[2016] CCJ 2 (AJ)

CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCR2015/002
BB Crim. Appeal No 6 of 2009

BETWEEN

ROHAN RAMBARRAN Appellant

AND

THE QUEEN Respondent

Before The Right Honourable and the Honourables

Sir Dennis Byron, President
Mr Justice R Nelson
Mr Justice J Wit
Mr Justice D Hayton
Mme Justice M Rajnauth-Lee

Appearances
Sir Richard L. Cheltenham, KA, QC, Ph.D and Ms. Shelly-Ann Seecharan for the Appellant

Mr. Charles Leacock, QC and Mr. Anthony L. Blackman for the Respondent

JUDGMENT
of
The President and the Honourable Justices Wit and Hayton

and

JUDGMENT

of

The Honourable Justices Nelson and Rajnauth-Lee

both delivered

on the 3rd day of February, 2016

JUDGMENT OF THE RT. HONOURABLE SIR DENNIS BYRON, PRESIDENT AND THE HONOURABLE JUSTICES JACOB WIT AND DAVID HAYTON

Introduction

[1] The Appellant Rambarran and another three Appellants, Campbell, Green and Persaud, are requesting orders that will require the Court of Appeal to hear their applications for leave to appeal against conviction and sentence on the merits. A jury had returned verdicts of guilty against them on 4th June 2009 for offences relating to the importation, possession and trafficking of, cannabis and cocaine under the Drug Abuse (Prevention and Control) Act.[1] The trial judge sentenced them on 11th December 2009 (190 days after the jury verdict) to various terms of imprisonment to run concurrently, ranging from a maximum of 15 years for Appellants Green and Persaud; 25 years for Appellant Campbell; and 30 years for Appellant Rambarran.

[2] Their applications, originally scheduled for hearing 21st to 24th July 2014, eventually came on for hearing on 23rd September 2014 when the DPP, for the first time, raised the point that the applications for leave to appeal against conviction had been filed out of time and so could not be heard. The Court of Appeal accepted this point in its judgment of 5th February 2015 dismissing the applications. Subsequently dealing in March 2015 with applications for an extension of time to file applications for leave to appeal against conviction, the Court of Appeal rejected them. It held that it was *functus officio* and the applications were an abuse of the process of the court.

[3] The members of this Court unanimously hold that that the Court of Appeal was not *functus officio*, having jurisdiction to hear the applications which involved no abuse of process. In addition, much dismayed by the excessive length of time that these appeal procedures have so far taken, all are agreed that it is vital to ensure that the merits of the

[1] Barbados Drug Abuse (Prevention and Control) Act, Cap 131.

appellants' cases have an expedited hearing by the Court of Appeal as soon as possible. The minority considers that the applications for leave to appeal against conviction were out of time so that applications need to be made to the Court of Appeal for extensions of time to file the former applications. Since the appellants' extension of time applications require investigating the merits of their appeals, as do their applications for leave to appeal against conviction, these matters should be resolved together in an expedited hearing required of the Court of Appeal.

[4] The majority considers that the applications for leave to appeal against conviction were in time, except for that of Persaud filed four days too late, though signed by her in prison in good time. In the unique circumstances, Persaud is to be granted an extension of time to file her application for leave to appeal so that the merits of all four appellants' applications may be heard together in an expedited hearing of their applications for leave to appeal against conviction, including sentence. The reasons for the majority's views now follow.

The Factual Background

[5] Notice and applications for leave to appeal were made in the following manner:

- Appellant Rambarran gave notice applying for leave to appeal against conviction on 9th July 2009 (35 days after the jury verdict) and against sentence on 30th December 2009 (19 days after sentencing);
- Appellant Green gave his notice applying for leave to appeal against conviction and sentence on 16th December 2009 (195 days after the jury verdict and 5 days after sentencing);
- Appellant Campbell gave his notice applying for leave to appeal against conviction and sentence on 21st December 2009 (200 days after the jury verdict and 10 days after sentencing); and
- Appellant Persaud gave her notice applying for leave to appeal against conviction and sentence on 5th January 2010 (215 days after the jury verdict and 25 days after sentencing), though the Court of Appeal granted leave to her to file an application for an extension of time for seeking leave to appeal but only against sentence, if

filed on or before 9th February, as was done. Indeed, in prison on 31st December 2009, she had signed her application for leave to appeal but it only reached the Registrar on 5th January 2010.

[6] The court office accepted the notices, and over the next 4 to 5 years conducted a number of hearings, managed the preparation of the record, and held case management conferences. These were conducted by the Registrar and the Chief Justice sitting as a single judge of the Court of Appeal from time to time. Each of these conferences was attended by representatives of the DPP's chambers. The record of appeal, which was quite voluminous, was prepared in several copies. A lot of time and expense must have been incurred by the State and the appellants, in addition to the court resources that were invested in the process. There could be no doubt that these expenses were incurred on the assumption by all relevant parties, other than Persaud, that there were before the court valid notices applying for leave to appeal; while Persaud could have had justified expectations that the court would permit an extension of time for her notice filed four days overdue over the holiday period.

[7] The four matters were eventually set down for hearing for the first time for 21st July to 24th July 2014 (1873-1876 days after the guilty verdict and 1683-1686 days after sentencing). Such a lengthy period was taken up since the practice of the court in hearing an application for leave to appeal was to go into the merits of the appeal. There were several adjournments. The matter eventually came on for hearing on 23rd September 2014 (1973 days after the guilty verdict and 1747 days after the sentencing). It was only on that date that the DPP, for the first time, took a point *in limine* that the applications for leave to appeal against convictions were filed later than the time prescribed by the statute, and should not be heard. The appellants' submissions in response to the DPP were heard by the Court of Appeal on 2nd December 2014 (2007 days after guilty verdict and 1817 days after sentencing); and the DPP's response on 16th January 2015 (2052 days after guilty verdict and 1862 days after sentencing), when the Judges reserved their ruling on the point. The Court of Appeal ruled on 5th February 2015 (2072 days after the guilty verdict and 1882 days after sentencing) that the notices applying for leave to appeal had

been filed more than 21 days after conviction and as such no valid applications were before the court and the applications were therefore dismissed.

[8] On 4th February 2015 Appellant Rambarran filed an application in the same proceedings for an extension of time to apply for leave to appeal against his conviction pursuant to section 19(2) of the Criminal Appeal Act.[2] Similar applications were made by Appellant Persaud on 9th February 2015 and Appellant Green on 10th February 2015. On 13th March 2015 the Court of Appeal determined, without hearing any oral arguments on the applications, that it was *functus officio* and had no jurisdiction to hear the applications, and that they constituted an abuse of the process of the court. The court's reasons were reduced to writing in a judgment dated 24th March 2015.

The Practice on Filing Appeals

[9] All of the notices seeking leave to appeal against conviction were filed more than 21 days after the verdict of guilty had been pronounced (35, 195, 200 and 215 days, respectively). Section 19(1) of the Criminal Appeal Act states that appeals against conviction and notices seeking leave to appeal against conviction must be lodged within 21 days of the conviction. Counsel contended that it was the practice in Barbados that when there was a delay between the pronouncement of the verdict of guilty and the imposition of sentence, the 21 days begin to run from the date of sentence. Nevertheless, counsel for Rambarran explained that, in view of the complex lengthy trial proceedings and in the interests of efficiency in the use of his time, he had filed his client's notice seeking leave to appeal against the verdict well before sentence while the case was fresh in his mind. We have to determine whether the alleged practice is in fact a prevailing practice because in its 24th March decision, the Court of Appeal, through Moore JA, commented that the practice did not exist in fact. This was not a finding of fact in the sense of a conclusion drawn from evidence adduced in the proceedings. No evidence had been adduced and the court was responding to statements made from the Bar table. The comment was stated to be based

[2] Barbados Criminal Appeal Act, Cap 113A.

on a deduction from the perceived impact of the Penal System Reform Act,[3] and further illustrated by the decision of Simmons CJ in the case of *Martin Glenn v The Queen.*[4]

[10] The actual transcript of the proceedings conducted by Simmons CJ on 27th March 2007 was exhibited. This revealed that he did not have to consider or rule on that practice at all:

> "SIMMONS CJ: In this application, the applicant is seeking an extension of time within which to appeal. This circumstance is brought about because the applicant was convicted and sentenced on the 7th June 2000, but his Form 1 Notice of Appeal or application for leave to appeal was filed only on the 3rd July 2000."[5]

In that case, therefore, the conviction and sentence occurred on the same day. The time in respect of an appeal against conviction commenced to run from the same time as the sentence was imposed. This case is also instructive because of the practice of the court office, as outlined by Simmons CJ:

> "In the space provided on the form, grounds of appeal or application, there is this notation and I quote: 'This notice was handed in by the appellant today. We allowed affidavits to be filed to explain the reason for non-compliance with the time Limit imposed by criminal appeal rules."[6]

[11] That is very different from what happened in the instant case because in that case the appellant was immediately put on notice that he needed to apply for an extension of time. It may be instructive to note another important element in Simmons CJ's approach to the case. Despite the fact that the court office had given the warning of the need to apply for an extension of time, there was inordinate delay in the filing of the respective affidavits. In fact, the affidavits were not filed until February and March, 2007. Despite this, Simmons CJ did not summarily dismiss the application. He considered that he had to apply two principles, namely, whether there were substantial grounds for the delay and whether the appeal had a reasonable chance of success. He examined both carefully. He found against the appellant on the two interconnected principles and dismissed the application, but only after considering the merits of the case.

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[3] Barbados Penal System Reform Act, Cap 139.

[4] Criminal Appeal No. 15 of 2000.

[5] Transcript of *Martin Robert Glen v The Queen*, page 16, lines 2-7.

[6] ibid 11-17.

[12] Before this Court there was ample evidence provided in the affidavit of search sworn by Ms Sophia Payne, Secretary to Sir Richard Cheltenham, QC. This affidavit was supported by exhibits, including several notices of appeal. There was no rebuttal evidence and the contents of her affidavit were not challenged in any way. It is not necessary to go into detail but the evidence showed 37 cases where there was a long delay between the guilty verdict and the imposition of sentence, and the notice of appeal against conviction was lodged after sentence was passed. In each case, the Court of Appeal heard the appeal and the prosecution never challenged the filings as being out of time. It is sufficient to refer to two cases that were dealt with by the Court of Appeal during 2015. In *Bailey v The Queen*,[7] the appellant had filed his appeal in respect of conviction and sentence only after he was sentenced, and long after the verdict was pronounced. His appeal went through and the court gave a written judgment in this case as recently as 20th June 2015. In *Macklean Samuels v the Queen*,[8] the appellant was found guilty on 27th October 2011 and sentenced on 22nd March 2013 (17 months after the verdict of guilty) to 6 years imprisonment. The notice seeking leave to appeal against conviction was filed on 26th March 2013. Sir Richard informed us that this application was scheduled to be heard on its merits on 16th October 2015, the prosecution not having challenged the filing as being out of time. Subsequent inquiries have revealed that the application has not yet been heard.

[13] We are convinced that there is a longstanding practice, accepted by the Court of Appeal, the Director of Public Prosecutions, and the Bar, that notice of application for leave to appeal against conviction is lodged after sentence has been imposed, even when there is a delay between the two events. This practice is buttressed by a leading text by the late Dana Seetahal, SC:

> "In order to activate the appellate process, an appellant must either file a notice of appeal notice of application for leave to appeal or notice of application for an extension of time to appeal. In whichever instance, the notice must be filed within 14 days or (21 days in The Bahamas and Barbados) of the conviction and/or

[7] Criminal Appeal No. 2 of 2013.
[8] Criminal Appeal No. 2 of 2013

sentence. If the sentence is on a different date from the finding of guilt, the time must be counted from the date of sentence."[9]

We state for the record that a practice cannot change statute law, although it might have other consequences. This decision is intended to clarify the statute law.

The Issues for Determination

[14] In these proceedings we have to determine:

- whether the time for filing a notice of appeal or an application for leave to appeal pursuant to section 19(1) of the Act against a conviction expires when such notice or application has not been given within twenty-one days of the determination of guilt by the jury or within twenty-one days of the date of sentence (reflecting the ultimate judicial expression of the determination of guilt); and
- whether, on the facts of this case, the Court of Appeal properly refused to enlarge the time for filing such a notice applying for leave to appeal against conviction pursuant to section 19(2) of the Act in favour of an applicant who had filed such a notice but which had been dismissed by the court as being out of time.

When does time for appeal against conviction expire?

[15] The relevant statutory provision is section 19(1) of the Criminal Appeal Act, Cap. 113A, which came into effect on 1st September 1983:

> "19.(1) Subject to subsection (2), a person who wishes to appeal to the Court, or to obtain the Court's leave to appeal, must give notice of appeal or his application for leave to appeal, in the manner provided by rules of court within 21 days of the date of conviction, verdict or finding appealed against, or,
>
> (a) in the case of an appeal or application for leave to appeal against sentence, other than a sentence of death, within 21 days of the date on which sentence was passed; or
>
> (b) in the case of an appeal or application for leave to appeal where the sentence is death, within 14 days of the date on which sentence was passed; or
>
> (c) in the case of an order made or treated as made on conviction, within 21 days from the date of the making of the order."

[9] Dana Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* (3rd edn, Routledge-Cavendish 2010) pp. 292-293.

[16] Two interpretations of the section are before us. Determining the proper interpretation is most important for the administration of justice. The appellants contend that time should run after conviction in the sense of the pronouncement of the verdict and the final disposition of the case by sentence or other order. On the other hand, the Court of Appeal ruled that time commences to run at the time the jury has pronounced its verdict of guilty. In a system where the sentence and verdict are addressed on the same day there would be no difficulty. But this is not the case in Barbados since the passing of the Penal System Reform Act, which came into effect on 15th May 2000. That Act requires a Judge passing sentence on an offender who has been convicted of an imprisonable offence to consider whether the offence is so serious that only a custodial sentence can be justified (section 35). Before coming to that conclusion, the Judge must, consistent with section 37 of the said Act, obtain and consider a pre-sentence report. The method used to manage this legislation involves a lapse of time between the pronouncement of the verdict and the imposition of sentence, and often a lengthy delay, the rationale for which this case has not interrogated. In the instant case, for example, sentence was passed some 6 months after the jury pronounced the verdict of guilty.

[17] It has been seen that the main body of section 19 prescribes three separate non-overlapping events from which the time for filing a notice of appeal or an application for leave to appeal can be reckoned: a "conviction", a "verdict" and a "finding", while section 19(1) (a) deals with a sentence other than a sentence of death, (b) deals with a sentence of death and (c) deals with an order made or treated as made on conviction. In our view, construing section 19 in context, the date of a "conviction" is the date of the judgment consummating the verdict of guilty or a guilty plea by a sentence or order, the date of a "verdict" is the date of a verdict of not guilty by reason of insanity and the date of a "finding" is the date of a finding of unfit to plead. Paragraphs (a) to (c) of section 19(1) deal with cases where an appeal is *only* against a sentence or order. Thus, in the usual case of an appeal against a determination of guilt and the sentence, an appellant has until 21 days from the date of that sentence entailing the determination of guilt. Where an appeal is only sought against a "sentence" or "order" the position is spelled out in paragraphs (a) to (c) as 21 days from the date of the sentence or order. If, unusually, the

appellant seeks to appeal only the determination of guilt he has until 21 days after the date of the sentence. Thus, he can put in an early appeal or application for leave to appeal, though it will not be heard until sentence has been passed, the date of which will be well before the application is listed for a date for hearing, taking account of the length of the list of criminal appeals.

[18] As is the current practice, an accused's admission to bail will terminate on his being found guilty but he can immediately apply to the trial judge for bail on the basis that he is going to appeal and deserves bail until its outcome, even though he has not yet filed an appeal and sentence has not been passed. If the trial judge is unavailable, for example through illness, the bail application can be entertained by another judge under section 24 of the Criminal Procedure Act.[10] Nevertheless, once an appeal has been filed it is the Court of Appeal that under section 21(2) of the Criminal Appeal Act takes over jurisdiction to hear bail applications, taking account of what appears in the filed appeal or notice of application to appeal. As made clear above, such filing can be made at any time until 21 days have elapsed since a sentence entailing a determination of guilt. When section 2(1) of that Act defines an appeal to mean "an appeal by a person convicted upon indictment" in our view this needs to be construed in context as meaning a person found guilty upon an indictment and not a person sentenced after being found guilty. This is so even though section 19 uses "conviction'' in the sense of a sentence entailing a determination of guilt. Indeed, where a judge has made an order dismissing a bail application of an accused found guilty, it would seem that this can fall within section 19(1) (c) as an order made or treated as made on conviction that needs to be appealed before 21 days have elapsed from the date of the order. As will subsequently be shown, the Criminal Appeal Act is poorly drafted, leaving a court with the difficult task of "ironing out the wrinkles" so that where two alternative constructions of an Act are possible, a court has to choose the construction it considers is more conducive to the efficient administration of criminal justice as we emphasise at [36] below.

[10] Barbados Criminal Appeal Act, Cap 127.

[19] As part of the background context, it is notable that there is only one form for appealing against conviction or sentence. Form 1 is headed "Notice of Appeal or Application for Leave to Appeal Against Conviction or Sentence." Guidance Note 1, as prescribed by the Criminal Appeal Rules, states: "This form should be sent to the Registrar within 21 days from the date of conviction or of an order made or treated as made on conviction, sentence (other than death), verdict or finding appealed against and within 14 days where the sentence is death." There is nothing to warn prisoners of a crucial point if correct, namely that, if they do not seek to appeal against a guilty verdict within 21 days, a subsequent appeal against the verdict and the resultant sentence made within 21 days of the sentence leads only to a valid appeal against sentence, not against the verdict. An ordinary prisoner would naturally expect to seek to appeal once the proceedings were completed by a sentence since no proceedings on the appeal would normally occur between the guilty verdict and the sentence. Moreover, many prisoners do not decide whether to appeal or not until they know what sentence is imposed. The affidavit filed in these proceedings exhibited numerous completed copies of Form 1 on which actual appeals have been processed to completion. These were all filed after sentence had been imposed.

[20] That practice is consistent with the statutory powers vested in the Court of Appeal on hearing appeals against conviction. These powers include quashing or varying the sentence imposed. In the definition section, section 2, "conviction" is not defined, but "sentence" is defined to include any order on conviction with reference to the person convicted, or his wife or children. The use of the preposition "on" instead of "after" suggests that, for the purposes of this Act, the sentencing process is to be regarded as part of the conviction process.

[21] This is also suggested by later sections of the Act. Section 3 of the Act prescribes that a person convicted of an offence on indictment may appeal to the court against conviction. Section 3(2) provides for appeals without leave and 3(3) for appeals with leave of the court. Section 3(3) (c) provides for "an appeal against the sentence passed on conviction". Section 5 provides that the court has the power on an appeal against

conviction to substitute a verdict of guilty of another offence and to pass another sentence in substitution. Section 6 provides that, on hearing an appeal against conviction on an indictment with two or more counts, the court can allow the conviction in respect of part of the indictment and in respect of the count on which the appellant remains convicted pass a sentence in substitution for any sentence passed at the trial. Section 7 provides that on an appeal against conviction based on a special verdict found by a jury the court can, instead of allowing the appeal, substitute a different sentence. Sections 8, 9, 10 and 11 deal with the power of the Court of Appeal where it makes findings on the issue of insanity. These sections confer powers on the Court of Appeal to make orders that can quash or vary the conviction, the verdict and the sentence. It seems from these sections (and also sections 32 and 34) that Parliament intended that when an appeal against conviction was made, the sentence would have already been imposed.

[22] The intention of the legislature to empower the court to address sentencing issues on appeals against conviction is made very clear by section 14 which prescribes:

> "On an appeal against conviction or sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence authorised by law, whether more or less severe, in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the trial."

This is unequivocal. The court, on hearing an appeal against conviction, has the power to quash the sentence and pass another sentence in substitution. This implies that the appeal against conviction gives the court power to vary the sentence. It would therefore be logical that the appeal against conviction be filed once the sentence has been passed.

[23] In interpreting the meaning of section 19(1), we must further note that different meanings must be attributed to the three events, conviction, verdict and finding appealed against. This is the result of the fundamental canon of construction of statutes described in the text books as the presumption against tautology[11]. This canon requires the court to presume that Parliament intends that each word in a piece of legislation should have

[11] Oliver Jones, *Bennion on Statutory Interpretation (6th* edn Butterworths Law 2013); Ruth Sullivan, *Sullivan and Dreidger on Construction of Statutes* (4th edn Butterworths Law 2002) pp 158, 160.

effect and that, without more, different words mean different things[12]. Moreover, in a statute imposing time limits running from particular events one would expect there to be no overlap between the events, there being three independent comprehensive time limits and no provision for the latest of the three events to be the deadline.

[24] Therefore the words "conviction" and "verdict" should be given different meanings. This view is strengthened by the fact that the words "conviction" and "verdict" are used next to each other in the same sentence. We have already seen that the statutory meaning of the word "conviction" can be deduced from the fact that, on hearing an appeal against conviction, the Court of Appeal has power to quash and vary the sentence.

[25] The word "verdict" is not defined in the Act. In sections 4 and 5 it is used in a different sense from the word conviction. The verdict is the pronouncement of guilt or innocence by the jury for a particular offence. Section 4(1) (a) prescribes that an appeal against "conviction" shall be allowed where the court is of the opinion "that the verdict of the jury should be set aside on the ground that under all the circumstances of the case the verdict is unsafe or unsatisfactory". In a similar vein, section 5 provides after an appellant has been convicted of an offence that could have led the jury to find him guilty of some other offence, the court can replace the jury's verdict with a verdict of guilty of the other offence.

[26] Section 7 provides " Where a special verdict had been found by a jury, then on an appeal against conviction, if the Court considers that a wrong conclusion was arrived at by the court of trial regarding the effect of the jury's verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict; and the Court may pass such sentence in substitution for the sentence passed at the trial as may be authorized by law." A "special verdict" here has its normal meaning of a verdict that does not necessarily pronounce on innocence or guilt. It is a verdict by a jury that makes specific factual conclusions rather than a declaration of guilt or liability. This procedure became well known for its use in the famous case of *R v*

[12] *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 at 546 per Viscount Simonds

Dudley and Stephens.[13] That was the English criminal case where survivors of a shipwreck killed and ate another survivor and sought to justify their cannibalism on the basis of necessity and the custom of the sea. It will be recalled that the jury were required to give a "special verdict" stating their findings of fact. It was left to the judges to apply the law to those facts and determine innocence or guilt. In their famous opinion, the judges rejected the defence and found the accused guilty of murder, although with a plea for clemency. It will be seen that section 7 is premised upon there being an appeal against conviction, not an appeal against a verdict, so that such appeals should not be required to be made within 21 days of the verdict.

[27] The term "finding" is explained in section 9, which deals with a finding by a jury that a person is not guilty by reason of insanity, and also in section 12, which deals with a finding by a jury that a person is unfit to be tried. A problem arises, however, in respect of section 9 (in force from September 1983). Until the Criminal Procedure Act was amended in 1998 by Act No 25 of 1998, a jury could not find a person not guilty by reason of insanity, but had to find an insane person guilty. Thus, until then there was no scope for the application of section 9. However, section 8 allowed the Court of Appeal on the appeal against conviction to quash the conviction and sentence and substitute a finding of not guilty on the ground of insanity, while ordering detention in a mental hospital at Her Majesty's pleasure.

[28] At this stage it must be noted that the Barbados Criminal Appeal Act was substantially based on provisions in the English Criminal Appeal Act 1968. Section 18(2) thereof reads "Notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed, or, in the case of an order made or treated as made on conviction, from the date of the making of the order."

[29] As indicated in section 12 of the 1968 Act, the verdict of not guilty by reason of insanity fell within "verdict" within section 18(2), while, as indicated in section 15, the finding of

[13] (1884) 14 QBD 273 DC.

unfit to plead fell within "finding" in section 18(2). It would appear that when the Barbados Criminal Appeal Act was enacted in 1983 it was wrongly assumed (as reflected in section 9) that insanity cases gave rise to a jury verdict of not guilty by reason of insanity (with incarceration indefinitely in a mental institution) so that such a verdict could be appealed as a "verdict" under section 19(1), which was not actually the case, the appeal having to be against a "conviction". Matters were put right by Act No 25 of 1998 adding section 9A to the Barbados Criminal Procedure Act enabling a jury to "return a special verdict to the effect that the accused person is not guilty of the act charged against him by reason of insanity." This needs to rank as a "verdict" within section 19(1) so as to give current substance to what appears to have been originally intended. A "finding" within section 19(1) covers a jury's finding of unfit to be tried.

[30] In context, therefore, the three events referenced in section 19(1) mean "conviction", as the judgment of the court consummating the determination of guilt or a guilty plea by a sentence or order, "verdict" as the pronouncement by the jury of not guilty on the ground of insanity, and "finding" as the jury finding unfitness to be tried[14].

[31] The Court of Appeal found a different meaning of "conviction" by applying the interpretation given to section 18(2) of the English Criminal Appeal Act 1968 by the English Court of Appeal in the case of *R v Long*.[15]In that case, after reciting section 18(2), Lord Bingham said[16]

> "It appears to us that the language of that subsection is quite unambiguous and requires notice of application for leave to appeal against conviction to be given within 28 days of conviction. If, as is not infrequently the case, there is a lapse of time between conviction and sentence, then nonetheless time begins to run on the date of conviction and not on the date of sentence."

[14] In ascertaining the law as to time limits in the poorly drafted Criminal Appeal Act we find little assistance from section 3 of the Criminal Procedure Act that states "The proceedings before the High Court shall be subject to the laws of Barbados and according to the practice applicable to the trial of indictable offences in England."

[15] [1998] 2 Cr App Rep 326.

[16] ibid 326.

[32] Lord Bingham did not address the meaning to be attached to the word "conviction." It is easy to agree that the requirement that the notice for the application for leave should be given within 28 days is not ambiguous. But the notion that the word "conviction" could have no other meaning than the one ascribed is not supportable and was not shared by Judges at the highest levels in England. Just a few years earlier, in a case that was not discussed in Long, Lord Bridge confronted the meaning of the word in *Richards (Lloydell) v R*,[17] a Privy Council case from Jamaica, in the context of the doctrine of *autrefois convict*. He stated "It has been said many times that the word 'conviction' is ambiguous and it has sometimes been construed in a statutory context as referring to nothing more than a finding of guilt. But, in the absence of something in the context which suggests that narrower meaning, the authorities in the 19th century and earlier all seem to point to the conclusion that the requirement to establish a conviction requires proof not only of the finding of guilt but also of the court's final adjudication by sentence or other order."

[33] There is a plethora of authority which demonstrates that the meaning of the word "conviction" varies depending on the circumstances in which it is being employed. Stroud's Judicial Dictionary proclaims that "The word 'convicted' or the 'conviction' of a person accused, is equivocal."[18] Tindal CJ in *Burgess v Boetefeur*[19] observed "The word 'conviction' is undoubtedly verbum equivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the court." Lord Reid in *S (an Infant) v Recorder of Manchester*[20] noted "Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It is often used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt."

[34] The rationale for words to have different meanings in different statutory contexts was explained by V.C.R.A.C. Crabbe in his work "Understanding Statutes" when he wrote

[17] (1992) 41 WIR 263.
[18] Daniel Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* (Vol. 1 A-E, 8th ed., Sweet & Maxwell 2012) 608.
[19] (1844) 7 Man & G 481; (1844) 13 LJMC 122.
[20] [1971] A.C. 481.

"…the primary meaning of a word changes with its context…words in themselves, not in the abstract, do not have a meaning. A dictionary definition merely gives us a history of the word, how over the years it has been used in various contexts with respect to various subject-matters. Thus the sentence structure determines the meaning that is intended to be conveyed, bearing in mind the idea that is intended to be expressed."[21] This concept has found judicial expression in the case of *Attorney General v Prince Ernest Augustus of Hanover*,[22] where Viscount Simonds said "...words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context."[23]

[35] It follows, therefore, that we do not agree with Lord Bingham's conclusion that the word "conviction" was unambiguous and that it was therefore unnecessary to examine the context in which it had been used to determine the meaning to be attributed to it. We have done such an examination and are satisfied that, in the context of section 19(1) of the Barbados Act, the statutory intention was to use the term conviction in the sense of final adjudication by sentence or other order and not simply the pronouncement of guilt by a guilty verdict.

[36] Nevertheless, even if we had found the DPP's contrary position to be more arguable, so that the arguments were more evenly balanced, we would not have accepted it when considering its consequences as must be done when involved in statutory interpretation. As made clear by Sullivan and Dreidger[24], when a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to the well-being of the community. Support for that approach is to be found in Bennion[25] at page 783, where he expressed the view that when the court is considering which of the opposing constructions of the enactment corresponds to its legal meaning it should assess the likely consequences of adopting each construction, and give effect to the construction that is more likely to be beneficial. In our view it is more beneficial to the administration of justice for time to appeal against a conviction only to

[21] V.C.R.A.C. Crabbe, *Understanding Statutes* (1st edn, Routledge-Cavendish 1995) 85.
[22] [1957] A.C. 436 (HL).
[23] ibid 461.
[24] Sullivan (n 11) 235.
[25] Bennion (n 11).

expire when 21 days have elapsed since the date of sentence, especially when this is clearer than the date of conviction as apparent from dicta in Australian cases[26]. This makes the system practical, clear and less dependent on judicial discretion for extensions of time, reflecting natural expectations of prisoners.

[37] It will also be consistent with the practice in several other Commonwealth Caribbean countries where the legislature has addressed itself to this issue so as to make the position unambiguous. To cite a few examples: from the Caribbean, in Jamaica, the Judicature (Appellate) Jurisdiction Act, 1962, section 16(4) provides "For the purposes of this section, the date of conviction shall, where the court has adjourned the trial of an indictment after conviction, be the date on which the court sentences or otherwise deals with the offender." In the Bahamas, the Court of Appeal Act, 1965, section 17(3) provides "For the purposes of this section the date of conviction shall, where the Supreme Court has adjourned the trial of an information after conviction, be deemed to be the date on which such court has sentenced or otherwise dealt with the appellant." In Dominica, the Eastern Caribbean Supreme Court (Dominica) Act, 1969, section 46(3) provides "For the purposes of this section the date of conviction shall, where the Court has adjourned the trial of an indictment after conviction, be the date on which the Court sentences or otherwise deals with the offender."

[38] From the wider Commonwealth, section 28(4) of the Australia Criminal Appeals Act, 2004 provides "If the date on which a person is sentenced for an offence is not the date on which the person is convicted of the offence, the time in subsection (3) for an appeal against either the conviction or the sentence or both runs from the date of sentencing." In India, the appeal is not only against the order of conviction but also against the order of sentence so that the limitation period commences from the date of order of sentence if the sentencing is done on a different date. This is based on sections 353 and 354 of the Criminal Procedure Code, 1973, which prescribe that a judgment of a trial court consists not only of the conviction but also the punishment to which the convict is sentenced.

[26] *Griffiths v R* (1976-1977) 137 CLR 293 at 335-336 and *DPP v Nguyen, DPP v Duncan* [2009] VSCA 147, (2000) 23 VR 66 at [76] and [77].

[39] In these circumstances, we are satisfied that the answer to the first question on the appeal is that the time for filing a notice of appeal or an application for leave to appeal against a conviction pursuant to section 19(1) of the Act expires when such a notice or application has not been given within twenty-one days of the date of sentence.

If the Court of Appeal had been right as to time limits did it properly refuse to enlarge the time for appealing against conviction?

[40] Section 19(2) of the Act provides that "Subject to section 20, the time for giving notice of appeal or of application for leave to appeal may be extended at any time by the Court." This confers power on the Court of Appeal to grant extensions of such time *at any time* when needed, as here, by an applicant to make progress with an appeal that had not been finally determined. The Court of Appeal had earlier dismissed the Appellants' applications for leave to appeal in circumstances where an appeal was open to the CCJ unless the Court of Appeal granted an extension of time under its powers under section 19(2). Indeed, since the court had not dealt with the merits of an appeal but only with an application for leave to appeal and had not previously heard an application for an extension of time it clearly was not *functus officio*.

[41] The way in which these powers should normally be exercised was explained by Simmons CJ in *Martin Glenn v The Queen* [27] as follows:

> "In approaching the question as to whether an application for extension of time to appeal should be granted, the authorities clearly point to two principles which should be examined and evaluated by the court. The first is, that there must be substantial grounds for the delay...the second principle that has to be applied, is that the court is enjoined by the authorities to pay some regard to the merits and to make a determination as the court would in a civil appeal, as to whether the appeal has some reasonable prospect of success. To determine whether the appeal has reasonable chances of success, the court must necessarily examine briefly, at this stage of the application for leave, the grounds of appeal that will most likely be argued if leave is granted."

[27] *Martin Glenn* (n 4). These principles have been applied by the CCJ in *Somrah v Attorney General of Guyana* [2009] CCJ 5 and *System Sales Ltd v Browne-Oxley* [2014] CCJ 16 (AJ).

[42] The Court of Appeal, however, did not apply these two principles, erroneously relying on itself being *functus officio* and also finding the applications to be an abuse of process.

[43] During argument on 2nd December 2014, Sir Richard declined the invitation of the Court of Appeal to apply for an extension of time, insisting that the court was bound to accept his submission that no extension of time was needed because appeals against conviction had been made in due time. His subsequent application for an extension of time which was filed on the eve of the pronouncement of the court's decision on 5th February 2015 was characterised by the court as a *volte face*, as indeed it was. Counsel was, of course, entitled to change his mind. The problem was, however, that, having done so, he filed the application the day before the date announced for the judgment without even drawing the attention of the court to the filing as he should have done. Shortly afterwards, counsel for Appellants Persaud and Green followed Sir Richard's leave in filing applications for an extension of time. While we strongly discourage the approach taken by counsel of not having a contemporaneous fallback to an application for an extension of time if their claim as to having valid applications for leave to appeal against conviction failed, we consider that the court over-reacted in holding the applications for an extension of time to be an abuse of the process of the court.

[44] It is most desirable that the court should consider all relevant matters at the same time, and the issue of the extension of time was a matter which therefore should have been considered when the issue of whether the appeal was in time was being adjudicated. Nevertheless, these principles need to be applied in a balanced manner taking into account the relevant surrounding circumstances. This was explained by Lord Bingham in *Johnson v Gore Wood & Co.*,[28] where he noted at page 31:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole... It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to

[28] [2002] 2 AC 1.

> what should in my opinion be a broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

[45] The approach of the court when confronting an issue of abuse of process should not be inflexible. Rather, a holistic perspective should be employed that takes into account the particular facts and circumstances of the matter. This is especially significant in this case where the point of the timeliness of the filing of the appeal only arose after all preliminaries had been completed and the court had scheduled the three day hearing of the application for leave to appeal. Additionally, the application for extension was not the subject of previous litigation by the court. The court was being asked to flex different muscles from those that it used when determining whether or not the applications fell outside the stipulated time limit.

[46] In the instant case, there was no abuse of process and the Court of Appeal should have heard the applications before it according to the two principles in *Martin Glenn* so as to examine the grounds for delay and the merits of the applicants' appeals. Thus, it did not act properly when refusing to enlarge the applicants' time for applying for leave to appeal against conviction.

[47] Normally, issues of timeliness should be resolved as soon as an appeal is filed. If the filing is out of time the relevant court officers should take such action as will enable the matter to be ruled upon at the earliest possible opportunity. This is what happened in the Barbados case of *Martin Glenn* to which reference was earlier made, and in the St. Kitts case of *Cannonier v DPP*,[29] which eventually reached the Privy Council. Sections 22 and 23 of the Act require the Registrar to be proactive in the management of the criminal appeal process. The intention of proactive management is also reflected in section 6(9) of the Criminal Appeal Rules.[30]

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[29] [2012] 5 LRC 381.

[30] The section provides "if Form 1 or Form 2 is not signed by the appellant and the appellant is in custody, the Registrar shall, as soon as practicable after receiving the form, send a copy of it to the appellant."

The Peculiar Position of Persaud

[48] The applications of Rambarran, Campbell and Green for leave to appeal against conviction were filed in time so that their applications for such leave may proceed as scheduled initially for the hearing on 21st to 24th July 2014. Persaud's application for such leave, however, though signed by her in prison on 31st December 2009 did not reach the court office until 5th January and so was four days late. This means that she needed to file an application for an extension of time, which she actually did on 9th February 2015. The Court of Appeal, however, rejected the application along with the other applications against the determination of guilt in its above-criticised March 2015 judgment, though it did grant her leave to file an amended application for an extension in respect of her 15 year sentence.

[49] By virtue of section 3 of the Caribbean Court of Justice Act,[31] giving the force of law to The Agreement Establishing the Caribbean Court of Justice and, in particular, Article XXV, paragraph 6, "The Court shall, in relation to any appeal to it in any case have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought." It is thus open to this Court to grant Persaud an extension of time so that this will enable the applications of all four appellants for leave to appeal to get back on track as per the hearing initially scheduled for 21st -24th July 2014.

[50] Normally, as pointed out above in *Martin Glenn*, in considering whether to grant an extension of time, the court considers not just the reasons for the relevant delay but also the merits of the substantive appeal. We consider that there are justifiable reasons for the delay but we are not in a position to review the merits of the appeal. Underlying these two considerations, however, is the need to determine whether there might be a miscarriage of justice if the extension were not granted. We take into account the following factors. The merits of Persaud's appeal will in any event be investigated on the hearing of her application for leave to appeal; remitting her application for an extension of time to the Court of Appeal would delay the hearing of the applications for leave to

[31] Barbados Caribbean Court of Justice Act, Cap 117.

appeal of her three co-applicants; and Persaud will complete her sentence in March 2016 in the light of the duration of her pre-trial detention. Thus, we consider Persaud's unique circumstances to justify granting her the requisite extension of time to enable the hearing of all four applicants' applications for leave to appeal to proceed as initially scheduled for 21st to 24th July 2014.

The Issue of Delay

[51] During the oral hearing, the DPP informed the bench that the appellants sentenced to 15 years, after taking into account their pre-trial detention, would complete their terms in March 2016. They could complete their 15-year sentence without having their appeals heard. This must tempt them to withdraw their appeals. The administration of justice must prevent delay which could have this type of consequence. This is another example of the inordinate systemic delay of the Barbados judiciary. Too frequently we have been forced to bemoan this unacceptable situation. The instant case is of special concern, since it is a criminal matter and has serious implications for the liberty of the four appellants who have approached this Court for relief. We must comment that the appellants in this matter, as well as all individuals brought before the courts in Barbados, are entitled to expect that they will be afforded a fair hearing within a reasonable time as guaranteed to them under section 18(1) of the Barbados Constitution. Steps must be taken to address this for the proper administration of justice in Barbados and a better perception of the system by the public.

[52] We consider that the court should hear the applications for leave to appeal against conviction (together with those against sentence) with expedition. There is already the risk that, whatever happens next, two of the appellants would have served their entire sentence before the completion of their applications.

Costs

[53] Appellants Green and Persaud have sought an order for costs from this Court. Counsel grounded their applications on the complaint that these appellants were seriously aggrieved by the conduct of the DPP. It is accepted that awards for costs in criminal

cases are not normally recognised at common law.[32] Although the Court does not exclude the possibility of making an order for costs in cases of prosecutorial misconduct where appellants have been put to unnecessary expenditure for costs, the Court does not consider that the facts of this case would justify making such an order. The applications for costs are dismissed.

[54] Although no order for consolidation of these four actions was made, the Court has, in the interests of expediency, opted to hear these actions jointly as they involve common questions of law and fact. This is in keeping with the approach that was adopted by the Barbados Court of Appeal and this Court in the application for special leave. It is also part and parcel of this Court's general powers of case management as provided for in its Rules.[33] In this matter, the appellants are before the Court on different factual footings in certain respects. One such factual footing has made it necessary, as seen above, to grant Persaud an extension of time to 9th February 2015 so that she has a valid application for leave to appeal against conviction to be heard, alongside the other appellants. The order set out below is made in relation to Appellant Rambarran. The orders in relation to Appellants Green, Campbell and Persaud, while premised on the above reasons, are set out in separate judgments.

The Orders of the Court

[55] It follows that the following orders should be made.

(i) The Appellant Rambarran's appeal is allowed.

(ii) It is declared that "conviction", in the context of section 19(1) of the Barbados Criminal Appeal Act, Cap. 113A, means the date on which an accused is sentenced after having been found guilty; and that notice must be given of an appeal or an application for leave to appeal before twenty-one days have elapsed since the date of conviction.

[32] *Affleck v The King* (1906) 3 CLR 608, 630.

[33] Caribbean Court of Justice (Appellate Jurisdiction) Rules 2015, r. 8.

(iii) It is declared that the Court of Appeal in its oral decision of 13th March erred in finding itself *functus officio* and in finding the applications before it for an extension of time to be an abuse of process.

(iv) The Appellant Rambarran's application for leave to appeal his conviction is remitted to the Barbados Court of Appeal for an expedited hearing and determination of his application in accordance with the order that scheduled the hearing on the 21st to 24th July 2014.

(v) No order is made as to costs.

JUDGMENT OF THE HONOURABLE JUSTICES ROLSTON NELSON AND MAUREEN RAJNAUTH-LEE

Introduction

[56] Lord Macmillan once remarked that in statutory interpretation "one of the chief functions of our courts is to act as an animated and authoritative dictionary."[34] In this appeal, the judicial dictionary does not provide a singular definition. Rather we must unfortunately disagree with the decision of the majority and their interpretation of the statutory framework governing the filing of criminal appeals in Barbados.

Factual background

[57] The applications before the Court arise out of the Appellants' conviction in connection with the importation, possession and trafficking of cannabis and cocaine contrary to the Drug Abuse (Prevention and Control) Act, Cap. 131 of the Laws of Barbados. The jury's verdict of guilty was returned against all four Appellants on June 4, 2009. On December 11, 2009, the Appellants were sentenced to various terms of imprisonment, ranging from thirty (30) to fifteen (15) years. The Appellants have applied for leave to appeal against their conviction and sentence. All the applications for leave to appeal against conviction were more than 21 days after June 4, 2009 and in three cases were after the date of sentence, December 11, 2009.

[34] Lord McMillan, *Law and Other Things* (Cambridge University Press 1937) 163.

[58] The Court of Appeal on February 5, 2015 dismissed the applications for leave to appeal against conviction because they were out of time. On March 13, 2015 the Court of Appeal dismissed the three applications to extend the time for leave to appeal against conviction. The Appellant, Campbell, made no application to extend time.

The Issues

[59] The main issues to be determined in this appeal are: (1) what is the meaning of the term 'conviction' as appears in section 19(1) of the Criminal Appeal Act, Cap. 113A ("the Act") and (2) whether an extension of time should be granted to Rambarran, Greene and Persaud under section 19(2) of the Act. Each of these matters will be examined against the backdrop of the legislative scheme governing the filing of criminal appeals in Barbados and the submissions of the parties.

The Legislative Scheme

[60] Section 19(1) and 19(2) of Act has as its progenitor section 18 of the Criminal Appeal Act 1968 ("the UK 1968 Act"), which in its turn was derived from the Criminal Appeal Act 1907.

[61] Section 19 of the Act provides:

> 19(1) Subject to subsection (2) a person who wishes to appeal to the Court, or to obtain the Court's leave to appeal, must give notice of appeal or his application for leave to appeal within 21 days of the date of conviction, verdict or finding appealed against or
>
> (a) In the case of an appeal or application for leave to appeal against sentence, other than a sentence of death, within 21 days of the date on which sentence was passed; or
>
> (b) In the case of an appeal or application for leave to appeal where the sentence is death, within 14 days of the date on which sentence was passed; or
>
> (c) In the case of an order made or treated as made on conviction, within 21 days from the date of the making of the order.

(2) Subject to section 20, the time for giving notice of appeal or of an application for leave to appeal may be extended at any time by the Court.

[62] By way of comparison section 18 of the UK 1968 Act provides as follows:

18(1) A person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain leave of that court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be directed by the rules of the court.

(2) Notice of appeal, or of application for leave to appeal, shall be given within twenty-eight days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order.

(3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal.

The Submissions of the Parties

[63] The Appellants argue that when there is a delay between the delivery of the jury's verdict and sentence being passed by the trial judge, the time period under section 19 for appealing against conviction runs from the date of sentence. The Appellants rely on *Richards v R*,[35] which, though admittedly dealing with the issue of *autrefois convict*, is said to contain a principle of broad application, namely that a conviction encompasses both the jury's verdict and the sentence passed by the trial judge. The Appellants further rely on the practice which has developed in Barbados of filing a single notice of appeal challenging both conviction and sentence. The State submits that two separate notices of appeal must be filed in the event that a person wishes to challenge both conviction and sentence. In the State's view the wording of section 19 is clear and unambiguous and the terms 'conviction' and 'sentence' are disjunctive.

[35] *Richards* [n 17].

Issue (i) What does 'conviction' mean?

[64] In law there is no precise definition of the term 'conviction.' This was recognised as far back as the 1844 decision of *Burgess v Boetefeur*[36] where Tindal CJ remarked that "the word 'conviction' is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the Court." In practice, the choice between the two is oft dictated by the surrounding circumstances and context. In the context of the instant appeal, useful assistance can be derived from the decisions of *S (an infant) v Manchester City Recorder,*[37] *R v Drew*[38] and *R v Shergill.*[39]

[65] In *S (an infant)* the House of Lords considered the meaning of 'conviction' within the context of a change of plea. S was a juvenile offender who appeared before a magistrate charged with attempted rape. He pleaded guilty whereupon the hearing was adjourned to facilitate the preparation of a medical report. At the adjourned date, S was represented by counsel who asked for S's plea to be changed to not guilty owing to his sub-normal mental capacity and penchant for confessing to offences he had not committed. The magistrate refused to allow the change in plea on the basis that S had already been convicted. The House of Lords allowed S's appeal and overturned the magistrate's ruling. Lord Reid explained that a trial judge can allow a change in plea at any point before the case is finally disposed of by sentence or otherwise and there was no valid reason why the same power could not be exercised by a magistrate. In his Lordship's view, the magistrate fell into error based on an improper interpretation of the term 'conviction'. As his Lordship explained:

> "Much of the difficulty has arisen from the fact that "conviction" is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after "conviction" in the former sense. But it does not at all follow that a plea cannot be changed after "conviction" in the latter sense."[40]

[36] *Burgess* [n 19].
[37] S (an infant) (n 17).
[38] [1985] 2 All E.R. 1061.
[39] [1999] 2 All E.R. 485.
[40] *S (an infant)* (n 17) 1232.

[66] A similar situation arose in *Drew* where the accused was not allowed to change his guilty plea on the basis that he had already been put into the charge of the jury who had entered a guilty verdict against him. The appellant lodged his appeal prior to being sentenced by the judge. On appeal, the issue arose as to whether the appellant had been convicted within the meaning of section 2(1) of the UK 1968 Act. The Court of Appeal cited the above-quoted passage from *S (an infant)* in making the point that the term 'conviction' was capable of more than one meaning. In the circumstances of the appeal, the term was held to "properly encompass the verdict of the jury finding the accused guilty."[41] However the court went on to observe that in most cases an appeal should be lodged after there has been a final disposal of the matter, namely after the accused has been sentenced. The following passage from *Drew* bears note:

> "We would wish to make it plain however that generally speaking it would be inappropriate to seek to appeal to this court until the Crown Court proceedings have been finally concluded, which of course includes sentence being passed on the accused. It would be a rare case indeed where, as here, this court will be prepared to entertain an appeal short of this stage. We would add that, whilst we in no way criticise the trial judge for acceding to the invitation to defer sentence in the instant case, it would in our judgment have been preferable had he proceeded to pass sentence without waiting for the disposal of any appeal."[42]

[67] In *Shergill*, the appellants pleaded guilty in October 1996 to fraudulent evasion of excise duty on alcohol and were sentenced to four years' imprisonment in June 1997. At the sentencing hearing, the prosecution applied for confiscation orders to be made against the appellants under section 71 of the Criminal Justice Act 1988. When the applications came up for hearing in October 1997, counsel for the accused raised a limitation point, arguing that more than six months had elapsed from the date of conviction and therefore the making of the confiscation orders was precluded by section 72 of the Criminal Justice Act. The trial judge, agreed with the prosecution, and held that the date of the appellants' conviction was not when they had pleaded guilty but rather when sentence was passed. Thus time only began to run from the date of sentencing in June 1997. This decision was overturned on appeal to the English Court of Appeal. The court held that the word 'convicted' as used in the Act meant the date on which the accused was found or pleaded

[41] *Drew* (n 38) 1064.
[42] ibid.

guilty. This conclusion was fortified by the fact that the court would have regard to any confiscation orders made as part of the sentencing process.

[68] Whilst *S (an infant)*, *Drew* and *Shergill* define the word 'conviction' narrowly, these cases cannot be taken to mean that the term only relates to a finding of guilt. The meaning of the term is driven by the context in which it is used. A fitting illustration of this contextual type of analysis is found in the case of *R v Secretary of State for the Home Department, ex parte Thornton.*[43] In *Thornton*, the English Court of Appeal was called upon to determine whether disciplinary proceedings were properly commenced against a police officer who pleaded guilty to wasteful employment of police time and was given a conditional discharge. In resolving this issue, the court had to consider the conjoint operation of three different statutory instruments: (1) the Police Act 1976, section 11 which provided that an officer who is acquitted or convicted of a criminal offence cannot be charged with a disciplinary offence which is identical to that for which he had been acquitted or convicted, (2) the Police (Discipline) Regulations 1977, regulation 15 which provided that criminal conduct, that is, being found guilty of a criminal offence amounted to a breach of the disciplinary code and (3) the Powers of Criminal Courts Act 1973, section 13 which stated that a conditional discharge was not to be treated as a conviction. The court held that the latter statute did not operate to prevent the initiation of disciplinary proceedings against Thornton. Purchas LJ emphasised that the words used in the statutes in question indicated that the term 'conviction' was used in different contexts with different meanings. His Lordship explained the issue thus:

> "… the words 'found guilty of a criminal offence' used in s 11(2) of the 1976 Act and para 15 of Sch 2 to the regulations are synonymous with the informal meaning of the word 'conviction', ie 'finding of guilt' and are to be distinguished from the formal meaning of the word 'conviction' used in s 13(1) of the 1973 Act or the word 'convicted' in s11(1) of the 1976 Act, ie the finding of guilt and disposal with the result that s 13 of the 1973 Act does not prevent the operation of s 11(2) of the 1976 Act."[44]

[69] Similarly Nicholls LJ emphasised that the word 'conviction' in section 13 of the 1973 Act did not have the same meaning as 'found guilty' which appears in the 1976 Act.

[43] [1986] 2 All ER 641.
[44] ibid 640.

Though acknowledging that this finding created a distinction between a conviction and a finding of guilt, Nicholls LJ bolstered his conclusion by observing that such a distinction was intended by the legislature and furthermore that the term 'conviction' has more than one meaning, citing *S (an infant)* in support of the latter proposition.

What does 'conviction' mean in the context of the Act?

[70] From the foregoing it is clear that in determining the meaning of the term 'conviction', context is everything. It therefore follows that resolving the first question posed in this appeal necessitates an analysis of section 19 against the backdrop of the entire scheme of the Act and the relevant legal principles of criminal procedure relating to trials on indictment. When one considers the entire scope the Act, it is clear that section 19 describes five events from which the time for filing a notice of appeal can be reckoned:

(1) conviction;
(2) verdict;
(3) finding appealed against;
(4) sentence; or
(5) order.

[71] Taking a holistic view of the entire scheme of the Act, it is evident that each of these five categories exists independently. The first event, i.e. conviction, is dealt with in section 3 of the Act which creates the right to appeal against conviction. Special verdicts appear in section 7 of the Act. The most common form of special verdict is where the accused is found not guilty by reason of insanity: Criminal Procedure Act, Cap. 127 of the Law of Barbados section 9A. Findings of the jury are covered by sections 9 and 12 of the Act. Section 9 treats with appeals against a finding of the jury that the defendant is insane, whilst section 12 speaks to the right to appeal a finding of the jury that the defendant is not fit to stand trial. Sentence is defined in section 2 to include "any order of the High Court made on conviction." Lastly, sections 8 and 11 treat with orders which would encompass an order for the continued detention of the defendant in accordance with the Mental Health Act.

[72] The scheme of the Act does not support the conclusion that a conviction includes sentence. In fact, the term 'sentence' is specifically defined in section 2 of the Act. Based on this definition it is clear that a sentence is the order which is imposed by the judge after the accused has been convicted. Furthermore section 8 of the Act empowers the Court of Appeal, on an appeal against conviction, to quash the conviction and direct that a finding of not guilty on the ground of insanity be entered and quash the sentence passed at trial. In a similar vein, in sections 15, 16 and the Schedule to the Act all of which deal with retrials, the Court of Appeal is empowered, *inter alia*, to quash the conviction and any sentence passed thereon when ordering an appellant to be retried. This again supports the view that a sentence is the order of the trial judge made after conviction. In addition section 3(3) (c) creates the requirement to obtain leave to appeal against the sentence passed on conviction. In our view, this wording does not reflect that a sentence is included in a conviction. Even the transitional provisions of the Act do not treat conviction as including the sentence: see section 41(1).

[73] For the sake of completeness, mention must be made of section 20 of the Act. Section 20(1) precludes the grant of an extension of time for giving a notice of appeal or an application for leave to appeal "in the case of a conviction involving a sentence of death." At first blush, this provision seems to support the interpretation of section 19 being contended for by the Appellants, namely that a conviction includes sentence. However such a conclusion cannot withstand close scrutiny. Throughout the Act the term 'sentence' is used to refer to an order passed on conviction, in particular at sections 2 and 3. However such a description is not apt in relation to the death penalty, given that this is a sentence specifically fixed by law. As such the true import of section 20 is to create a special scheme in relation to sentences specifically fixed by law, rather than to create any overarching rule that a conviction includes the sentence imposed by the court.

[74] When one considers section 20 in its entirety, it is clear that there is no intention on the part of the legislature to disturb the five part categorisation spelled out in section 19 for the calculation of the time period for appealing. In fact section 20(2) provides that in the case of a conviction involving sentence of death or corporal punishment, the sentence

shall not be executed until after the expiration of time for giving notice of appeal or application for leave to appeal under section 19. This section further states that where the notice of appeal or the application for leave is duly filed within the time limits set out in section 19, the appeal or application shall be heard and determined with as much expedition as practicable and the sentence shall not be executed until after the determination of the appeal or the application for leave. Section 19(1) (b) provides a 14 day time limit for the filing of a notice of appeal or application for leave to appeal where the sentence is death, which time begins to accrue from the date on which sentence was passed. It is therefore clear that the conjoint effect of section 19(1) (b) and section 20 is to create a statutory procedure governing appeals involving the death sentence.

[75] In fact, to construe section 20 as meaning that a conviction includes sentence, would render the Act unworkable. If conviction and sentence were synonymous, it would create difficulties as to the procedural vehicle for initiating a criminal appeal. Based on section 3(3) of the Act leave is required in all "appeals against the sentence passed on conviction, not being a sentence specifically fixed by law." If conviction is interpreted to include sentence, it would mean that leave is always required before initiating a criminal appeal. Such a conclusion would nullify the provisions of section 3(2) of the Act which provides for appeals as of right. In sum, the better view is that section 20 cannot be taken to set out any governing principles on the meaning to be ascribed to the term 'conviction' as it appears in the Act.

[76] The legislative provisions governing criminal appeals in Jamaica, the Bahamas, Dominica and Australia, only serve to reinforce the point that the time for appealing against conviction runs from the date of conviction. It is clear that where the legislature intends that the time for appealing conviction begins to run from the date of sentence, specific provision is made to that effect. If it were the case that in situations where there is an intervening period between conviction and sentence, the time for appealing one's conviction only begins to accrue at the date of sentence, then why would there be the need to make specific legislative provisions to this effect in other Caribbean territories? Would not such provisions be superfluous? The better view is that section 19 must be

construed as creating five separate events from which the time for appealing begins to accrue. In our view, if the legislature in Barbados intended the statute to operate in the manner envisioned by the majority they would have made provision to that effect as has been done in other Caribbean territories.

[77] Further support for the contention that the Act treats a conviction and sentence as separate events from which the time for appealing falls to be reckoned can be derived from *R v Long*[45] which specifically dealt with the construction to be placed upon section 18 of the UK 1968 Act, upon which the Barbados provision is based. The UK provision does not contain any sub-sections but rather is drafted as one, all-encompassing provision. It describes five events from which the time for appealing can be calculated: conviction, sentence, verdict, finding or order (see the provision as set out above at [62]). This five-part categorisation is also reflected in the Criminal Procedure Rules 2015 (UK) in the note to Rule 39.1 which states:

> Under Part 1 (sections 1 to 32) of the Criminal Appeal Act 1968, a defendant may appeal against—
>
> (a) a conviction (section 1 of the 1968 Act(**i**));
> (b) a sentence (sections 9 and 10 of the 1968 Act(**j**));
> (c) a verdict of not guilty by reason of insanity (section 12 of the 1968 Act);
> (d) a finding of disability (section 15 of the 1968 Act(**k**));
> (e) a hospital order, interim hospital order or supervision order under section 5 or 5A of the Criminal Procedure (Insanity) Act 1964(**a**) (section 16A of the 1968 Act(b)).[46]

[78] The decision in *Long* can be treated as dispositive of the main issue in the instant appeal. In *Long* before the Court of Appeal (Lord Bingham CJ, Potts and Butterfield JJ) were (1) an appeal against conviction and (2) an application for leave to appeal against sentence. A single judge of the Court of Appeal had considered the application for leave to appeal against conviction. That application was filed more than 28 days after conviction. It is not clear from the report whether an oral or written application for an extension of time for leave to file an appeal against conviction was made. A single judge had that power under section 31(2) of the UK 1968 Act. In any event there was no application by the Crown to

[45] *Long* (n 15).
[46] Criminal Procedure Rules 2015 p. 313-14.

set aside the leave to appeal against the conviction. However it seems clear that counsel invited the Court to pronounce on what was becoming "a prevailing practice" of filing notices of application for leave to appeal against conviction after the sentence was passed on a date after conviction. The Court of Appeal heard the appeal against conviction and dismissed it.

[79] The single judge of the Court of Appeal also heard a separate application for leave to appeal against sentence and dismissed it. The Court of Appeal had before it a second (renewed) application for leave to appeal against sentence and dismissed it. On these facts *Long* reinforces the view that two separate applications for leave to appeal are filed in relation to conviction and to sentence. Lord Bingham in *Long* comments on the practice of filing the application for leave to appeal against conviction out of time after sentence when 28 days after conviction have passed. No issue arose as to whether separate applications should be filed.

[80] *Long* in effect sets out the reason why the application for leave to appeal must be filed within 28 days after conviction and disapproves of the practice of filing such applications outside the 28 day period after conviction and after sentence has been passed. Lord Bingham was examining the context of section 18 of the UK 1968 Act and not merely the general meaning of the word 'conviction'. In this context there was no ambiguity as his Lordship noted:

> "the language of that subsection is quite unambiguous and requires notice of application for leave to appeal against conviction to be given within 28 days of conviction. If, as is not infrequently the case, there is a lapse of time between conviction and sentence, then nonetheless time begins to run from the date of conviction and not on the date of sentence. Counsel submits that that statutory rule is the subject of practical difficulty since he contends that nowadays, if not when the subsection was enacted in 1968, there is frequently a delay between conviction and sentence, and he contends that if notice were required routinely within the 28 days following conviction there would be notices given which, when sentence was passed, might not be pursued.
>
> It appears to us that there is room for argument both for and against the present rule and we decline to express any opinion one way or the other as to whether any modification of the rule is called for. We do however draw the attention of the profession to the rule as it stands, which is quite unambiguous and which requires

> notice to be given within the time limit. We hope that practitioners will take note of that fact and act accordingly unless or until the rule is altered."

[81] Although in *Long*, the Court of Appeal went on to hear the appeal against both conviction and sentence, this should not be taken to mean that the passage set out above is mere dicta. Long was granted leave to appeal his conviction by a single judge, despite the procedural error. Having obtained leave, his appeal against conviction was properly before the Court of Appeal for adjudication. Thus the court quite properly dealt with both aspects of the appeal, namely conviction and sentence. Nonetheless Lord Bingham felt compelled to note that the procedural route taken by Long in pursuing his appeal did not accord with the time lines set out under the UK 1968 Act; no doubt in an effort to forestall the mushrooming of the practice of filing a notice of appeal or application challenging one's conviction, only after the sentence of the court had been imposed.

The Significance of section 3 of the Criminal Procedure Act, Cap. 127

[82] Since section 3 of the Criminal Procedure Act, Cap. 127 of the Laws of Barbados states that proceedings before the High Court are subject to the laws of Barbados (here an Act almost identical to the UK 1968 Act) and according to the practice applicable to the trial of indictable offences in England it seems clear that the law and practice set out in *Long* applies in Barbados. Section 3 provides that:

> 3. The proceedings before the High Court shall be subject to the laws of Barbados and according to the practice applicable to the trial of indictable offences in England.

[83] Therefore it is difficult to discern any rational basis upon which *Long* can be distinguished from the instant appeal. The decision in *Long* is still good law and has not been overruled. Even in the face of the 'practical difficulties' alluded to in *Long*, section 18 has not been amended to provide that the time for appealing a conviction runs from the date of sentence, when there is a delay between the conviction and the imposition of sentence. In fact section 18 remains largely unchanged up to present date; this despite the UK 1968 Act being amended by the Criminal Appeal Act 1995 and the Criminal Justice

Act 2003. It should be noted that in the 2003 legislation where a case in the Crown Court has been conducted or continued without a jury and the court convicts a defendant, the reference in the UK 1968 Act section 18(2) to the date of conviction is to be read as a reference to the date of judgment stating the reasons for the conviction: see the Criminal Justice Act 2003 section 48(5) (b) (this section is not yet fully in force). To date, no amendment has been made to the UK 1968 Act to account for an intervening period between conviction and sentence.

[84] The current practice in England is described in Blackstone's Criminal Practice 2016:

> "Notice of appeal (if the trial judge has granted a certificate that the case is fit for appeal) or notice of application for leave to appeal (required in all other cases) must be lodged in the prescribed manner. Under s. 18(2), the notice must be lodged within 28 days of either conviction or sentence, depending on which is being appealed. By virtue of s. 18A, the same rule applies in respect of cases of contempt of court. If a conviction is the subject of appeal, then time runs from the date of conviction and not sentence (if the sentence hearing takes place at a later date) (*Long* (1997) 161 JP 769)."[47]

[85] The independent status of each of the five categories contained in section 19 is further strengthened when one considers the broader legal principles applicable to a trial on indictment. In Barbados these principles are contained in the Criminal Procedure Act. As noted earlier, section 3 provides that proceedings before the High Court shall be conducted according to the practice applicable to the trial of indictable offences in England. According to the settled English criminal practice and procedure, as set out in Archbold,[48] it is clear that conviction and sentence are separate events in the course of a trial on indictment. In summary, a trial on indictment involves the following procedural steps:

[47] Blackstone's Criminal Practice 2016 section D27.3.
[48] Archbold Criminal Pleading, Evidence and Practice 2016 Chapter 4.

(1) Arraignment: the indictment is read to the defendant, who is asked to enter a plea to each charge. The arraignment is not complete until the defendant has pleaded: *R v Duffy* (1847) 7 St. Tr. (n.s.) 795 at 799;

(2) Guilty plea: the plea must be accepted by the judge who records the conviction. There can be no ambiguity in the plea and care must be taken to ensure that the defendant understands the charge and the plea that he wishes to enter. The allocutus is then put to the defendant (plea in mitigation). Then the judge proceeds to the sentencing hearing;

(3) Not guilty plea: matter is set down for trial;

(4) Trial:

   a. Jury is selected and empanelled: Once the jury is sworn, the defendant is put in the charge of the jury. Once this is done the trial has begun (*R v Tonner* 80 Cr.App. R 170, CA),

   b. Prosecution's case: opening statement, presentation of the evidence which must be done in the presence of the jury (*R v Reynolds* [1950] 1 KB 606 at 611, prosecution closes its case,

   c. No case submission (if applicable) using the test in *R v Galbraith* 73 Cr.App. R. 124. This is done in the absence of the jury: *R v Falconer-Atlee* 58 Cr.App. R 348, CA,

   d. Defence: counsel for the defence is entitled to make an opening statement (Criminal Procedure Act 1865 section 2) but not if the defendant is the only witness to be called (Criminal Evidence Act 1898 section 2). The defendant must give his/her evidence before other defence witnesses are called: Police and Criminal Evidence Act 1984 section 7,

   e. Directions: Judge discusses with counsel the appropriate directions to be given to the jury: *R v Wright* [2000] Crim. L.R. 510, CA,

   f. Closing speeches,

   g. Summing up,

   h. Jury retires to consider their verdict,

   i. Delivery of the verdict: done in open court,

j. Acceptance of the verdict: the judge determines whether to accept the verdict. The verdict must be accepted once it is not ambiguous, it is a verdict which is open to the jury on the indictment (*R v Robinson* [1975] Q.B. 508 and it is not an inconsistent verdict (*Burrows* [1970] Crim. L.R. 419),

k. Recording of verdict: once the verdict is accepted, it is then recorded on the indictment. In cases of a guilty verdict, a conviction is recorded,

l. Discharge of jury,

m. Remand or release: If the defendant is found not guilty, he/she is immediately released unless they are required to be detained in connection with a separate offence. If found guilty, the defendant is remanded to await sentencing,

n. Sentencing: allocutus is put to the defendant (plea in mitigation) and judge passes the appropriate sentence.

[86] It is important to note that in the UK practice the matters listed at (h) – (n) are the critical steps in respect of adjudication post summing up. In particular, Archbold notes that after the guilty verdict is accepted by the trial judge, a conviction is recorded. The UK practice therefore clearly distinguishes between a guilty verdict, a conviction and a sentence. Based on the import of section 3 of the Criminal Procedure Act, it follows as a matter of course, that a similar practice and similar distinctions between the different phases of an indictable trial, form part and parcel of the laws of Barbados.

Conviction v Sentence: The Australian perspective

[87] Practical examples of the various procedural steps involved in a trial on indictment can be gleaned from two Australian decisions: *Griffiths v R*[49] and *DPP v Nguyen and DPP v Duncan*.[50] The practice and procedure in Australia are derived from the UK practice which in turn informs the practice and procedure in Barbados. Therefore the Australian jurisprudence provides useful insight into the distinction between conviction and sentence.

[49] *Griffiths* (n 26).
[50] *Nguyen and Duncan* (n 26).

[88] In *Griffiths*, the defendant pleaded guilty to breaking, entering and stealing. At his sentencing hearing, the judge remanded him for sentence for one year on condition that he enter into a recognisance of $200 conditioned on his being on good behaviour and to place himself under the supervision of the Probation and Parole Service. The Attorney General lodged an appeal against sentence under the Criminal Appeal Act 1912 (N.S.W.) section 5D. Section 2 of the Act defined sentence to include "any order made by the court of trial on conviction." The central issue was whether the placing of the defendant on a "common law bond" amounted to a sentence. The Court of Criminal Appeal held that the defendant had been sentenced, that the Court had jurisdiction to entertain the Attorney General's appeal against sentence and imposed a six year sentence of imprisonment. Griffiths successfully appealed this decision to the High Court of Australia. The High Court held that the effect of the judge's order was to postpone the defendant's sentencing by binding him over to appear for sentence at a later date. As such, it could not be said that Griffiths had been sentenced and the Attorney General therefore had no right of appeal.

[89] In *Nguyen and Duncan*, the defendants pleaded guilty at their arraignment to one count of trafficking in heroin and two counts of trafficking and one count of possession of MDMA, respectively. The allocutus was administered and a date for the hearing of the plea was fixed. In accordance with the Confiscation Act 1997, restraining orders were made over the property of both men. They both sought to apply for exclusion orders which would prevent their property from being automatically forfeited. Under the Act, an exclusion order had to be sought within 60 days of the date of conviction. Nguyen only filed his application after he was sentenced. Duncan filed his application while out on bail awaiting sentence. The Director of Public Prosecutions applied to strike out both applications on the ground that they were filed out of time. The Court of Appeal upheld the DPP's primary submission that once there had been a plea of guilty and the allocutus put, there had been a conviction.

[90] In both *Griffiths* and *Nguyen and Duncan*, the courts clearly indicate that a conviction is a judicial determination of guilt.[51] Both cases also establish that conviction and sentence are separate phases in a trial on indictment. In *Griffiths* Jacobs J puts the matter thus:

> "… a conviction precedes judgment. It seems to me that the verdict of the jury is a conviction when it has been recorded and that a confession of guilt after arraignment is also a conviction when it has been recorded. There remains a conviction so long as the verdict or confession remains on the record. The record in this sense is the formal record, the authentic memorial, of proceedings."[52]

Aickin J noted that there was no prescribed formula for the recording of a conviction, rejecting the applicant's argument that the trial judge is required to state "I convict the accused." Rather, Aickin J could find:

> "no reason why a conviction may not occur by indirect words or by conduct. If a trial judge does some act consistent only with there being a conviction, I do not consider that he must utter some formula to make that action effective. If a trial judge imposes a sentence without having uttered some such formula, it would be plain that the accused had been convicted because the pronouncing of the sentence would be inconsistent with any other view … *the step of remanding for sentence could not be taken by any court without there having been a conviction*."[53] (emphasis mine).

In a similar vein, the judgment of Barwick CJ in *Griffiths* clearly indicates that a defendant is convicted at the moment when, by express words or by necessary implication, the trial judge accepts the jury's verdict of guilty.

[91] In *Nguyen and Duncan* the Court noted that there can only be a conviction where there is a clear determination of guilt by a court, as explained in the following passage:

> "the test for determining whether, in any relevant sense, there has been a conviction, is whether, viewed objectively and on the facts as established, there was at the relevant time an "unequivocal acceptance" by the court of the guilty plea or, to put the matter another way, a judicial determination of guilt. Of course, the clearest possible indication of such a determination would be an express statement by the court to that effect. In other parts of Australia, it is the practice of courts to order, after a plea of guilty entered or a verdict of guilty delivered, that a conviction be formally recorded. That practice, as we understand the position, is not generally followed in this State. Of course, it is not necessary for a judge to state formally that a plea of guilty has been accepted or that a conviction has been recorded, in order to make it unequivocally clear that the court has made a finding of guilt."[54]

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[51] See also *Cobiac v Liddy* (1969) 119 CLR 257, 271-273 where Windeyer J emphasised that conviction and sentence were distinct things.
[52] *Griffiths* 313.
[53] ibid 335-336.
[54] *Nguyen and Duncan (n 26)* [76].

[92] The Court also emphasised that the terms 'verdict' and 'conviction' are not coterminous, noting that:

> "a court may deal with an offender who has been found guilty — whether as a result of a plea or by verdict — without proceeding to conviction. Release on adjournment without conviction, and dismissal of a charge on being satisfied that a person is guilty of an offence, are but two examples. The same is true where a jury has brought in a verdict of guilty, but the judge has exercised his or her discretion not to record a conviction."[55]

[93] In our view, both the practice and procedure applicable to trials on indictment in the UK and these Australian cases, serve to bolster the point that section 19 describes five separate events from which the time for appealing can be calculated, i.e. conviction, verdict, finding appealed against, sentence or order. This interpretation is further borne out by the facts of the instant appeal. Based on the transcript of the proceedings before the trial judge, it is clear that the trial judge had, on June 4, 2009, accepted the verdict of the jury, discharged the jury and adjourned the matter. The conviction therefore took place on that date. This is explicitly recognised in all four notices of application for leave to appeal filed by the appellants which record the date of conviction as June 4, 2009 and the date of sentence as December 11, 2009. The form of the notices of application for leave to appeal also puts paid to the Appellants' arguments regarding the practice in Barbados governing the filing of a criminal appeal.

Evidence of Barbados Practice

[94] Ms. Sophia Payne swore an affidavit as to the practice in Barbados by reference to records at the Registry of the Supreme Court. Ms. Payne, whose qualifications are not stated, averred that "where there was a gap between a guilty verdict and sentence, appeals were generally filed within twenty-one (21) days of sentence."[56] Without an opportunity to verify the conclusions of Ms. Payne we are unable to treat her conclusions as proven. In any event the evidence of Ms. Payne is not comprehensive or exhaustive as to how the appeals referred to by her proceeded in the Registry and the Court of Appeal. Furthermore

[55] ibid [77].
[56] Affidavit of Search, Record of Appeal p. 995.

she has not demonstrated any experience or expertise in the filing and management of appeals.

[95] Fortunately, however, the practice in Barbados cannot change the fact that the practice sought to be proved was treated as mistaken in *Long* and cannot change the law as laid down in respect of legislation which is almost identical to the Act. Furthermore the existence of the alleged practice seems highly dubious in the light of the Form 1 notices of application for leave to appeal against conviction or sentence. As noted earlier, in each of those four forms the date of conviction is stated to be June 4, 2009 and the date of sentence December 11, 2009. Indeed the Appellant, Rambarran, applied for leave to appeal against conviction on July 9, 2009 and filed two separate notices for leave to appeal against conviction and sentence.

[96] *Richards v R* relied on by the Appellants is of little assistance since it deals with *autrefois convict*, which is concerned with conviction only in the sense of the final disposal of the case by sentence. In the case of a plea of guilty such as occurred in *Richards* the plea can be changed at any time until sentence is passed: see *Griffiths v R* (supra).[57]

[97] We are of the view that our construction of the Act produces a more fair, just and equitable result. We take notice of the not insubstantial delay which currently takes place between conviction and sentence in Barbados. To deprive a person who has been convicted of a criminal offence of the opportunity of appealing and/or applying for bail until he/she was sentenced and therefore convicted is manifestly unjust. This cannot be what the legislature intended. Sentencing no longer follows automatically after conviction with the advent of the Penal Reform Act, Cap 139. In fact in these appeals sentencing only occurred some six (6) months after the Appellants' convictions. The better view and the view which accords more closely with the tenets of justice must be that if a person wishes to challenge his conviction he/she can file a notice of application or a notice of appeal twenty-one (21) days after his conviction that is after the guilty verdict has been accepted by the trial judge. However our conclusion on the construction of the Act is not an end of the matter.

[57] *Griffiths* (n 26) 334.

Issue (ii) Extension of Time

[98] The second issue to be determined was whether an extension of time could have been granted after the dismissal of the application for leave to appeal against the convictions. In the course of the proceedings it became clear that there was no application for an extension of time.[58] Moore JA reminded himself that the matters before him were not appeals but applications for leave to appeal.[59]

[99] The Director conceded that the Court could extend the time for applying for leave to appeal against conviction at any time. Gibson CJ remarked that there was no application for an extension of time. The Director submitted that Rambarran had filed his application for leave to appeal against conviction on July 9, 2009, "14 days after the expiration of the 21 days … and to this date no application for leave to extend the time has been made and it is now 5 years, 3 months and 19 days have elapsed …"[60]

[100] On the other hand, leading counsel for Rambarran doggedly insisted: "… there is no question that there is any obligation on Rambarran now to file an application for an enlargement of time. Time had not begun to run."[61] Yet counsel for Rambarran filed an application for an extension of time after the application for leave to appeal was adjourned for judgment on February 4, 2015. He was followed by the Appellants Persaud and Green on February 9, 2015 and February 10, 2015 respectively. The Appellant Campbell sought no extension of time.

[101] Notwithstanding the position taken by the Court of Appeal on the judgment of February 5, 2015, the Court of Appeal after a review of the applications for an extension of time in which to make an application for leave to appeal, ruled that the Court was *functus officio* and without jurisdiction to entertain the applications ostensibly on the principle that there should be finality in litigation. Much of the blame for this patent error of the Court of Appeal was that it lapsed into thinking it had dealt with the notices of appeal in these

[58] Transcript of September 23, 2014, Record of Appeal p.1302.
[59] ibid 1307.
[60] ibid 1302.
[61] Unreported, Decision of the Court of Appeal, February 5, 2015 per Moore JA at [9].

matters. In fact it had dealt only with the notices of application for leave to appeal against conviction. Accordingly, there could have been no finality at that stage.

[102] The Director correctly relied on the judgment of Sir David Simmons CJ in *Martin Robert Glenn v R*[62] for the proposition that in an extension of time application the applicant had to show (1) what were the substantive grounds for the delay and (2) the merits of the appeal. In our view, whether the existence of the alleged practice of filing one notice of application after sentence properly accounts for the delay is a matter for the court hearing the extension of time application. From the judgment of the Court now before us there is no indication that it considered the reasons for the delay. Although the Director submitted that there was no merit in any of the grounds of appeal, the judgment of the Court of Appeal provides no indication as to whether the Court of Appeal considered the merits of the appeal.

[103] For the above reasons, we would have remitted these applications for leave to extend the time for filing applications for leave to appeal against conviction to the Court of Appeal to consider the twin requirements laid down by Simmons CJ in *Glenn* (supra). We would therefore have allowed the appeal on this issue.

Costs

[104] As to the issue of costs we agree that the rule in criminal cases is that the Crown neither receives nor pays costs unless that rule has been displaced. In Barbados there is no statutory power of the courts to award costs in criminal proceedings. Accordingly we would have dismissed the application for costs.

Conclusion

[105] The term 'conviction' as used in section 19 of the Act refers to a judicial determination of guilt. It does not include the sentence passed on the accused. As such the time for appealing against conviction runs from the date of conviction and the time for appealing against sentence runs from the date that the sentence of the court is imposed on the accused. In the instant appeal, the time for appealing against conviction began to run on

[62] *Martin Glenn* (n 4).

June 4, 2009 and the time for appealing against sentence began to run on December 11, 2009. The Appellant's notice of application seeking leave to appeal his conviction was therefore filed out of time. The Court of Appeal erred in ruling that they were functus officio regarding the application seeking an extension of time. Rather they should have considered the application in light of the reasons for the delay and the merits of the appeals. The application filed by Rambarran seeking an extension of time ought to be remitted for such consideration.

[106] We would have made the following orders:

(i) The term 'conviction' as used in section 19 of the Act refers to a judicial determination of guilt and does not include the sentence passed on the accused.

(ii) The time for appealing against conviction ran from June 4, 2009 and the time for appealing against sentence ran from December 11, 2009.

(iii) The Appellant's notice of application seeking leave to appeal conviction was filed out of time.

(iv) The Court of Appeal erred in ruling that they were *functus officio* regarding the application seeking an extension of time. The application ought to be remitted to the Court of Appeal.

(v) The application for costs ought to be dismissed.

DISPOSAL

[107] For the reasons given in the judgment of the President and Justices Wit and Hayton, Justices Nelson and Rajnauth-Lee dissenting, the Court makes the following orders.

(i) The Appellant Rambarran's appeal is allowed.

(ii) It is declared that "conviction", in the context of section 19(1) of the Barbados Criminal Appeal Act, Cap. 113A, means the date on which an accused is sentenced after having been found guilty; and that notice must

be given of an appeal or an application for leave to appeal before twenty-one days have elapsed since the date of conviction.

(iii) It is declared that the Court of Appeal in its oral decision of 13th March erred in finding itself *functus officio* and in finding the applications before it for an extension of time to be an abuse of process.

(iv) The Appellant Rambarran's application for leave to appeal his conviction is remitted to the Barbados Court of Appeal for an expedited hearing and determination of his application in accordance with the order that scheduled the hearing on the 21st to 24th July 2014.

(v) No order is made as to costs.

/s/ Dennis Byron

The Rt Hon Sir Dennis Byron (President)

/s/ R F Nelson

The Hon Mr Justice R Nelson

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee