Christopher's), it is stated that the Appellant was never advised that she had 10 days within which to appeal the Magistrate's decision. It is further said that the Appellant instructed Counsel Marc Daniels who took little to no action for a period of several months.

13. The Crown did not raise the issue of the outstanding application for an extension of time. It seems that the preliminary issue of leave was likely overlooked. Notwithstanding, having heard full arguments on the substantive grounds and having considered the Mr. Jamal's affidavit, I find that there is sufficient basis for the granting of the time-extension application.

Notice of Appeal against Conviction and Sentence

14. The Notice of Appeal, originally filed on 28 March 2017, was amended by an Amended Notice of Appeal which was filed on 18 January 2018 without objection from the Crown. In the Amended Notice of Appeal, the following grounds are pleaded:

THE GROUNDS OF APPEAL AGAINST CONVICTION

1) *The Appellant had ineffective counsel during my trial, which are particularized as follows:*
   a. *The Appellant wanted to give evidence at the trial but was not allowed to do so. The Appellant did not sign a waiver stating that she did not want to give evidence.*
   b. *The Appellant(’s) trial attorney advised both Appellant and her then boyfriend Gianni Fenaroli, in this matter even after it appeared that they had competing interests.*
   c. *Counsel for the Appellant failed to lead evidence of the Appellant’s good character. Therefore the Learned Magistrate did not have this to measure what the Appellant said to the police or on the propensity limb. Further, head (sic) the Appellant given evidence it would have figured powerfully in the assessment of her evidence.*

The Grounds of Appeal

<u>Ground 1a</u>

Decision whether to give evidence at trial

15. Ms Christopher argued that the conviction was unsafe as her client had been denied her entitlement to decide of her free will whether to give evidence in her own defence.

<u>*The Affidavit Evidence before this Court*</u>:

16. An affidavit from trial Counsel, Larry Scott, was filed on 21 November 2017. Mr. Scott’s affidavit pre-dates the Appellant’s affidavit which was sworn on 22 December 2017 and filed on 27 December 2017. However, the Prosecutor informed the Court that Mr. Scott was served with a copy of the Appellant’s affidavit and was given several opportunities to file a further reply. However, Mr. Scott declined to do so.

17. At an earlier stage in these proceedings, the Court adjourned this appeal to allow Counsel to consider the position on the sufficiency of the evidence before this Court in relation to Mr. Scott, specifically. However, no applications were made on the return date by either side for the filing of further affidavit evidence or for any of the deponents to be cross-examined before this Court.

The Affidavit of Appellant

18. On the subject of the decision whether the Appellant would give evidence at trial, the Appellant stated at paragraphs 5-6 of her affidavit:

 "*5. Mr. Scott told me not to give evidence during the trial. I really wanted to give evidence... At the time of trial, I had completely intended on giving evidence. I had even reached the point of standing up to move forward to give evidence when an intervention was made that stopped me from giving evidence.*

 6. My lawyer told me not to give evidence as the prosecution would show me to be a liar and because I was vulnerable. By the stage I made the statement of 21.01.16 I had told my first statements and then contradicted myself in my statement of 21.01.16 and we were trying to put that statement in. So clearly I was willing to let the court know that I had not been completely forthright to the police in the beginning. At that stage I just wanted to tell the truth and let the judge make his decision on that. I did not know and was not advised that the magistrate would have to remind himself that people tell lies for all sorts of reasons and it does not mean you are guilty. I felt that if I did give evidence in light of what he said to me I would not have the support of my lawyer and I had already been let down by my previous experiences with the three groups- Gianni, the police, the lawyer. The reality was how could I do this without my lawyer on board. I was put on the spot of having to[2] (sic)".

19. The Appellant concluded her affidavit as follows:
 "*When Mr. Scott told me to not give evidence in the trial I did not sign anything. I believed if I did give evidence it would only have helped me and that's why I wanted to give it.*"

The Affidavit of Trial Counsel, Larry Scott

20. Mr. Scott provided the following 28 paragraph affidavit:
 1. *That I am a sole practitioner…*
 2. *That Ms. Walita Brangman was my client, and I represented her…(a) Conspiracy to import a control (sic) drug.*
 3. *That I came to know about Ms. Brangman through Gianni Fenerolli (sic), who asked me to represent his girlfriend. Ms Brangman.*
 4. *That I was present on the 2nd, 3rd , of October 2014 when caution interviews were conducted with Ms. Brangman, and I (was) also present on the 3rd of October 2014 when a caution interview was conducted with Mr. Fenarolli (sic).*
 5. *That it was during the interview with Mr. Fenarolli (sic) that he revealed and made references to Ms. Brangman in a most disparaging way.*
 6. *That resulting from consultation with Ms. Brangman during the time she made me to understand that Mr. Fenarolli (sic) was her boyfriend of some time.*

[2] This sentence was not completed in the affidavit.

7. *That because of this revelation from Mr. Fenarolli (sic) I had not further dealings with Mr. Fenarolli (sic), but I did conclude that he was clearly trying to use and had used Ms. Brangman and probably knew more about what was going on than he was letting on.*
8. *That we became aware from conversations with the investigating officers that Mr. Fenarolli (sic) was being observed by the police during the pick up by Ms Brangman of the package from the Somerset Post Office and that they were going to try to link him to the case.*
9. *That I brought my suspicion about Mr. Fenarolli (sic) to Ms. Brangman's attention and she was devastated and couldn't believe that Fenarolli (sic) was saying the things he said about her. In fact initially she thought I was not telling her the truth.*
10. *That Ms. Brangman then got serious about the matter and gave further assistance to the police in an attempt to show Fenarolli (sic) must have known about the whole transaction.*
11. *That Ms. Brangman provided the police what she believed was Mr. Fenarolli's (sic) accomplice in Jamaica, this information was passed on to the DP for their input and to show that Fenarolli (sic) should be further interviewed about his involvement in the importation.*
12. *That (it) is (sic) was explained to us that that would require the police traveling to Jamaica to interview that person.*
13. *That we got the impression that the Police nor the DPP were prepared to expand further resources on chasing Fenarolli (sic), or going to Jamaica because on the evidence they had despite Ms. Brangman's consistent denial, was sufficient to put her on trial.*
14. *That we however continued to press the police to bring Mr. Fenarolli (sic) in for further questioning, they indicated that they would but the next we heard from the police was that Mr. Fenarolli (sic) had left the jurisdiction.*
15. *That regarding the fact of Ms. Brangman not giving evidence, we were of the view that she was (a) weak witness and often could not fill in the blanks about the investigation because she was consistent that she knew nothing about it accept that she came to fully appreciate that she had been vulnerable to Fenarolli (sic) because of her affection for him.*
16. *That further we did not want her to be vigorously tested by very competent Crown Counsel who would have exposed her weakness as a witness, which would not have been favourable to her at trial. These matters are always a judgment call.*
17. *That we discussed this with Ms. Brangman and in fact the Learned Magistrate allowed us time to consult with her before she indicated that she would not give evidence based on our advice.*
18. *That we took the position that her caution statement that were (sic) in evidence would be sufficient to raise what we felt was doubt justifying an acquittal. And we implored the Learned Magistrate to assess that evidence fully before making his finding.*

19. *That her evidence was never disputed, nor could any inference be drawn over her failure to give evidence from the dock, but her statements raise a sufficient doubt that she had no knowledge of any agreement nor did she conspire with anyone.*
20. *That doubt we felt arose from the questioning of officer Bundy the lead officer in the case who admitted that there was another person whom the police were pursuing but who had left the jurisdiction, but we were limited by the court in how far we could question officer Bundy by the court in this regard, much to our dismay.*
21. *That this was not as is being asserted a case of "he blamed her and she blamed him", (a) because Ms Brangman had no knowledge of what Mr. Fenarolli (sic) was up to (b) because as officer Bundy pointed out to myself during the appearances prior to the trial, Mr. Fenarolli was observed by him on more than one occasion hiding in the shadows of the St Paul's AME Church and opposite the entrance to the court building observing as we all entered court and exited and paused outside to converse. This Bundy indicated was reason to want to question him further, but as said Mr. Fenarolli (sic) fled the jurisdiction and has not returned we are reliably informed.*
22. *That if there was any possible inference to be drawn of the existence of an agreement it would have been in the conduct of Mr. Fenarolli (sic) who was being observed by the police during their whole surveillance of Ms Brangman when she went to collect what she believed was the Tamarind Balls from the Mangrove Bay Post Office.*
23. *That Ms Brangman's actions prior to and after collecting the Tamarin Balls were never secretive but open as she explained in her statement.*
24. *That it was clear from Brangman's statements that she had no knowledge of the importation, but admitted freely that she did and intended to report "Tamarin Balls".*
25. *That we state again that we had no conflict between Ms. Brangman and Mr. Fenarolli (sic), he knew that Ms Brangman was angry at how he had used her and had to know that at trials she would not be able without his assistance succeed unless he Mr. Fenarolli (sic) assisted. He fled, and in my view is an indication of his complicity.*
26. *Mr. Fenarolli (sic) took mean advantage of a very vulnerable women (sic).*
27. *That at no time did Brangman indicate that she was dissatisfied with my service.*
28. *That at no time did we advise Mr. Fenarolli (sic). We only sat in during his police caution interview and had no further dealings with him.*

<u>*The Transcript Note of Trial Proceedings at the end of the Crown's Case*</u>:

21. The Crown most helpfully provided a transcript note of the trial proceedings at the stage immediately following the Magistrates' finding that there was a case for the Defence to answer.

22. The transcript note, in its relevant portion, provides as follows:
THE COURT: Now if she wants to give evidence

Mr. Scott: um hmm
THE COURT: that will have to be considered
Mr. Scott: Yes
THE COURT: with the Crown evidence to see whether or not the proper inference can be drawn. But at this stage there is a case to answer.
Mr. Scott: Just give me a second (fiddling and background noise) alright, and
THE COURT: you see let me, let me explain, let me explain here, ahh very often, well, (clears throat) very often, the well, the defendant don't have to give evidence at all, she can say nothing
Mr. Scott: that's right mmm hmm
THE COURT: and sometimes because of the oath with regards to the admissibility of statements she can gain um evidence in (sic) (and) her defence can be put in through the prosecution's case
Mr. Scott: yes, yes
THE COURT: but in any event in determining the innocence or guilt of this defendant whether the Crown has proved its case to the requisite standard. I must look at all the evidence, now only the Crown's evidence is in.
Mr. Scott: yes
THE COURT: It's up to her if she so wishes to put the defence, she may go on (the) stand and explain the circumstances of her being in possession of the contraband that she was found with
Mr. Scott: hmmm hmmp
THE COURT: and the circumstances under which and what, was or might have been meant by the evidence that the Crown says support the conspiracy
Mr. Scott: hmmm hmmp
THE COURT: and I'll have to consider all that
Mr. Scott: (inaudible) ok, I, I, I
THE COURT: You know I mean I'm, I am not commenting on the case but the evidence is what it is, the Crown's evidence is that sometime after ahh she was ahh arrested
Mr. Scott: Yes
THE COURT: um a person who she admits she knows
Mr. Scott: Yes
THE COURT: sent a message saying don't say anything
Mr. Scott: that's right yes

23. I pause here to observe that the learned Magistrate wrongly stated the evidence on the wording of the WhatsApp text message. This misstatement of the facts was left uncorrected by Mr. Scott. Notably, similar errors were made during the police interviews. The direct evidence of the WhatsApp text messages appears from the Record to have been produced through trial exhibit #9 which shows the relevant text to have read, "*U know bout notten*." (See page 89A of the Record). Notably, Ms. Christopher did not plead any appeal grounds arising out of this mis-direction on the evidence.

24. The transcript note continues as follows:

THE COURT: and that to put it loosely confirms, the supports, is inferential evidence.
Mr. Scott: Yes
THE COURT: from which conspiracy can be inferred
Mr. Scott: I, I, I, yup
THE COURT: So what are we going to do? Miss I've made my ruling
Mr. Scott: Yea, I, I, I
THE COURT: Miss
Mr. Scott: I, I, I was just about to say Your Worship
THE COURT: Miss, Miss
Mr. Scott: I was just about to say Your Worship, I, I'm with you, You need to put, yup mmm
THE COURT: Miss Miss Walita Brangman, you heard evidence against you, it is your right if you so wish to come to the witness box and give evidence in your defence. I must warn you that if you give evidence in your defence you may be liable, you are liable to be cross-examine(d) like any other witness and that cross-examination becomes part of the evidence against you. I must warn you that you can stay there and say nothing it is the duty of the Crown to prove the case against you. In any event you are also entitled to call witnesses you might have. What do you wish to do Ma'am?
Walita Brangman: (inaudible)
THE COURT: (clears throat)
(Talking in court) (inaudible) (Quietness)
Mr. Scott: Alright, she will give evidence Your Worship, She will give evidence. (11:14:56)

25. It is worth reminding that the Appellant stated, at paragraph 5 of her affidavit, that she really wanted to give evidence and that she stood up, at one point during trial, to move forward to take the stand when an intervention was made that stopped her from giving evidence.

26. Mr. Scott's statement to the Court that the Appellant would give evidence is consistent with the Appellant's assertion before this Court that she wanted to give evidence at trial. It is an agreed fact (or unchallenged evidence at the least) between the parties that Mr. Scott never advised Ms. Brangman to take the stand. So, the only reasonable inference to be drawn from Mr. Scott's statement to the learned Magistrate that Ms. Brangman would give evidence is that Ms. Brangman informed him that she wanted to give evidence in her own defence.

27. As can be detected from the transcript note of what occurred next, Ms. Brangman was stopped from proceeding to the stand only because the learned Magistrate required her to first state from her own mouth that she wished to give evidence, a fact which he was apparently not prepared to infer from her advancement to the stand and her attorney's open Court confirmation.

28. The transcript note of the appearance continues as follows:
THE COURT: The Defendant warned of, Mr. Scott
Mr. Scott: Yes (mumbles something) (inaudible)
THE COURT: let's make this clear in open court
Mr. Scott: Yes, yes
THE COURT: The right to give evidence is her
Mr. Scott: choice
THE COURT: yes her election not yours
Mr. Scott: I understand. Maybe (inaudible)
THE COURT: alright so I want to hear it from her if she wants to come to the witness box and give evidence or not
Mr. Scott: listen clearly to his
THE COURT: not
Mr. Scott: Sorry, question (inaudible), sorry
Mr. Scott: Sorry, sorry
THE COURT: did she want to talk to you?
Mr. Scott: Sorry Your Worship (inaudible)
THE COURT: warned of her right to give evidence
(voice talking softly audible) (11:15:46)
Mr. Scott: Alright, you need to make clear to this (11:16:06)
(voices mumbling)
THE COURT: Jah, Jah, Just a minute, I have warned you of your options, your right to give evidence in your defence. By coming to the witness stand and giving evidence I also warned, warned you that you could stay there and say nothing, what do you want to do Ma'am? (11:16:09)
Walita Brangman: I am going to sit here and say nothing
THE COURT: Alright. Defendant elects not to give evidence. (Clears throat). Ok are there any witnesses you would want to call?
Mr. Scott: No Your Worship, we have no witnesses
THE COURT: Mr. Scott for Defendant says that there are no witnesses. Ahh and of evidence stage

29. At 11:14:56 Mr. Scott informed the Court that Ms. Brangman would give evidence. However, approximately one minute and thirteen seconds later, at 11:16:09 (or seconds thereof), after interventions from both the Court and Mr. Scott, Ms. Brangman announced that she would remain silent.

30. The Court stated that the right to give evidence was the Appellant's '*election*' to make and not that of her attorney. In this context, the learned Magistrate was simply saying that he wanted to hear the decision confirmed by the Appellant personally and not from her attorney. It is apparent from the transcript that in the moments immediately prior to 11:15:46, Mr. Scott was also addressing the Appellant while the Court was informing the Appellant of her right to make the election.

31. The Appellant's reply; "*I am going to sit here and say nothing"* led Mr. Scott into making a request for time to continue his in-Court dialogue with the Appellant. It was at the Court's behest that the matter adjourned to enable Mr. Scott to privately take proper instructions on whether she would be giving evidence.

32. The transcript note provides:
Mr. Scott: If Your Worship, if just, just, you could just give me a little more time (11:17:18)
THE COURT: Yea (voices inaudible)
THE COURT: Mr. Scott (11:17:38)
Mr. Scott: Yes, You Honour
THE COURT: before you go any further can the witness be taken outside? Sorry, no I can't do that, (inaudible) listen. It is not the intention of this court to get between you and your client. That is why it is sometimes become unseemly by taking instructions in court
Mr. Scott: mm hmm
THE COURT: because you then exposed the situation to court and put the court, put me
Mr. Scott: um hmm
THE COURT: in an (inaudible), situation alright?
THE COURT: As I pointed out before this is an important stage of the trial, you are the defendant's representative, you are the lawyer and you are entitled to give her (11:18:26)
THE COURT and Mr. Scott: Advice
Mr. Scott: Yes
THE COURT: like in any situation she is not bound to take that advice in this regard it is her choice whether or not she wish to give evidence in her
THE COURT and Mr. Scott: defence
Mr. Scott: hmmm hmmp
THE COURT: listen to me carefully, it must not be seen that you or anyone else is persuading her
Mr. Scott: One way or the other
THE COURT: One way or, or another
Mr. Scott: yes (11:19:26)
THE COURT: Especially in open court
Mr. Scott: Yes!
THE COURT: there's ultimately her choice and her choice alone regardless of the advice that she gets
Mr. Scott: that's right
THE COURT: I don't think that I can be clearer
Mr. Scott: clearer than that (11:19:37)
Mr. Scott: Mr.
Mr. Ricketts: I totally concur Your Worship
THE COURT: very well

33. The learned Magistrate went as far as can be reasonably expected from the Court in correctly stating the boundaries between Counsel and Ms. Brangman in respect of the decision whether to give evidence.

34. The transcript continued:
Mr. Scott: Well, Your Worship, Your Worship, let me say this
THE COURT: You don't have to answer me Sir
Mr. Scott: No, I, I'm, I am not answering you, I wish to make a statement. I understand you with utter clarity, we tend to because we understand the rules, the person who must understand them with clarity is the defendant because it is her choice, and I would ask the court (11:20:06)
THE COURT: Would you take your time outside?
Mr. Scott: I am happy to do so
THE COURT: take a few minutes
Mr. Scott: Yes
THE COURT: and take further instructions, if you need to
Mr. Scott: I'm grateful
THE COURT: That is the way it should be done
Mr. Scott: I'm grateful, your worship
Mr. Ricketts: in writing (inaudible)
Mr. Scott: hmmm?
Mr. Ricketts: in writing
Mr. Scott: Well, um mum, I, my learned friend is giving me advice about in writing to protect my interest. I am aware of those
THE COURT: I am not
Mr. Scott: you're not giving advice
THE COURT: that is nothing to do with me, I don't work for the bar (inaudible) or what have you but I, I would, if I were you, I would take (clears throat) advice with regards to what the required procedures are, alright?
Mr. Scott: I, I,
THE COURT: I'm coming back at 12 o'clock
Mr. Scott: I am well aware of it Your Worship, (inaudible) just so, stay with me
THE COURT: no one is criticizing you (11:20:58)
Mr. Scott: stay with me, stay with me
THE COURT: We are moving simply on abundance of caution
Mr. Scott: I understand that Your Worship, I wish to say this
THE COURT: Yes
Mr. Scott: because it, it often times appears not understood, I've been through this with the Court of Appeal on a previous occasion and the Court of Appeal has been very clear about how Counsel should act in these matters (11:21:21)
THE COURT: yes
Mr. Scott: and I refer the court and ah my Learned Friend to the case of Sousa Tucker Simons and the Queen it's an appeal by 3 defendants, um mum, against the Crown and that is ahh Criminal Appeal 2 um number 9, 10 and 18 of 2009 (11:21:25)

THE COURT: yes
Mr. Scott: My position was, well it's worth a read ahh by Counsel where the, where the, where the Court of Appeal
THE COURT: It's worth a read by you, I am not getting into that
Mr. Scott: I get it, I get it
THE COURT: my only responsibility
Mr. Scott: is to
THE COURT: is to illicit from the defendant
Mr. Scott: Defendant
THE COURT: what her position
Mr. Scott: is
THE COURT: is, what goes on between you and her
Mr. Scott: umm
THE COURT: now, is nothing to do with me I don't sit in the court of appeal
Mr. Scott: I understand, thank you your worship
THE COURT: that's all I have to say
Mr. Scott: I am grateful to be giving, of having the opportunity
THE COURT: 12 o'clock (11:22:20)
Mr. Scott: 12 o'clock

35. Crown Counsel, Mr. Loxely Ricketts, prompted Mr. Scott to take his instructions in writing during the 11:22 – 12:00 adjournment. Mr. Scott responded with an assurance that he was aware of his duty to do so. However, Mr. Scott oddly cited S*ousa, Tucker and Simons v R [2010] Bda L.R. 76* as an attempt to demonstrate his familiarity with the practice requirement to record in writing an Accused's decision not to give evidence (see Practice Direction No. 7 of 2008 further below).

36. This is a convenient point to address the relevant law.

The Law on an Accused's Decision whether to give Evidence at Trial

37. Ms. Christopher produced the Court of Appeal decision in S*ousa, Tucker and Simons v R [2010] Bda L.R. 76* principally to demonstrate its irrelevance at the stage when Ms. Scott cited the case. She correctly observed that the issue of whether an Accused would give evidence did not arise at all in *Sousa et al* as each of the Appellants had given evidence in that case. Notwithstanding, the subject of Mr. Scott's trial competence was in central issue in the *Sousa et al* appeal.

38. The unsuccessful grounds pleaded against the competence of trial Counsel's conduct were in respect of, *inter alia*, allegations of a failure to properly advise the Appellant on his right to silence when questioned by the police and a failure on the part of Counsel to adequately prepare for the trial. The Appellant's case (Vernon Simons) was also that his trial Counsel failed to object to the admission of his witness

statement and failed to adequately put Mr. Simons' case to his Co-Accused men during cross-examination.

39. The Court of Appeal in S*ousa, Tucker and Simons v R* outlined the correct approach to be taken by the Court in cases alleging incompetence of trial counsel (see para 72):

"*The Director of Public Prosecutions reminded us that in cases such as this, where the alleged incompetence of trial counsel is relied upon as a ground of appeal against a jury's verdict, the Courts' concern is whether or not the verdict should be regarded as safe, notwithstanding any shortcomings in the conduct of the defence case: John O'Donald Fox v The Queen (Bda. CA Criminal Appral No. 19 of 2007; and compare R. v Thakar [2003] EWCA Crim 1060). The incompetence, if proved, is possibly a reason for treating the verdict as unsafe: it is not an end itself. We therefore have approached the matter in the following way. If and to the extent that there are valid criticisms of the way in which Vernon Simons' defence was conducted, the Court nevertheless must consider what effect, if any, that had upon the course of the trial and upon the safety of the jury's verdict…*"

40. Suffice to say, the Court of Appeal dismissed the appeal in S*ousa, Tucker and Simons v R* and found that trial Counsel's conduct did not fall below the 'high standards' demanded of him.

41. Ms. Christopher also referred this Court to the remarks made by Watkins J in *R v Bevan (1993) 98 Cr App R 354 at 358*:

"*One criticism has, however, to be levelled at Learned Counsel. It is to be hoped that all Counsel will heed what we now say. When a decision is taken by a Defendant not to go into the witness box, it should be the invariable practice of Counsel to have that decision recorded and to cause the Defendant to sign a record, giving a clear indication that (1) he has by his own will decided not to give evidence and (2) that he has so decided bearing in mind the advice; if any, given to him by his Counsel. That certainly was the practice in the days when the members of this Court were practising at the Bar. It should have never have been departed from. It is our firm view that if the practice has fallen by the wayside, it should be restored to its former prominence and become invariable once again.*"

42. *R v Bevan* was approved in the majority judgment delivered by Lord Rodger in *Privy Council in Ebanks v* R *[2006] UKPC 16; 1 WLR [2006] at p.1836.*

43. In *Ebanks v* R the Appellant was jointly charged with another for the offence of murder and was tried before a judge without jury at his own election in the Grand Court of the Cayman Islands. The Co-Accused gave evidence in his own defence and

admitted to stabbing the victim in his taxi but suggested that the Appellant had not been present at the murder scene.

44. At trial, the Crown relied on a statement made by the Appellant to the police which he had unsuccessfully challenged through two *voir dire* applications on grounds that the statement was fabricated. The evidence from the second *voir dire* (including the cross-examination of the police officers) became evidence of the main trial so not to have the officers repeat their evidence for a third time. The Appellant's Counsel declined the opportunity to further question the officers who took the statement.

45. According to the police officers, the Appellant confessed to having taken part in a joint robbery and he accepted that he handed the knife to his Co-Accused who went on to stab the victim to death. The Appellant did not give evidence at trial and was convicted by the judge on the strength of his admission statement to police.

46. The Appellant instructed new Counsel and appealed against his conviction. The main trust of the appeal grounds in *Ebanks v R* was that the Appellant had been deprived of his right to a fair trial by his Counsel's failure to call him to give evidence in his own defence and to cross-examine the police officers on a positive case of lies. The Appellant alleged that he had "*continually and consistently instructed each of his defending counsel that he had not made the alleged statement and that it was a fabrication by the police officers*" and that the failure to call him to testify on the voir dire proceedings, in defiance of or without proper instructions, "*was a failure of judgment so fundamental in nature that the appellant was deprived of due process of law and did not receive a fair trial*". On his amended grounds of appeal, the Appellant alleged that the conduct of Counsel discouraged, impeded and prevented the Appellant from testifying that he did not make the statement alleged, resulting in a material irregularity in the course of his trial. (see p. 1831 para F)

47. Affidavits were filed before the Court of Appeal in *Ebanks v R*. Extracts from the Appellant's affidavit are recited as follows (see p. 1832):
"*11. When the voir started concerning my statement, I was expecting Mr. St John-Stevens to charge right at the two police officers who were lying and trying to discredit them. But he didn't, and he kept telling me, 'This was is better. They gave you a truncated form of your rights.' He also kept saying to me, 'You've told me that you did not make the statement, but I'm going to attack it this way. They kept you in custody too long without charging you. I'll get the statement thrown out because of oppressive conduct.' Never once did he put to the officers the fact that I didn't make the statement at all. I sat in the court and listened to the two officers' lies and kept thinking that I would have my chance to talk later. At all times I wanted to testify and tell the judge under oath what I have stated in this affidavit. Then the time came and I was talked out of it by the two lawyers. They made me think that they knew best and so I put all my trust in them.*

12. During the testimony of [WPC] Angela Campbell, when I heard her lying about a number of things, I got upset and I raised my hand and said, 'I want to testify. I want to tell my side of the story.' Mr. Stevens jumped up and rushed back to me and said, 'Be careful what you're doing, Kurt. They haven't proven anything against you. They're not hurting you, so relax and behave and keep quiet. And don't put yourself in the stand and give them a chance to cross-examine you'. I told him, 'I don't have any problem going on the stand. I'm not guilty of anything. I don't have anything to hide.'....
...."

48. The Appellant's affidavit account of his conversation with his solicitor, Mr. David McGarth, was as follows:
"*At lunch time on that day, Mr. McGarth came to see me about taking the stand. Mr. McGarth did not actually play much part in my trial. He was not in court every day and it was Mr. St John-Stevens who conducted my defence. On this day, Mr. McGarth gave me the impression that Mr. Stevens had sent him to talk to me. He said, 'This is the turning point in your case. We have to make a tactical decision. I know you were adamant from day one that you gave no statement to the police officers.' I said, 'Yes sir.' Then he said, 'It will be better to approach the case this way since nothing is damaging you.' He just talked and talked and I got confused and thought, 'Well he's the lawyer', and he talked me out of testifying. Because of that, the judge never got to hear what was the most important thing and that was that those two police officers fabricated a statement that I never made to them. Because of that statement, I have been convicted of a murder I did not commit and had nothing to do with*."

49. The affidavit evidence filed by the trial attorneys presented a very different version. Portions of the affidavit reply of Second Counsel, Mr. David McGarth, is recited as follows (see p. 1832-1833):
"*4. From a very early stage the appellant's instructions were firm and unequivocal in a number of regards: (i) he would contest the allegation; (ii) he would elect trial by judge alone; (iii) he disputed the making of the alleged confession; (iv) at no stage in the proceedings would he give evidence.*
5. The appellant alleges that his case was presented in defiance of his instructions. This is untrue. The conduct of the case at trial was entirely consistent with the appellant's particular instructions. Whilst it is correct to say that no positive case was ever put in relation to 4(iii) above this was upon the appellant's instructions.
6. The appellant's instructions that he would not give evidence in the proceedings remained a central tenet of his position throughout.
7. The consequences of his not giving evidence were discussed in great detail with the appellant, both prior to the arrival of leading counsel and in the presence of leading counsel. The decision not to give evidence in the trial created tactical considerations and decisions for the appellant…"

50. Lead Counsel, Mr. St John-Stevens, stated the following, *inter alia*, in his affidavit reply:
"*I was instructed by Mr. David McGrath of Quin & Hampson. Mr McGrath informed me that, inter alia, the appellant was contesting the matter, he did not wish, indeed would not, give evidence and that he would elect a 'judge alone' trial. In the week before the trial commenced I conducted a conference…with the appellant and Mr. McGrath. I confirmed the instructions that the appellant would not give evidence at any stage. I explained fully the ramification of not giving evidence, the tactical considerations and how he wished his trial to be run*."

51. These recitals are sufficient to obtain the flavour of the contrasting positions stated in the affidavits between trial Counsel and the Appellant in *Ebanks v R*. The Court of Appeal dismissed the appeal, having refused admission of additional affidavit evidence by the Accused.

52. On appeal to the Privy Council, the Board identified material factual differences between the affidavits of Mr. McGarth and Mr. St John-Stevens. In the majority judgment delivered by Lord Rodger it is stated (at p. 1836 para 17):
"*It is unfortunate that there should be any room for doubt about the position. The decision whether or not to give evidence is always ultimately one for the defendant himself after receiving appropriate advice from counsel…But the decision not to give evidence is one of such potential importance that it has long been recognised that it should be recorded in writing…*"

53. The Board also cited with approval the warning remarks of Pitchford J in *R v Chatroodi [2001] EWCA Crim 585 at [39]-[40]*:
"*39. As long ago as 1993 Watkins LJ, giving the judgment of this Court in R v Bevan 98 Cr App R 354 said that it should be the invariable practice of counsel to record any decision of a defendant not to give evidence, signed by the defendant himself, indicating, clearly, that the decision has been made of his own free will, and that in reaching that decision he has borne in mind advice tendered by counsel. We are bound to express some dismay at the knowledge that comparatively senior counsel, advising a client not to give evidence, notwithstanding the provisions of section 35 of the Criminal Justice and Public Order Act 1994, was unaware of this obligation.*
40. While we would not expect counsel to record every detail of every conference between himself and his client, we would expect some written record of a conversation relevant to the important question whether it was in the defendant's interests to give evidence at his trial. This court suffers the disadvantage, in the absence of such a record, of being required to evaluate the recollections of counsel, on the one hand, and the appellant on the other."

54. Lord Rodger also referred to the Board's statements in *Bethel v The State (1998) 55 WIR 394, 398* to illustrate the applicability of this rule of practice in Caribbean

jurisdictions. The desirability of the practice was also expressly stated to cover cases ranging all levels of seriousness.

55. The Crown relied on the following passage in *Ebanks v* R at [1837]:
"*Mr. Froomkin submitted that the rule of practice was so important, that where it had not been followed, the appellant should be given the benefit of the doubt and an appeal court should proceed on the basis of his version of events. Their Lordships would not accept that submission. Rather, in the absence of any written record, an appeal court has to consider the respective accounts of the appellant and his former counsel and evaluate them in the light of the other relevant circumstances*."

56. Their Lordships narrowed the issue for determination down to whether Counsel '*in effect forced him, against his will, not to go into the witness box*' (see p. 1837 para F):
"*… Their Lordships notice that there is nothing to suggest that Mr. Ebanks made any protest about this during the trial. Nor is there anything to suggest that, even shortly after the trial, he complained to any fellow prisoner, or court official or prison officer. The first time that such a complaint emerges is some nine months later in his amended grounds of appeal dated 24 October 2001 and in his affidavit dated two days earlier. Of course, the delay in making the complaint does not show that it is unsound, but it is a factor to be taken into account. An appeal court must always bear in mind the distinct possibility that such a complaint may be fabricated- indeed that is precisely why there should be a contemporaneous written record of the decision that the defendant is not to give evidence*."

57. The Privy Council in *Ebanks v R* assessed trial Counsel's general conduct of the case and the apparent care that was taken throughout to trial to take instructions from the Appellant on issues of less consequence. Having identified the evidence of Counsel's regular consultation with the Appellant on more minor points, the Board, by majority decision, affirmed the conviction.

58. Following the Privy Council's judgment in *Ebanks v R*, Richard Ground CJ (as he then was) published Court Circular No. 7 of 2008 requiring Counsel to make a written record of the facts surrounding an Accused's decision not to give evidence:

Practice Direction No. 7 of 2008:
"*Counsel are reminded that where it is decided that the defendant will not give evidence, this should be recorded in writing, along with a brief summary of the reasons for that decision. Wherever possible, the record should be endorsed by the defendant. This statement of principle is taken from the judgment of the Privy Council in Ebanks v R [2006] UKPC 16, at [18].*

Indeed, defending counsel should as a matter of course make and preserve a written record of all the instructions he receives, including a witness statement: Ibid. [17], quoting and applying Bethel v The State (1998) 55 WIR 394, at 398.

These principles are of universal application and are not limited to capital cases or to England & Wales: Ebanks v R (supra) at [17].

The practice has recently been reinforced by several cases in Bermuda Court of Appeal, and should now be well understood by the profession. In view of that, in future Counsel who fail to comply may be subject to disciplinary proceedings."

Un-pleaded Part of Ground 1a

59. Ms. Christopher did not plead any grounds of appeal criticizing Mr. Scott for advising Ms Brangman not to take the stand. It is therefore not necessary for me to explore the merits of such an argument, notwithstanding that the issue arose during oral arguments. Suffice to say, the Appellant's defence was based on a lack of knowledge.

60. Section 32 of the Misuse of Drugs Act 1972 gave rise to a statutory presumption against the Appellant once it was proved that she had the tamarind balls containing the crack cocaine in her possession. This placed an evidential burden on Ms. Brangman to disprove knowledge. The discharge of the evidential burden would have occurred once she simply raised the issue of knowledge. It is plain to see that her taking the stand would have been one of the most effective ways to do so. The burden would then remain on the Crown to disprove knowledge beyond all reasonable doubt.

61. In any event, I make no findings on this particular un-pleaded point.

Findings on Ground 1a

62. The real issue for determination is whether the Appellant's decision not to take the stand was made of her own free will.

63. The learned Magistrate in his final comments prior to the 11:22am adjournment implicitly marked a red line distinction between persuasion by Counsel and advice by Counsel. There is a difference. It is not the role of Defence Counsel to coerce an Accused into his or her decision on whether or not to give evidence. A decision made based on coercion is tantamount to a decision void of free will.

64. The requirement for a written note endorsed by the Accused effectively serves as a safeguard against coercion or any other form of deprivation of free will. Potentially, the written note required by Counsel is valuable proof of two things:
    (i) that the Accused was aware of his or her right to freely decide whether or not to give evidence in his or her own defence; and
    (ii) that the decision was in fact made of the Accused's own free will.

65. The fact that the Appellant was made aware by the Court of her right to make the decision of her own free will did not mean that Mr. Scott was incapable of subsequently depriving her of that free will, notwithstanding. This Court cannot ignore that Mr. Scott first told the learned Magistrate that the Appellant would give evidence. I find, having regard to all of the affidavit evidence before me, that Ms. Brangman did want and intend to give evidence when Mr. Scott told the Court that she would take the stand.

66. The real question is what transpired between the Appellant and Mr. Scott when they privately met for nearly 40 minutes between 11:22am and 12:00 noon. It is a note of this meeting which is required by the relevant Practice Direction. Regrettably, no such note was ever produced. As a matter of consequence, this Court must now rely on the agreed facts and the affidavit evidence filed by the Appellant and Mr. Scott in order to make any findings on the facts.

67. The position is this: Ms. Brangman in her affidavit states that she did not give evidence because Mr. Scott told her not to give evidence. She described herself as vulnerable in her dealings with Mr. Scott and conveyed her fear that she would not have Counsel's support if she decided to give evidence. The Appellant's version of her interaction with Mr. Scott amounts to an accusation of improper coercion.

68. The question then turns to whether this accusation has been adequately defended by Mr. Scott in his affidavit. Put simply, it has not. Mr. Scott's affidavit, unfortunately, confuses more than it clarifies. While he has offered a series of reasons why, on his analysis, it was best for her not to have taken the stand, there is no suggestion in his affidavit that the Appellant made the decision of her own free will.

69. Stylistically, Mr. Scott's affidavit is written from a plural perspective. However, the curious use of the word "we" throughout his affidavit obviously does not refer to him and the Appellant as an item. It is more likely that Mr. Scott's numerous references to 'we' are in respect of him and his firm collectively. The point is best illustrated by paragraph 17 of his affidavit:
"17.That we discussed this with Ms. Brangman and in fact the Learned Magistrate allowed us time to consult with her before she indicated that she would not give evidence based on our advice.

70. In my judgment, this narrative does not suffice as an effective rebuttal to Ms. Brangman's complaints at paragraphs 5 and 6 of her affidavit:
"*5. Mr. Scott told me not to give evidence during the trial. I really wanted to give evidence... At the time of trial, I had completely intended on giving evidence. I had even reached the point of standing up to move forward to give evidence when an intervention was made that stopped me from giving evidence.*

6. My lawyer told me not to give evidence as the prosecution would show me to be a liar and because I was vulnerable … … … I was willing to let the court know that I had not been completely forthright to the police in the beginning. At that stage I just wanted to tell the truth and let the judge make his decision on that. I did not know and was not advised that the magistrate would have to remind himself that people tell lies for all sorts of reasons and it does not mean you are guilty. I felt that if I did give evidence in light of what he said to me I would not have the support of my lawyer and I had already been let down by my previous experiences with the three groups- Gianni, the police, the lawyer. The reality was how could I do this without my lawyer on board. I was put on the spot of having to[3] (sic)".

71. In my judgment, Mr. Scott was derelict in his duty to the extent that he failed to record any kind note containing (i) his instructions from Ms. Brangman on whether she would give evidence; and (ii) a statement that the decision was made of her own free will.

72. This dereliction of duty has left me with real doubt as to whether or not Ms. Brangman decided not to give evidence of her own free will. Such doubt can only be resolved fairly in favour of the Appellant.

73. For these reasons, this ground of appeal succeeds.

Ground 1b

Trial Counsel's pre-trial representation of the Appellant and Gianni Fenaroli

74. This ground of appeal was not vigorously pursued.

75. I find that the Appellant was not prejudiced during her trial by Mr. Scott's earlier representation of Mr. Fenaroli. If a complaint does meritoriously arise from the double representation, it would sooner be in respect of prejudice to Mr. Fenaroli and not the Appellant.

76. In any event, Mr. Scott's representation of Mr. Fenaroli was not shown to have prejudiced Ms. Brangman's trial in any way.

77. For these reasons, I find Ground 1b has no merit and fails.

[3] This sentence was not completed in the affidavit.

Grounds 1c

Trial Counsel's failure to lead good character evidence

78. The Appellant is a person of previous good character in that she has never before been convicted of a criminal offence. However, Mr. Scott took no steps whatsoever during the trial to establish before the learned Magistrate that the Appellant was of previous good character.

79. No discord arose on the basic principles of law on good character evidence. Section 16(1)(e)(ii) of the Evidence Act 1905 contemplates that an Accused may establish his or her own good character by giving evidence or though Counsel's questions of any witness.

80. The Crown relied on the judgment of the learned Chief Justice, Ian RC Kawaley, in *Sharon Smith v The Queen [2013] Bda LR 31*. In that case, this Court, in its appellate jurisdiction, considered the impact of a Magistrate's failure to give an adequate statement with respect to his consideration of the Appellant's good character. However, I am not assisted by *Smith v R* because in that case Kawaley CJ found that the Magistrate did not fail to consider the good character issue, notwithstanding his omission to make proper reference to it in his final judgment.

81. In this case, the issue is that the learned Magistrate was not made aware that the Appellant was of previous good character. Silence at trial from the Defence on the issue of character evidence is most often consistent with an Accused person who is not of previous good character. Therefore, it is clear to me that the learned Magistrate had no way of knowing through Mr. Scott's deafening silence that the Appellant was of previous good character.

Credibility

82. The Bermuda Court of Appeal in *Formanchuk v R* cited *Berrada* at p.134 where Waterhouse J considered the position when both character and credibility are in issue:

    "*We have no doubt, however, that the modern practice is that, if good character is raised by a defendant, it should be dealt with in the summing up. Moreover, when it is dealt with, the direction should be fair and balanced, stressing its relevance primarily to the defendant's credibility.*"

83. The Court of Appeal also cited *R v Aziz [1995] 2 Cr App R 478* (p. 6):
    "In the case of *R v Aziz et al [1995] 2 Cr App R 478 it was held that a defendant of previous good character who testified or made pre-trial answers or admissions as well as self-exculpatory explanations was entitled to good character directions as to credibility and as to propensity to commit the offense charged. Their convictions were quashed because none of the three defendants had been given good character*

directions both as to credibility and propensity. The law lords held that there has been a settled rule since 1989 that where a defendant testified, the judge must give a directive as to the relevance of good character to the defendant's credibility.

84. While I am left with real doubt about the Appellant's decision not to give evidence, *ipso facto*, an analysis of the credibility limb would be artificial given that the Appellant did not give evidence.

Propensity

85. It was open to Mr. Scott during cross examination to put it to the officer in charge that the Appellant had a clean record. Generally, where such omissions are inadvertently made by Counsel, the fact of a clean record may later be made known to the Magistrate as an agreed fact in the trial or by further evidence. Mr. Scott took no such action at any stage of the trial leading up to judgment. It follows that he would have made no mention of good character evidence in his final submissions. The effect of Mr. Scott's failure to present evidence of the Appellant's good character deprived Ms. Brangman of the benefit of a propensity direction which applies to Accused persons of previous good character. This is known law: see *John Arthur Vye, Frederick James Wise, Macolm Stephenson (1993) 97 Cr App R 134* and *Formanchuk v R [2004] Bda L.R. 24*.

86. In *Vye et al* the English Court of Appeal in referring to *Rashid Berrada (1990) 91 Cr. App R 131 at p.134* said at page 137:
"*That decision, therefore confirmed that, whatever the position may have been previously, it is now an established principle that, where a defendant of good character has given evidence, it is no longer sufficient for the judge to comment in general terms. He is required to direct the jury about the relevance of good character to the credibility of the defendant. Conventionally, this has come to be described as the "first limb" of the character direction. The passage quoted also stated that the judge was entitled but not obliged, to refer to the possible relevance of good character to the question whether the defendant was likely to have behaved as alleged by the Crown. The (in effect the Stannard direction) is the "second limb*"."

87. Citing *R v Bryant [1979] QB 108*, the English Court of Appeal in *R v Cohen (1990) 91 Crim App R 125* held that the proper direction on the second limb was for the judge to direct that because the Accused had lived his life to the age he had, he was less likely to commit a crime. (The particulars of the conspiracy offence in this case apply to a time range commencing from a date unknown leading up 29 September 2014 when the Appellant would have been 28 years of age, having been born on 17 June 1986).

88. Had the learned Magistrate been made properly aware of the Appellant's previous good character, he would have been obliged to direct himself under the "second limb" whether or not the Appellant had given evidence. The Appellant was wrongly

deprived by her Counsel of her entitlement to establish her good character evidence before the learned Magistrate. Consequently, she was not afforded the Magistrate's consideration that she was less likely to have committed the offence having lived her life to 28 years of age without a previous conviction.

89. Ground 1c succeeds on this basis.

Un-pleaded Part of Ground 1c

90. Ms. Christopher further criticized Mr. Scott for having failed to make the Court aware of Mr. Fenaroli's previous cannabis possession convictions. However, Mr. Fenaroli was not a Crown witness in these proceedings so his previous record is irrelevant on the issue of Counsel's failure to establish the Appellant's good character evidence.

Conclusion

91. Grounds 1a and Ground 1c have succeeded. The Court must then go on to consider whether or not the verdict should be regarded as safe, notwithstanding these shortcomings in the conduct of the defence case. In my judgment, the conviction is unsafe given the Court's doubt as to whether the Appellant exercised her free will in deciding not to give evidence and that she was further expropriated of the benefit of a good character direction as it relates to propensity because of her Counsel's inaction.

92. It should be emphasized that no criticism is made in this Judgment of the conduct of the learned Magistrate.

93. The appeal is accordingly allowed and the conviction and sentence of 6 years imprisonment is quashed.

94. I shall hear the parties on whether a retrial should be ordered.

Dated this 2nd day of April, 2018 ________________________________

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE