TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2006/001

BETWEEN:

WILLIAM PENN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne. SC, KCN — Chief Justice [Ag.]
The Hon. Mr. Hugh Rawlins — Justice of Appeal
The Hon. Mde. Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:

Dr. Joseph Archibald, Q.C. with Ms. Anthea Smith for the Appellant
Mr. Terrence Williams, D.P.P. with Ms. Grace Henry McKinley for the Respondent

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2007: June 5
2009: September 28.

Criminal Appeal – Burglary —Admissibility of Fingerprint Expert Evidence –- whether fingerprint evidence only admissible where fingerprints were taken before appellant charged pursuant to section 29 of the Police Act (Cap165) – common law jurisdiction to take fingerprints – guidelines and criteria for admissibility of fingerprint evidence - Admissibility of Video Tape evidence of masked burglar and photographic stills - probative value of that evidence – No case submission – Directions to be given to jury in absence of testimony that masked man in video was appellant – whether conviction unsafe - Whether trial judge's direction on time limit to deliberate and her subsequent correction of that previous direction before jury retired placed pressure on jury – Whether sentence was too severe - Sentencing guidelines for domestic burglary

The appellant was convicted on three counts of burglary and sentenced to eight years imprisonment on each count with sentences to run concurrently. The Crown's case was

that the appellant had between the 26th April 2000 and the 18th June 2002, burgled holiday villas in Virgin Gorda at different times and stole cash and ferry tickets from tourists occupying the villas. In mid June 2000, Mr. Cummings, the holiday occupant of one of the villas at Euphoria set up a surveillance camera and a 24-hour video recorder pointed at the exit/entrance door in the lower bedroom of the 2-storey villa; and on the 28th July 2000, the video captured a masked man entering the room through the exit/entrance door; and after taking up money from a table and dresser in the room the burglar left through the exit/entrance door. Following the burglary reports the police on each occasion lifted latent palm and fingerprint impressions from the several crime scenes including the outer door knob of the exit/entrance door of Mr. Cummings' villa. The burglaries remained unsolved until the 21st December 2002, when the appellant was charged with the burglaries including those for which he was convicted. The appellant who was detained as a suspect on the 20th December 2002, had consented to the police taking his palm and fingerprints before he was charged; and the Fingerprint expert Sgt. Mason confirmed that the appellant's fingerprints matched the latent fingerprint impressions taken from the crime scenes. At his trial the learned trial judge heard preliminary objections and ruled that the fingerprint evidence and the video tape and photographic still derivatives were admissible. The appellant appealed against his convictions on 7 grounds. The Court of Appeal in its previous determination of grounds 1 and 2 pertaining to the jury panel; declared the trial a nullity. The Privy Council held that the trial was not a nullity and remitted the matter to the Court of Appeal for a determination of grounds 3 to 7. Ground 3 contended that the mandatory conditions in section 29 of the Police Act Chapter 165 laid down the jurisdiction for the police to take a person's fingerprints after the person has been charged with an offence and the police had no common law jurisdiction to take the appellant's fingerprints before he was charged. The other grounds challenged the ruling of the trial judge on the preliminary objections and the no case submission while questioning the relevance and probative value of the video tape evidence, in the absence of any witness testifying that the masked burglar captured in the video is the appellant. The grounds also raised the issue as to the applicable standards for fingerprint work by fingerprint experts in our jurisdiction in the absence of any statutory criteria; and alleged that the conviction is unsafe. The directions given to the jury regarding the time they had for deliberations and the sentence imposed were also challenged

Held: dismissing the appeal against conviction and sentence and affirming the sentence.

1. The court is of the view that ground 3 has no merit since at the appellant's trial there was no suggestion or evidence that he did not voluntarily submit or consent to the request by the police for his fingerprints to be taken. In the absence of any such oppression there is nothing else which would justify the exercise of discretion in favour of excluding this evidence.

   Callis v Gunn [1964] 1QB. 495 and R v Buckingham and Vickers [1946] 1WWR 425 followed

2. There is no evidence more directly relevant than a video tape showing the commission of a crime. Though this circumstantial evidence could not be used

as the primary basis for establishing the guilt of the appellant, its probative value existed in the fact that the jury could properly find that it supported the fingerprint evidence to the extent that it confirmed that the burglar at the time of the offence had handled the outer knob of the exit/entrance door, from which the left middle finger print which matched the appellant's was lifted. It was permissible for the jury to be invited to compare the image of the burglar in the video and stills with the appellant in the dock. This video evidence was clearly evidence from which the members of the jury could draw inferences by using their own senses and their perception of what they observed in the video and stills. It was real evidence that was equally admissible as the sworn testimony or documentary evidence.

R v Patrick Dodson and another [1984] 1 WLR 971; David Richard Blenkinsop[1995] 1 Cr. App. R 7; R v Downey [1995] 1 Cr App. R. 547 considered and applied.

3. Consistent with the reasoning in The Queen v Richard Kieran Stevens [2002]NICA even though the trial judge did not give the jury any warning on the dangers of identification from photographic [or video tape] evidence which should be given in most if not all such cases; and is almost invariably required, a conviction may still be safe notwithstanding its absence. Considering that the jury specifically requested to have the video before retiring and the time they spent in their deliberations, we conclude that no more than ordinary common sense and judgment was required having regard to the facts in the appellant's case. It required no further specific direction from the learned trial judge to come to a safe conclusion and the limited directions of the trial judge on the video evidence would not have compromised the fairness of the trial.

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4. American cases referring to the existence of a current non numerical standard in England can provide no binding authority for our courts to abandon the English common law guidelines governing the admissibility of fingerprint expert evidence. Section 48 of the Criminal Procedure Act Chapter 18 of The Laws of the Virgin Islands mandates that matters of procedure not expressly covered by domestic legislation be regulated as to the admission thereof by the Law of England and the practice of the Superior Courts of Criminal Law in England. The trial judge was obliged to follow as she did the English common law guidelines declared by the English appellate court in R v Buckley [1999] EWCA Crim 1191 (30th April, 1999) in the absence of any known case law in England demonstrating any implementation of a new non-numerical standard in England.

5. The learned judge's mistake in imposing a 2 hour time limit for the jury to deliberate was subsequently corrected; and it is clear that the jury would have understood from her corrected instructions that there was no deadline or time limit to their deliberations. Such a mistake and the subsequent corrections cannot reasonably be construed as placing pressure on the jury; and the conviction which resulted is not unsafe.

McKenna (1960) 44 Cr App R. 68, Rupert Crosdale v The Queen Privy council App No.13 of 1994 (Jamaica) delivered 6th April, 1995, De Four v The State [1999] 1 WLR 1731 distinguished.

6. The English guidelines as to the appropriate sentencing levels in cases of domestic burglary given in Mc Inerney and Keating [2003] 2 Cr App. R. 240 which are set out at paragraphs 62 to 69 below are approved and recommended to sentencers in our courts. The trial judge's approach in weighing and analyzing the factors that she took into account included the 2 high level features of professional planning of the crimes and that the complainants were vulnerable victims deliberately targeted. The trial judge's sentencing judgment modeled the approved English guidelines and this court has no valid reason to disturb the long sentence imposed.

JUDGMENT

[1] EDWARDS, J.A: This is the Judgment of the Court. On 20th March 2006, the appellant, Mr. William Penn, was convicted on 3 counts of burglary from tourist rental villas in Virgin Gorda, Virgin Islands and sentenced to eight years imprisonment on each count on 21st March 2006, with the sentences to run concurrently.

[2] On 31st March 2006, the appellant appealed against his conviction and sentence. Grounds 1 and 2 of his 7 grounds of appeal contended that the trial was a nullity because of procedural irregularities in the selection process of the nine members of the jury who tried the appellant; and non compliance with the Jury Act (Cap. 39).

[3] The Court of Appeal in a written judgment delivered on the 3rd December 2007 held that the array of common jurors from the voters' list was invalid, set aside the verdict and judgment, and made an order for a new trial.

[4] The respondent successfully appealed to Her Majesty in Council. The Privy Council held that there was nothing in the Jury Act 1914 to compel a conclusion that either the array or the trial should be regarded as a nullity on an appeal after a trial during which such failures went unobserved by those responsible for trying

the issues of law and fact and all appeared entirely in order. Since the appellant's other grounds of appeal had not been considered by the Court of Appeal the matter was remitted for these to be considered and determined.

The Other Grounds of Appeal

[5] Grounds 3 to 7 allege:

> "3. The learned Trial Judge was wrong in law to overrule the submission in limine of Counsel for the Defence that the fingerprints taken of the accused in Police custody on 20th December 2002 prior to any charge being brought against the accused was a violation of Section 29 of The Police Act (Cap 165) of the Revised Laws of the Virgin Islands which was enacted for the protection of the rights of the accused, and therefore admissible.
> 4. The learned Trial Judge was wrong in law to overrule the submissions in limine of Counsel for the defence that the proposed video and derivative still photos as prosecution evidence were excessively prejudicial with little probative value, especially as no prosecution witness could identify that the masked person betrayed in the video or the said photos either was or could be the accused, and therefore inadmissible.
> 5. The learned Trial Judge was wrong in law to overrule the No Case Submission of Counsel for the Defence at the close of the case for the Prosecution.
> 6. The learned Trial Judge was wrong in law to direct the jury at the end of the Judge's Summing Up…
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> > "*and Members of the Jury, I will ask you to retire and consider your verdict. During the time frame it is now 25 to 12:00. You should return a verdict in two hours time with an hour provision for lunch. So you will be given up to 25 to 3:00 to deliberate, and hour being spent for lunch."*
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> which placed unnecessary pressure on the jury after a trial of eight days thus far, contrary to Sections 35 and 36 of the Jury Act (Cap 36) where there is provision for the jury to deliberate up to four hours after the conclusion of the Summing Up of the learned Trial Judge; and such pressure made the Trial unfair to the accused.
> 7. The sentences passed severally and concurrently were too severe."

Background Facts

[7] An appreciation of the relevant facts would be helpful before addressing these grounds. Tourists came to Virgin Gorda at different times and stayed in holiday villas on the island between 26th April 2000 and 18th June 2002. During the course

of their stay someone entered their villas at different times without their consent and stole cash and ferry tickets from them. The first count on the indictment charged that between the 26th and 27th April 2000, $456.00 and $1300.00 respectively was stolen from John and Carol Anne Bryant at La Cachette Villa main house. The fourth count charged that between the 17th to 18th June 2002, $450.00 along with $80.00 and 4 adult ferry tickets, $200.00, and $100.00 respectively was stolen from Ronald Hansen, Mary-Ann Hansen, Amy Smith and Curtis Smith at the Paradise Beach Villa Unit 14. The residence of Mr. Michael Cummings was also entered on 28th July 2000 and $45 was stolen from a downstairs bedroom in his house at Leverick Bay, Euphoria. This burglary was the subject of the second count.

[8] Ground 4 of the appeal concerns the residence of Mr. Cummings who lives in Arizona and was holidaying at his house in Virgin Gorda from May 2000 to September 2000. The facts concerning this ground must be stated in detail. In mid June 2000 he had set up a surveillance camera and a 24-hour video recorder in the lower bedroom of his 2 storey house pointed at the efficiency exit/entrance door. He had tested it, and after placing $5 in change on the table and another $30.00 to $40.00 in a pouch on the dresser by the bed had wiped all fingerprints from everywhere in this bedroom that he thought somebody might have touched and left the room with the recorder on. The following week after a maid had cleaned the room, Mr. Cummings again wiped away fingerprints as before. On 28th July 2000, he noticed that the efficiency exit/entrance door to the room was ajar and the money on the table was missing. On entering the room without touching the efficiency exit/entrance door knob he noticed that both sets of money were gone. Mr. Cummings removed the tape from the VCR, left the room, closed the door as best he could and contacted the police. Mr. Cummings viewed the VCR tape and saw a person wearing a mask come in the room, take the money and leave. He handed over the VCR tape to the police after playing the relevant portion of the tape in the police presence. Throughout the period that he had set up the surveillance camera he had rewound the tape in the VCR and reset it everyday.

[9] Following reports from the virtual complainants, on each occasion the police carrie out investigations immediately; and Police Constable No. 133 Dorsey Tittle lifted latent palm print and fingerprint impressions from the several crime scenes including the outer door knob of the exit/entrance door of Mr. Cummings downstairs bedroom. Sgt. George Mason also lifted latent fingerprints from the bedroom building at La Cachette. These burglaries remained unsolved until the 21st December 2002 when the appellant was charged with 4 counts of burglary including the 3 counts for which he was convicted. The police had arrested the appellant as a suspect, and he had consented to the police taking his fingerprints and palm print on the 20th December 2002. On the evening of the 21st December 2002 following the fingerprint expert Sgt. George Mason's confirmation that the appellant's fingerprints matched the latent fingerprint impressions taken from the crime scenes, the appellant was interviewed by Inspector Samuel McSheene for 6 hours under caution, and he denied any involvement in the several burglaries prior to being charged. Before the fingerprints of the appellant were taken by the police, a search warrant was executed on the premises of the appellant and a number of items taken into custody.

[10] Mr. Cummings who is the virtual complainant in the second count of burglary did not attend the trial. His deposition taken by the Magistrate at the Preliminary Inquiry held on the 9th February, 2004 was admitted as evidence. The video tape was not shown to Mr. Cummings at the Preliminary Inquiry and so he did not identify it in his deposition. At the trial P.C. John Antoine testified that Mr. Cummings had played the relevant portion of the tape in his presence, labeled the tape, and handed it over to him. P.C. Antoine placed his initials on the tape and tendered it in evidence. The still photographs derived from the video tape were also admitted as evidence.

Ground 3 – Obtaining the Appellant's Fingerprints

[11] Section 29 of the Police Act[1] states:

> "(1) A Gazetted Police Officer or any member of the Force of or below the rank of Inspector may request a person charged with an offence to submit to the taking and recording, for the purpose of identification, of his measurements, photograph and fingerprint impressions if he suspects that the person, from the nature or character of the offence with which he is charged (being a felony or misdemeanour) has been previously convicted or has been engaged in crime or that his measurements and photograph and fingerprint impressions (or any of them) are required in the interests of justice.
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> (2) Where a person referred to in subsection (1) refuses to submit to the taking of his … fingerprint impressions he may be taken before a Magistrate and if the Magistrate is satisfied that the request to submit to the taking and recording thereof is reasonable, he may make such order with respect to the taking of the … fingerprint impressions … as he considers justifiable."

[12] The contention of learned Queen's Counsel Dr. Archibald in the court below and before us, was that the police had no jurisdiction at common law to take the fingerprints of the appellant; and section 29 of the Police Act laid down mandatory conditions for the accrual of the jurisdiction to take fingerprint impressions. Dr. Archibald submitted that the fingerprint evidence was unlawfully obtained and therefore inadmissible; because the police had taken the appellant's fingerprint impressions at a time when he was not charged for burglary but was merely a suspect on the 20th December 2002.

[13] The learned Director of Public Prosecutions relying on Callis v Gunn[2] and R v Buckingham and Vickers[3] contended that the learned trial judge exercised her discretion correctly in admitting the fingerprint evidence; and this evidence was relevant and therefore admissible since the appellant had consented and there was no oppressive conduct from the police to vitiate the appellant's consent. We adopt the view of the Canadian Courts in Buckingham and Vickers that a

[1] Chapter 165 of the Laws of the Virgin Islands (Revised Edition 1991)
[2] [1964] 1 Q.B. 495
[3] [1946] 1 WWR 425 : See also Hayward (1957) 118 CCC 365

provision similar to section 29 of the Police Act extends, rather than restricts the common law power to take fingerprints. It appears that this provision may provide a defence to a charge of assault where force is employed to take a fingerprint. It was argued in Callis v Gunn that evidence relating to the defendant's fingerprints was inadmissible because he had not been cautioned by the police prior to the taking of his fingerprints. The court held that it was quite unnecessary to give a caution before fingerprints were taken provided that the fingerprints were given voluntarily. In our view the common law expounded in Callis v Gunn applies to the factual circumstances in the instant case.

[14] As a matter of law, once the evidence of fingerprints is relevant it is admissible subject to the overriding discretion of the court to exclude it if there is any suggestion that it was obtained oppressively[4]. Dr. Archibald argued that since the appellant was detained by the police at the time when his fingerprints were requested he was not a volunteer. However, the evidence defeats this argument as it discloses that during the interview with the appellant conducted by Inspector Samuel McSheene on the 21st December 2001, the appellant under caution was asked: "Did you give the police your fingerprints voluntarily to assist in this investigation ?". The appellant's answer was: "They ask me to give my fingerprint; I gave my fingerprints."[5]

[15] The court is of the view that this ground has no merit since at the appellant's trial there was no suggestion or evidence that he did not voluntarily submit or consent to the request by the police for his fingerprints to be taken. In the absence of any oppressive conduct by the police, in our view there was nothing else which would justify the exercise of discretion in favour of excluding this evidence.

[4] See Kuruma v The Queen [1955] 1 ALL E.R. 236 P.C.
[5] At page 116 lines 11 to 15 of Transcript Vol. 1

Grounds 4 and 5 – Admissibility of the Video and Fingerprint Evidence

The Video Evidence and Stills

[16] Before the learned Director of Public Prosecutions opened his case to the jury, Dr. Archibald took a preliminary objection to the admission of the video cassette and its still photographic derivatives. Dr. Archibald then expressed concern that Mr. Cummings who made the video would not be attending to testify at the trial, and there was a proposal to have his deposition read and still derivatives of his video given in evidence. Dr. Archibald objected to this evidence being admitted in the absence of Mr. Cummings, arguing that no witness would identify the appellant as the person in the video and so it was speculative, gravely prejudicial to the appellant, and of little or no probative value.[6]

[17] The Director of Public Prosecutions proposed to call the witness who made the still photographs from the video cassette and he explained: "if there is any challenge that he has tampered with them that can be put to him and certainly the jury can see the video and see if the stills and the video are depicting anything…. The stills provide a way that the jury can easily look at the picture and concentrate on it before another panel rolls by. It is merely an ease for them to examine, and for that reason it is relevant and admissible in my submission[7]. … The video and the still photographs … do not help us as regards the facial features of the person who did it. But it does help us as to the shape and form of such person, which is a matter which the jury can consider when they are considering the other evidence. So therefore it is relevant and admissible." [8] Mr. Williams relied on 2 authorities: R v Patrick Dodson and another[9] and R v Christopher Cook.[10] The trial judge ruled that the video evidence and stills were admissible.

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[6] At page 67 et sequiter of Transcript Vol. 1
[7] At page 57 of Transcript Vol. 1
[8] At pages 55 line 22 to 56 of Transcript Vol. 1
[9] [1984] 1 WLR 971
[10] (1987) 84 Cr. App R 369. It was held that a photograph of a suspect taken during the commission of an offence was admissible.

[18] It was held in Dodson that photographs taken at half-second intervals by security cameras installed at a building society office at which an armed robbery had been attempted were admissible, on the issue of whether an offence had been committed and, if so, who had committed it even though no witnesses were called to identify the men in the photographs. However, in a case in which the jury is invited to identify the accused in court from a photograph or video recording of the offender committing the offence, they should be warned of the risk of mistaken identity and of the need to exercise particular care in any identification which they make. They must take into account whether the appearance of the accused has changed since the visual recording was made.

[19] Following the learned judge's ruling that the video and its still derivatives were admissible, Police Constable Jerome Tittle testified under cross examination that the video showed a masked man come in through the door of Mr. Cummings' Villa Euphoria, go straight for the table, and use his left hand with one move to take something off the table; and the masked man left the room, came back while the door was still open, went around, went out and then closed the door with his left hand. This witness could not say definitively whether or not this masked man was wearing gloves. His evidence was that he lifted one fingerprint which had a 12% blur from the outer portion of the doorknob of this same door.

[20] Sgt. George Mason a fingerprint expert of 9 years experience up to the time of trial, testified that he prepared a comparison chart exhibit comprising the latent impression lifted from the door knob of Mr. Cummings' residence and the left middle finger of appellant William Penn's ink fingerprint. He found no areas of apparent or real discrepancy. From the comparison that he conducted he marked 16 ridge characteristics of similarity (although there were more) in the same place order and sequence relative to each other, and came to the conclusion that the latent impression that was made on the door knob of Michael Cummings' residence was made by the left middle finger of William Penn.

[21] The submissions of Dr. Archibald advanced at the preliminary objections and renewed in his no case submission were to some extent repeated in this court for ground 4. He complained about the Director of Public Prosecutions opening to the jury that the "form and shape of man" in the video was to be considered as regards the accused in the dock. He alleged that this speculative video evidence had prejudiced the appellant, vitiated the entire trial, and made the appellant's conviction unsafe where it was left to the jury to infer in the absence of any such testimony that the shape and form of the accused was the shape and form of the man in the video.

[22] In his no case submission he argued that there was no case to answer for count 2 as the video evidence was tenuous and the jury ought not to be allowed to look at the video evidence and come to their own conclusions in the absence of any evidence that the form of the man in the video matches the form of the appellant or any evidence linking the appellant with the video. Further, that since none of the police witnesses could say whether the burglar in the video was wearing a glove or not, the prosecution had not proven that the burglar in the video had left a mark on the door knob, having regard to Inspector Williams' testimony that a gloved hand would not leave a mark on the door knob. He submitted further that there was the real danger or risk that the jury would use their speculative conclusions on count 2 and apply those conclusions to the other counts if the video evidence was allowed to continue as part of the prosecution's case. Once the video evidence is left in, all the other counts should go, he argued, by a directive to the jury that the appellant had no case to answer for those counts.

[23] The learned trial judge in her ruling on the no case submission relied on the authorities Mr. Williams cited in his submissions: Dodson; R v Downey;[11] David Richard Blenkinsop;[12] and the judge also referred to the learning in Archbold.

[11] [1995] 1 Cr. App. R. 547
[12] [1995] 1 Cr. App. R. 7

At pages 11 to 12 in Blenkinsop the Court of Appeal approved the guidance given in Dodson and Downey when Evans L.J. said this:

> "It has been recognized that the jury's task when asked to "identify the defendant, whom they have seen in Court, as the person shown in a photograph or video recording of the offender committing the offence, is in a separate category. Authoritative guidance as to the appropriate form of direction to the jury in such a case was given…in this Court Dodson and Williams *(*1984) 79 Cr. App. R. 220…. One factor which the jury must take into account is the question whether the appearance of the defendant has changed, or not, since the visual recording was made, and in general terms this is something which should be brought to their attention. In other respects, the *Turnbull* direction is inappropriate or unnecessary; for example, the jury does not need to be told that the photograph is of good quality or poor; nor whether the person alleged to have been the defendant is shown in close-up or was distant from the camera, or was alone or part of a crowd. Some things are obvious from the photograph [or video] itself, and *Dodson and Williams* laid down guidelines which do not have to be applied rigidly in every case: *Downey, The Times, April 5,1994….*
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> Nevertheless, the need for a careful and thorough direction whenever there is identification issue is clearly established. The underlying requirement in our judgment is that the direction shall conform with *Turnbull* in a witness identification case and with the same principle as exemplified in *Dodson and Williams* in a case where the jury is invited to conclude that the person shown in a photograph or video recording was the defendant whom they have seen. There is also a general and invariable requirement that the jury be warned of the risk of mistaken identification, and of the need to exercise particular care in any identification which they make for themselves."

[24] The trial judge approached the no case submission properly in our view as she applied the second limb of the test laid down in the leading authority: R v Galbraith[13] along with the other relevant case law to the video evidence. She remained resolute that the video tape and stills were admissible on the authorities cited; and correctly ruled that with the appropriate directions given to the jury it was for the jury as judges of the facts to look at the video and decide on the factual issues that go with this evidence.

[25] We can think of no evidence more directly relevant than a video tape showing the commission of the crime. We have no doubt that the video and its stilled

[13] 73 Cr. App. R 124, CA

derivatives were relevant and admissible circumstantial evidence. Though this circumstantial evidence could not be used as the primary basis for establishing the guilt of the appellant, contrary to the submissions of Dr. Archibald before us that this evidence had no probative value, its probative value existed in the fact that the jury could properly find that it supported the fingerprint evidence to the extent that it confirmed that the burglar at the time of the offence had handled the outer door knob of Mr. Cummings' exit/entrance door; from which the left middle finger print which matched the appellant's was lifted. It was also permissible for the jury to be invited to compare the image of the burglar in the video and stills with the appellant in the dock.[14] This video evidence was clearly evidence from which the members of the jury could draw conclusions or inferences by using their own senses and their perception of what they observed in the video and still photographic derivatives. It was real evidence that was equally admissible as the sworn testimony or documentary evidence given.[15]

[26] A valid contest on admissibility would in our view arise were it the case that the video tape evidence was being used as the sole identification evidence of the person who committed the burglary. But this was not the case as there was also fingerprint evidence. Although there was no representation of the burglar's face in the video since he was wearing a mask; and there was no testimony that the man in the video was the appellant, these facts in our view would afford no good reason to deprive the jury of viewing and considering the video and stills.

The Fingerprint Evidence

[14] See Archbold 2008, at para 14-46

[15] Blackstones's Criminal Practice 2005, page 254 all para F18-28. See also Murphy in his text book "A Practical Approach to Evidence" (3rd et.) at page 7 where the writer defines **"real evidence"** as: "A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person…views of the locus in quo… and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum of their contents as such.… What is of importance in each case is the visual, aural or other sensory impression which the evidence, by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it."

[27] Sgt. Mason gave similar evidence for counts 1 and 4 as the evidence for count 2 (which is stated in paragraph 17 above). He prepared comparison charts exhibits for counts 1 and 4 from the fingerprint lift specimens connected with counts 1 and 4.Sgt. Mason testified that he made several comparisons including the comparison of the latent impression that was lifted from inside the shower block of the bedroom at La Cachette villa on the 28th April 2000 with the ink impression of the appellant's left ring finger; and identified 16 ridge characteristics of similarity. He concluded from this that the latent impression from inside the shower block was made by the left ring finger of the appellant. He testified that he had also drawn 15 or 14 ridge characteristics concerning the appellant's fingers, but that this was insufficient for court presentation.[16]

[28] As for count 4, Constable Tittle on the 16th December 2002 handed over to Sgt. Mason a latent palm print impression he had lifted from the door at villa number 7 at Paradise Beach. Sgt Mason carried out a reversal process on the white photographic enlargement of this latent print and then placed it on the left of his fingerprint comparison chart exhibit. Thereafter he compared it with the photographic enlargement of the appellant's left palm print which he had placed on the right of this comparison chart; and found 16 ridge characteristics of similarity; from which he concluded that the palm print lifted from the villa number 7 was made by the left palm of the appellant.

[29] There was also a thumb print lifted from the door at Paradise Beach Resort by Constable Title which was subjected to a similar comparison with the right thumb ink impression taken from the appellant. Sgt. Mason concluded from the 16 ridge characteristics of similarity he identified that the thumb impression on the door was made by the right thumb of the appellant.

[30] Sgt. Mason made all of these conclusions to the exclusion of all other occupants and workers at the burgled villas; having collected their fingerprints and palm prints and engaging in a similar comparison and elimination process.

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[16] See page 145 lines 7 to 10, Volume 2; Examination-In-Chief of George Mason.

[31] He explained in his evidence that the existence of 16 ridge characteristics was the standard established in England in 1901 for a positive conclusion implicating a defendant, based on an analysis of the pattern type, a comparative analysis, and ridgeology (an analysis of the post structure and the location and shape of the ridges). Another fingerprint expert Inspector Williams with over 25 years experience in the classification, identification and verification of fingerprints testified and agreed with Sgt. Mason's identification of the ridge characteristics and the conclusions arrived at in each case. Sgt. Mason testified also that there were other fingerprints among those he examined and analysed that did not meet the 16 ridges criteria and were not brought as evidence because of the existence of less than 16 characteristics.

The No Case Submission on the Fingerprint Evidence

[32] Dr. Archibald made a no case submission in relation to counts 1, 2 and 4 for the purposes of this appeal, concerning the fingerprint evidence adduced; and this is the subject of ground 5. He referred to the contradiction in the fingerprint experts' testimony for count 2 where Sgt. Mason testified that the latent print on the door knob had a 12 % blur while Inspector Williams said there was no blur.

[33] The bone of Dr. Archibald's contention is that the standards for fingerprint work by fingerprint experts in England have changed since February 2002 to comport with the Canadian and American standards, and that the standards employed by Sgt. Mason and the other experts in the appellant's case were inconsistent with the current English standards. He submitted that the fingerprint evidence is not admissible as it has failed the admissibility test as a matter of law on every count. To buttress his contention Dr. Archibald relied on numerous legal material including 2 United States cases: United States v Carlos Plaza,Wilfredo Martinezs Acosta and Victor Rodriquez;[17] and United States v Byron

[17] Cr. No. 98-362-10, 11, 12 United States District Court, E.D. Pennsylvania March 13, 2002. 188 F. Supp. 2ed 549 (E.D. Pa. 2002)

Mitchell.[18] These decisions contain expositions on the present English standard for the admissibility of fingerprint evidence.

[34] Dr. Archibald concluded that in using the 16 ridges criteria which was the wrong criteria, the fingerprint experts discarded a lot of other person's fingerprints which matched or might have fitted the fingerprints lifted from the crime scenes to the prejudice of the appellant.

[35] The American approach is explained in the judgment of Becker J in Byron Mitchell at pages 5 to 7, where Becker J stated:

> "Fingerprints are left by the depositing of oil upon contact between a surface and the friction ridges of fingers. "The field uses the broader term "friction ridge" to designate skin surfaces with ridges evolutionarily adapted to produce increased friction (as compared to smooth skin) for gripping…. The structure of friction is described in the record before us at three levels of increasing detail, designated as Level 1, Level 2 and Level 3. Level 1 detail is visible with the naked eye; it is the familiar pattern of loops, arches, and whorls. Level 2 detail involves "ridge characteristics" – the patterns of islands, dots and forks formed by the ridges as they begin and end and join and divide. The points where ridges terminate or bifurcate often referred to as "Galton points", whose eponym, Sir Francis Galton, first developed a taxonomy for these points. The typical human fingerprint has somewhere between 75 and 175 such ridge characteristics. Level 3 detail focuses on microscopic variations in the ridges themselves, such as the slight meanders of the ridges themselves (the "ridge path") and the locations of sweat pores. This is the level of detail most likely to be obscured by distortions. The FBI – the agency that made the primary identification in this case – uses an identification method known as ACEV, an acronym for "analysis, comparison, evaluation, and verification". The basic steps taken by an examiner under this protocol are first to winnow the field of candidate matching prints by using Level 1 detail to classify the latent print. Next the examiner will analyze the latent print to identify Level 2 detail (i.e Galton points and heir spatial relationship to one another), along with any Level 3 detail that can be gleaned from the print. The examiner then compares this to Level 2 and Level 3 detail of a candidate['s] full-rolled print (sometimes taken from a database of fingerprints, sometimes taken from a suspect in custody), and evaluates whether there is sufficient similarity to declare a match. In the final step, the match is independently verified by another examiner, though there is some dispute about how truly independent this verification is."

[18] In the United States Court of Appeals for the third circuit No. 02-2859, at pages 5 to 8.

[35] Becker J recognized also that several jurisdictions outside of the U.S.A. (including France, Argentina and Brazil) employ the point system approach that Sgt. Mason and other experts in the instant case used irrespective of Level 3 detail. Becker J observed further that the FBI in the late 1940's used a combination of quantity and quality. If ridge characteristics are abundant, then the quality of Level 3 detail is unimportant; but a paucity of Galton points can be compensated for by high-quality Level 3 detail. "While this has the advantage of allowing an examiner to find a match in situations where an examiner using a strict point based standard would not find one, with this flexibility comes the price of substituting a degree of subjectivity for an objective numerical standard."

[36] From the American material Dr. Archibald relied on it can be distilled that following the seminal decision of the Supreme Court of the United States in Daubert v Merrel Dow Pharmaceuticals[19] and the subsequent decision in Kumho Tire Co. v Carmichael[20] there have been numerous cases in the United States in which challenges have been mounted to fingerprint experts' testimony, applying the Daubert factors. On such occasions opposing expert testimony is proffered by the defendant prior to the judge's ruling on the admissibility of the proposed expert testimony. The American jurisprudence illustrates that the forensic acceptance and reliability which English Courts and other common law jurisdictions give to fingerprinting as a sound means of establishing identity do not insulate the science

[19] 509 U.S.579 (1993). 21 At issue was what test should be applied in determining whether an expert's affidavit concluding that material use of the prescription drug Benedictin has not been shown to be a risk factor for human birth defects was admissible. The Court held that the standard for admitting expert scientific testimony in a federal trial is governed by the Federal Rules of Evidence and the common law of evidence may serve as an air to their application; and that when a trial judge is faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a) must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and property be applied to the facts at issue. Among the considerations that will bear on the trial judge's inquiry are whether the theory or technique in question can be (and has been) tested, subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. Prior to the adoption of the Federal Rules of Evidence admission of Expert testimony was governed by the common law authority Frye v United States 293F 1013, 1014 which required that the evidence must have gained general acceptance in the particular field in which it belongs.

[20] 526 U.S 137 (1999). At issue was the proferred testimony of the plaintiff's expert in tyre failure analysis. The Court held that the Daubert preliminary assessment and factors apply to all experts, not merely scientists; and must be carried out in a District Court to ensure that expert testimony is sufficiently reliable.

of fingerprint assessment from challenges based on advances in scientific thinking in the U.S.A.

[37] Dr. Archibald concluded that in using the 16 ridges numerical criteria which was the wrong criteria, the fingerprint experts discarded a lot of other person's fingerprints which matched or might have fitted the fingerprints lifted from the crime scenes to the prejudice of the appellant. Dr. Archibald adduced no opposing expert testimony prior to the trial judge's ruling that the fingerprint evidence was admissible. He urged the trial judge to apply the American approach to the fingerprint evidence and rule that it is tenuous, unreliable, and there is no case to answer. No decided case in England from a conviction based on fingerprint identification under the new English non-numerical standard described by Lord Rosser in his speech to the House of Lords was brought to the Court's attention.

[38] The riposte of the learned Director of Public Prosecutions, Mr. Williams emphasized the obvious. The Crown in the appellant's case by using the 16 ridges criteria may have passed a higher test than the non numerical test set for Canada, the U.S.A, and maybe England since February 2002.

[39] Mr. Williams pointed to the decision in R v Buckley[21] establishing guidelines for the reception of such evidence that will be discussed later. This authority also chronicled the history of National Fingerprint Standards in England from as early as 1906 when a conviction was upheld in R v Castleton[22] depending solely on identification by fingerprints without a set criteria for ridge characteristics, to the subsequent evolution of a numerical standard requiring 12 similar ridge characteristics, to an increase of 16 similar ridge characteristics established as the criteria in 1924 by Scotland Yard. A National Fingerprint Standard was created in England requiring 16 similar ridge characteristics after the relevant authorities convened a Committee meeting in 1953. It is important to note why the 16 ridge criteria was established:

[21] [1999] EWCA Crim 1191 (30th April, 1999)
[22] 1910 3 Cr. App. R. 74

> "It is apparent that the committee were not seeking to identify the minimum number of ridge characteristics which would lead to a conclusive match, but what they were seeking to do was set a standard which was so high that no one would seek to challenge the evidence and thereby, to raise fingerprint evidence to a point of unique reliability" [23]((My emphasis.)

[40] The standard was amended following a National Conference of Fingerprint Experts established to monitor the application of the standard; by providing that" where at any scene there was one set of marks from which 16 ridge characteristics could be identified, any other mark at the same scene could be matched if ten ridge characteristics were identified. Logical or otherwise that system operated for many years." With developments in knowledge and expertise, there was a consensus developed among experts that considerably fewer than 16 ridge characteristics would establish a match beyond doubt. Some experts suggested 8 would provide a complete safeguard, others maintained that no numerical standards are necessary; while other countries admit identifications of 12,10, or 8 similar ridge characteristics. There was a Conference in 1983 where all fingerprint experts accepted that identification is certain with less than the current standard of 16 points of agreement. It was also recognised that all experts agreed that there should be a nationally accepted standard, which should be adhered to in all but exceptional cases. The Conference recognized that there would be rare occasions where an identification fell below the standard, but the print was of such crucial importance in the case that the evidence about it should be placed before the court. The Conference advised that in such extremely rare cases, the evidence of comparison should be given only by an expert of long experience and high standing. There have been cases in England in which convictions have been upheld where evidence of 12 similar ridge characteristics[24] and 14 similar ridge characteristics[25] were admitted. As at 25th March 1998, the Report of the Fingerprint Evidence Project Board established to identify the systems needed for a non numerical system recommended that the national standard be changed entirely to a non numerical system. A target date of April

[23] See page 4 of the judgment
[24] R v Charles (Unreported, Court of Appeal (Criminal Division) 17/12/98
[25] R v Giles (Unreported, Court of Appeal (Criminal Division) 13/2/88

2000 for this change when "the fingerprint experts would be able to give their opinions unfettered by any arbitrary numerical threshold" so that "the courts will be able to draw such conclusions as they think fit from the evidence of fingerprint experts" was not realized.[26]

[41] The American case Carlos Plaza that Dr. Archibald relied on may have completed the puzzle by disclosing what took place in England after the April 2000 target date. The judgment reveals that "the projected change based upon the consensus referred to in *Buckley* that there is no scientific basis for insisting on any given minimum of "similar ridge characteristics" was accomplished as of June 11, 2001. The new regime was described in some detail in the House of Lords on February 25, 2002 in answers given by Lord Rooker on behalf of Her Majesty's Government to questions that had previously been 'put down', in conformity with Parliamentary practice, by Lord Lester of Herne Hill." The discourse in the House of Lords and Lord Rooker's answers apparently provide Dr. Archibald with the authority for saying that the current standard prescribed for fingerprint identification is the non-numerical system which was introduced from the 11th June 2001 after extensive consultation with the Lord Chancellor, the Attorney General and other criminal justice system stakeholders.

[42] However, in our view, Carlos Plaza and the other American cases previously mentioned can provide no binding authority for our courts to abandon the English common law guidelines governing the admissibility of fingerprint expert evidence. Section 48 of the Criminal Procedure Act[27] mandates that matters of procedure not expressly covered by domestic legislation be regulated as to the admission thereof by the law of England and the practice of the Superior Courts of Criminal Law in England. The trial judge in our view was obliged to follow, as she did, the English common law guidelines declared by the English appellate court in

[26] See page 4 of the Buckley judgment

[27] Chapter 18 of The Laws of the Virgin Islands Revised Edition 1991. For the documentary exhibits connected with the fingerprint experts testimony see section 12 of the Evidence Act Chapter 23 (now repealed) which was held in Forbes v R (ECS) (1993) 45 WIR to be the vehicle for importing English legislation to the admissibility of documents of all kinds

Buckley, in the absence of any statutory provision in the British Virgin Islands specifically dealing with the reception of fingerprint expert evidence and such related documents. There was no known English case law before the trial judge or our court demonstrating any implementation of the new non-numerical standard that Lord Rosser described.

[43] Buckley establishes that fingerprint evidence is admissible as a matter of law if it tends to prove the guilt of the accused even if there are only a few similar ridge characteristics although in such a case it may have little weight. It may be excluded in the exercise of judicial discretion, if it is prejudicial effect out weighs its probative value. "When the prosecution seek to rely on fingerprint evidence, it will usually be necessary to consider two questions: the first, a question of fact, is whether the control print from the accused has ridge characteristics, and if so how many, similar to those of the print on the item relied on. The second, a question of expert opinion, is whether the print on the item relied on was made by the accused. This opinion will usually be based on the number of similar ridge characteristics in the context of other findings made on comparison of the two prints."

[44] In the state of knowledge of and expertise in relation to fingerprints existing in England in April 1999 the following guidelines were given by the Court of Appeal in Buckley (at page 6 of the judgment) to assist judges and those involved in criminal prosecution:

> "If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular:
>
> (i) the experience and expertise of the witness;
> (ii) the number of similar ridge characteristics;
> (iii) whether there are dissimilar characteristics;
> (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and

(v) the quality and clarity of the print on the item relied on, which may involve, for example consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination. In every case where fingerprint evidence is admitted, it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in light of all the evidence."

[45] The learned judge was also guided by the following 2 Caribbean authorities despite a dearth in this area: Michael Gayle v R;[28] Michael Bullock v The State.[29] The Privy Council in Gayle affirmed the safety of a conviction for murder in Jamaica based solely on a single fingerprint impression. The Court of Appeal had reasoned that given that there was no evidence of any legitimate cause for the accused's fingerprint to be found at the crime scene this was presumptive evidence of his culpability, which by itself was sufficient for an adverse verdict. In Bullock the Court of Appeal of Trinidad and Tobago considered the nature of the directions to be given to the jury in a fingerprint identification case where the accused at his trial explained the circumstances in which his fingerprint happened to be on the window glass. It was held that all that is required where an issue of this kind arises is for the trial judge in the trial judge's form and style to direct the jury that they must not find against the accused on this issue unless they are convinced (a) as to the finding of the fingerprint alleged; (b) that the print was in fact that of the accused; and (c) that there was no reasonable justification or possible explanation for its presence at the spot where it was found.

[45] Having regard to the evidence reflected at paragraphs 20, and 27 to 32 of this judgment, the other circumstances of the Crown's case, and the authorities that the learned trial judge relied on in overruling the no case submission we can find no fault with how the learned judge exercised her discretion.

The Directions on the Video Evidence

[28] (1996) 48 WIR 287 (P.C.)
[29] (1988) 41 WIR 276

[46] The appellant remained silent and called no evidence. Although Dr Archibald did not specifically complain about the directions the learned judge gave to the jury on the evidence relating to the video tape and stills, he submitted that the conviction was unsafe because of this evidence. He also reminded us that there was no evidence adduced as to how the appellant looked at the time the burglary was captured in the video in the year 2000 and the appellant was tried in 2006. Though this may be correct, it was not disputed that there was evidence regarding the height of the appellant being over 6 feet and the height of the exit/entrance door way which the burglar used in the video being 6ft. 10 inches.

[47] Mr. Williams argued that in applying their common sense the jury while looking at the video would be able to decide whether the person in the video was tall as the appellant and whether the shape and form was that of a man. We observe that the trial judge gave no specific direction such as that contemplated in Dodson. Her directions were as follows:

> "What is disputed and what is the main or the sole area of contention which you will have to resolve is who committed these burglaries…. The Prosecution says that their case is based on fingerprint evidence and in the case of count 2, the video evidence which captured a man, not a woman, a tall man, not a short man, of the same form and shape as the Accused. Madam Foreman and Members of the Jury, I earlier told you that you could draw reasonable inferences from the evidence and you may wish to draw reasonable inferences from the video cassette that was shown to you, but do not allow yourself to be drawn into speculation. Do not speculate and if there is more than one reasonable inference to be drawn from any finding of fact, you must draw the one most favourable to the Accused."[30]
>
> "Then there is also a video cassette which may assist you in your deliberations in coming to a conclusion. In looking at this video I warn you to be extremely careful. Do not enter a world of speculation. The Defence asked you to discard the evidence of the video presented. They call it a speculative bit of evidence. That not a single witness or police officer told you that the person in the video is the Accused. Not one of them has told you that it is the shape and form of this Accused and that when Inspector McSheene put to him: "What would you say then if a videotape with you being captured in it has been found," the Defence says it was pressurizing

[30] At page 33 lines 3-21 of the Transcript Vol. 3

> the Accused to commit himself to say something funny, but this Accused was strong and he maintained his innocence that he knows nothing about these burglaries."[31]
>
> "The Prosecution invites you to look at the still album, JT-2. Look at the shape and form of the person in the picture and to draw reasonable inferences. The Prosecution say to you it is not for their witnesses to say, it is this Accused or not this Accused. It is for you, ...having the facts, you are the ones who have to come to your conclusion. So even if a witness told you it is Willliam Penn, you are free to reject that witness' testimony. At the end of the day, it is for you to determine who committed this offence and all the other offences. The Prosecution told you that … Officer Antoine gave you evidence as to the length of the door and said that the door was…6 feet, 10 and a half inches in length and the various evidence of this Accused is 6 feet 2 inches. The Prosecution is saying that the shape and form of the man captured in the video is none other than this Accused, William Penn. As I told you, you could draw reasonable inferences, but you must not speculate about whatever there might have been or allow… yourself to be drawn into speculation. The Prosecution's case is that the person who went to Villa Euphoria was not wearing a glove, but the Defence is saying to you that Mr.Tittle cannot tell you,…whether the person was wearing a glove. So you will examine the pictures carefully to see whether or not the person captured in the video was wearing a glove or not wearing a glove. Officer Tittle is not saying that the person is not wearing the glove or the person is wearing the glove. All he is saying is he can't tell whether the person is wearing the glove."[32]

[48] The learned Director of Public Prosecutions apart from relying on the cases previously discussed referred further to the Irish case The Queen v Richard Kieran Stevens[33] in support of his submission that since the video tape and stills were not the sole evidence of identification in the appellant's case, it was unnecessary to give any special direction to the jury for their consideration of the videotape and still photographs of a masked robber.

[49] In Stevens Carswell LCJ delivered the judgment of the Court of Appeal following the appellant's appeal against his conviction for a bank robbery carried out by an armed and masked robber captured in the act on the videotape of the bank's closed circuit television camera. This video tape and its still photographs were

[31] At page 51 line 22 to page 52 line 12 of the Transcript Vol. 3
[32] See paragraphs 18 and 23 of this judgment
[33] [2002] NICA at paras 21, 23 and 24

admitted in evidence and shown to the jury. The appellant had confessed to his associate about robbing the bank. This associate testified against the appellant at the trial. The appellant's counsel complained that the judge should have given the jury a Turnbull type warning which was mandatory, in respect of their identification of the appellant from the video and the still photographs taken from it. The trial judge had told the jury that they were entitled to look at the accused in the dock and when giving evidence and make up their own minds. He did not give them any general warning of the risks involved in identification or the more specific matters discussed in Dodson.

[50] The court held in Stevens that comparison of the still photographs with the applicant was a straightforward matter on which more detailed directions were not required, and no special factors were relied on as taking the case outside of that category. Even though the trial judge did not give the jury any warning on the dangers of identification from photographic evidence which should be given in most if not all such cases; and is almost invariably required, a conviction may still be safe notwithstanding its absence. The court considered that the jury clearly took their task of comparison seriously and devoted time and trouble to it, and they considered that on the facts of the case the conviction was safe in this respect

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[51] Broadly speaking the facts in Stevens bear some similarity to the appellant's case to some extent. Considering that the jury specifically requested to have the video before retiring and the time they spent in their deliberations, and consistent with the reasoning of the Court of Appeal in Stevens, we conclude that no more than ordinary common sense and judgment was required having regard to the facts in the appellant's case. In our view, on examination of the total directions, it required no further specific direction from the learned trial judge to come to a safe conclusion. We therefore conclude that these limited directions of the trial judge on this aspect of the evidence would not have compromised the fairness of the trial.

Ground 6 – The Judge's Retirement Directions to the Jury

[52] Having directed the jury in the terms stated in this ground;[34] the learned judge, after she had given instructions regarding the space to be occupied by the jury during their retirement, corrected her directions before the jury retired under the following circumstances and in the following manner:

> "MR WILLIAMS: Just one thing, on another issue, the directions as regard the time for deliberations, I would think the jury would need to know there is no - -
> THE COURT: No limit. There is no limit.
> MR WILLIAMS: And that they can come back earlier and there is no pressure, of course.
> THE COURT: You can come back anytime you want to. There is no limit. I used the word "may". Officer, could you check what is the hold up Inspector Fahie, is it ready?
> INSPECTOR FAHIE: Yes My Lady.
> THE COURT: So, Madam Foreman and Members of the Jury, you can retire to the jury room. The secretary will come along with a proper menu. Lunch will be provided for you.
> (THEREUPON, the jury retired to the jury room to deliberate at 11:53 a.m.) (Court resumes at 2:02 p.m.)
> (THEREUPON, the jury returned at 3:04 p.m.)"

[53] Upon their return the jury returned a verdict of guilty for counts 1,2 and 4. Dr Archibald complained that the judge rushed the jury to arrive at a verdict within 2 hours and the Director of Public Prosecutions made matters worse by saying that the jury could come back before. The jury, Dr Archibald said, should have been warned to take their time and consider carefully; instead the judge compounded the error in her instructions by saying that there was no time limit when this could mean 6 hours, which is inconsistent with sections 35 and 26 of the Jury Act Cap. 36.[35]

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[34] See para. 6 of this judgment: "and Members of the Jury, I will ask you to retire and consider your verdict. During the time frame it is now 25 to 12:00. You should return a verdict in two hours time with an hour provision for lunch. So you will be given up to 25 to 3:00 to deliberate, and hour being spent for lunch."

[35] Section 35 states:" A verdict of a jury shall not in any proceeding, be accepted within two hours after the conclusion of the Judge's summing up, may be, unless it is unanimous, but after the expiration of two hours from the conclusion of the summing up, any verdict, in which seven of them agree, may be accepted as the verdict of the whole, unless it is the verdict of guilty or not guilty of a capital charge, which shall not be accepted at any time unless it is unanimous.
Section 36 provides: "If, in any proceeding, no verdict is delivered by a jury within four hours after the conclusion of the summing up of the presiding Judge, and the Judge is satisfied that there is no prospect of the jury agreeing, he may discharge them."

[54] Having regard to sections 35, 36, and 37[36] of the Jury Act it seems to us that the jury could have returned a unanimous verdict within 2 hours after the conclusion of the summing up, or a majority verdict where 7 of them agreed after 2 hours and within 4 hours from the conclusion of the summing; and the outer limit of the jury's deliberations beyond 4 hours would depend on how the trial judge exercises the discretion to discharge the jury or permit the jury to continue their deliberations. In other words, after 4 hours from the conclusion of the summing up the trial judge could permit the jury to continue their deliberations where the jury was not unanimous for even a period beyond 6 hours, once the judge is satisfied that there is a reasonable prospect of the jury agreeing.

[55] The overriding principle is that no pressure must be exerted on a jury to return a verdict and they should be free to deliberate uninfluenced by any promise and untimidated by any threat. It has long been recognized that where the judge issues an ultimatum or stipulates a deadline, the conviction is liable to be set aside.[37]

[56] The learned Director of Public Prosecutions whilst conceding that the judge made an error in practice, argued that her subsequent instruction that there is no limit served to remove the 3 hour limit erroneously imposed; and his statement that the jury could come back earlier was consistent with the law in section 35 of the Jury Act which permitted the jury to return a unanimous verdict at any time after the conclusion of the summing up.

[57] In our view the trial judge's mistake bears no striking similarity to the mistake made in any of the 3 cases Dr. Archibald cited: See McKenna;[38] Rupert Crosdale v The Queen;[39] De Four v State.[40] After the jury in McKenna had been deliberating for over two hours, they were told by the judge that, if they did not reach a verdict within the next 10 minutes, they would have to be 'kept all night'. That was at least

[36] Section 37 permits the trial judge to discharge the jury whenever from any cause the trial of any proceeding shall prove abortive and the proceeding may be tried with a new jury.
[37] See R v Baker [1997] EWCA Crim 2966 Per Lord Mantell citing R v McKenna at Fn41
[38] (1960) 44 Cr App R. 68
[39] Privy Council App No. 13 of 1994 (Jamaica) delivered 6th April, 1995
[40] [1999] 1 WLR 1731

capable of conveying the impression that they would be kept in their jury room. Thus warned, they took a mere five minutes more to convict, but the pressure to which they had been subjected meant that the verdict could not stand and McKenna's conviction was quashed.

[58] The Privy Council held in Crosdale that the judge should not have asked the jury whether they wished to retire. It is a cardinal rule of criminal procedure that a trial judge must avoid any hint of pressure on a jury to reach a verdict; and in the context of the summing up which trenchantly exposed improbabilities in the defence case the judge's remarks fell foul of this principle; and their Lordships did not exclude the possibility that one or more jurors understood the judge to be conveying to them that there was really nothing to discuss. The judge in De Four asked the foreman if they would be able to reach a verdict if given more time. The foreman said they would and the judge gave them an additional 30 minutes and the jury subsequently returned a verdict of guilty within 20 minutes. The Privy Council found that the reference to the period of thirty minutes was in fact an imposition of a time limit. In other words the jury was given to understand that they had 30 minutes within which to reach a verdict.

[59] The significant distinction in the appellant's case is that though the judge at first appeared to impose a time limit, she corrected herself before the jury retired. The jury was then sent out and came back with their unanimous verdicts 39 minutes beyond the time originally stated by the judge. It is clear that the jury would have understood from her corrected instruction that there was no deadline or time limit to their deliberations and that they were free to deliberate beyond 2:35 p.m. As was stated in R v Baker,[41] every case must turn on its own particular facts. We do not consider that the learned judge's mistake which was subsequently corrected can reasonably be construed as placing pressure on the jury. We are satisfied that the conviction which resulted is not unsafe.

Ground 8 – The Length of the Custodial Sentence Imposed.

[41] [1997] EWCA Crim 2966 (17th November 1977)

[60] The learned judge imposed the sentence of 8 years on each count after considering and applying settled sentencing principles and Desmond Baptiste and The Queen.[42] She also considered other cases determined in the BVI where the accused pleaded guilty and custodial sentences of 5 years were imposed. The maximum sentence prescribed for burglary is 14 years imprisonment. The learned judge considered the facts and circumstances surrounding the commission of the offences, the character and record of the appellant, and the mitigating and aggravating factors in a commendable sentencing judgment. The learned Director of Public Prosecutions bemoaned the absence of sentencing guidelines from our court in the case of domestic burglary offences while submitting that the sentence should be increased.

The English Guidelines

[61] In Mc Inerney and Keating v R[43] a guideline judgment as to the appropriate sentencing levels in the case of offences of domestic burglary was given by the Court of Appeal in England as a result of the advice of the Sentencing Advisory Panel ("the Panel") dated 9 April 2002. Some of this guideline may be relevant and suitable for burglary cases in our jurisdiction.

Aggravating Factors

[62] The judgment recognized at paragraphs 20 to 24 that the aggravating factors which a sentencer should take into account are at 2 levels: high level and medium level. The high level aggravating factors are: force used or threatened against the victim; a victim injured (as a result of force used or threatened); the especially traumatic effect on the victim, in excess of the trauma generally associated with a standard burglary; professional planning, organisation or execution; vandalism of the premises, in excess of the damage generally associated with a standard burglary; the offence was racially aggravated; a vulnerable victim deliberately targeted (including cases of deception or distraction of the elderly). The medium-

[42] Criminal Appeal No 8 of 2003 (St. Vincent and the Grenadines) delivered 6th December 2003. See paragraph 45.
[43] [2003] 2 Cr App R. 240

level aggravating features are: a vulnerable victim, although not targeted as such; the victim was at home (whether daytime or night-time burglary); goods of high value were taken (economic or sentimental); the burglars worked in a group.

[63] The number of offences in relation to which the offender is to be sentenced may indicate that the offender is a professional burglar which would be a high level aggravating feature but even if they do not fall within this category the number could still be at least a mid level aggravating feature. The fact that the offender is on bail or licence can also be an aggravating feature as can the fact that the offence was committed out of spite. While not indicating what percentage uplift should result from the presence of either the high-level or medium-level factors the guidelines state that it is appropriate for the sentencer "to reflect the degree of harm done, including the impact of the burglary upon the victim whether or not the offender foresaw that result or the extent of that impact". If, of course the offender foresees a result of the offending behaviour then that increases the seriousness of the offence.

Mitigating Factors

[64] The mitigating features which obviously are appropriate to take into account in mitigating the seriousness of the offence are set out at paragraphs 25 to 31 of the judgment. They include: a first offence; nothing, or only property of very low value, is stolen; the offender played only a minor part in the burglary; there is no damage or disturbance to property. The fact that the crime is committed on impulse may also be a mitigating factor; as also a timely plea of guilty which serves to reduce the determinate sentence by 20%. In addition, the offender's age or state of health, both physical and mental can be a mitigating fact, so can evidence of genuine remorse, response to previous sentences and ready co-operation with the police.

[65] In judging the antecedent record it is of course necessary to take into account the type of offence for which the offender has previously been convicted and the number of offences which were considered on any particular occasion. It is of

importance to consider the efforts which an offender has or has not made to rehabilitate himself. In the case of offences committed because the offender is an alcoholic or a drug addict, while the taking of drink or drugs is no mitigation, the sentencing process must recognise the fact of the addiction and the importance of breaking the drug or drink problem. This is not only in the interests of the offender but also in the public interest since so commonly the addiction results in a vicious circle of imprisonment followed by re-offending. When an offender is making or prepared to make a real effort to break his addiction, it is important for the sentencing court to make allowances if the process of rehabilitation proves to be irregular. What may be important is the overall progress that the offender is making. This is part of the thinking behind drug and treatment orders. An offender convicted of a single domestic burglary will accrue a qualifying conviction. Equally an offender convicted on one occasion of three burglaries who asked for another three burglaries to be taken into consideration will also only accrue one qualifying offence. The totality of the actual criminal behaviour is important.

Determining the Nature of the Custodial or Non-custodial Sentence

[66] Where a custodial sentence is necessary, then it should be no longer than necessary. In the case of repeat offenders and aggravated offences long sentences will still be necessary. As to the incremental increases in custodial sentence, the increase in sentencing levels should slow significantly after the third qualifying conviction. It is necessary to retain a degree of proportionality between the level of sentence for burglary and other serious offences.

[67] Where the legislative provisions permit the use of community service punishment for sentencing, for a burglary lacking in aggravated features, and committed by a first-time domestic burglar (and for some second-time domestic burglars), where there is no damage to property and no property (or only property of very low value) is stolen, the starting point should be a community sentence or other appropriate non-custodial sentence.

[68] The offence may be regarded as a standard domestic burglary where it is a burglary which has some of the following features: (i) it is committed by a repeat offender; (ii) it involves the theft of electrical goods such as a television or video; or the theft of personal items such as jewellery; (iii) damage is caused by the break-in itself; (iv) some turmoil in the house, such as drawers upturned or damage to some items occurs; (vi) no injury or violence, but some trauma is caused to the victim. For a domestic burglary displaying most of the features of the standard domestic burglary the initial approach of the courts should be to impose a community sentence [or other appropriate non–custodial sentence] subject to conditions that ensure that the sentence is (a) an effective punishment and (b) one which offers action on the part of the Probation Service to tackle the offender's criminal behaviour and (c) when appropriate, will tackle the offender's underlying problems such as drug addiction. If, and only if the court is satisfied the offender has demonstrated by his or her behaviour that punishment in the community is not practicable, should the court resort to a custodial sentence. It will be pointless to try and identify all the factors that will indicate that a community disposal is not a practical option but they may relate to the effect of the offence on the victim, the nature of the offence or the offenders record.

[69] If an offender has not complied with the requirements of a community punishment [or other non custodial sentence] this will be a strong indicator that a custodial sentence and possibly a substantial sentence is necessary. The Court observed that the new approach to sentencing and community punishment will set real challenges for the Probation Service while benefiting the public as it requires appropriate action to tackle the offending behaviour of the offender. It will also result in a saving in the increasing expense of imprisonment. The public will also benefit because it should help to reduce the demands placed on the Prison Service by ever increasing numbers. We approve and recommend these guidelines to sentencers in our courts.

[70] Having considered the submissions of Dr.. Archibald and the Director of Public Prosecutions and the totality of the actual criminal behaviour leading to the

appellant's convictions we find no fault with how the learned judge weighed and analysed the factors that she took into account in arriving at the sentence. She identified 7 aggravating factors including the 2 high level features of professional planning of the crimes, and that the complainants were vulnerable victims deliberately targeted. We approve her sentencing judgment which modeled the above stated English guidelines and have no valid reason to disturb the long sentence imposed.

[71] For all of the reasons previously stated we would dismiss the appeal against conviction and sentence and affirm the sentence.