EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2015/0005

BETWEEN:

VIOLET HODGE

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. John Carrington, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Julian B. Knowles, QC with him, Mr. Patrick Thompson for the Appellant
Mrs. Tiffany Scatliffe Esprit with her, Mr. O'Neil Simpson for the Respondent

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2017: July 12;
2018: February 27.

Criminal appeal — Offence of conspiracy — Whether variance between complaint and evidence is substantial to result in unfairness to appellant— Whether defects in complaint renders conviction unsafe — Sections 217 and 218 of the Magistrate's Code of Procedure Act of the Virgin Islands — Whether procedural and technical points not addressed in the lower court may be addressed for the first time on appeal — Identification evidence — Identification parade versus dock identification — Turnbull direction — Section 146 of the Evidence Act of the Territory of the Virgin Islands – Whether magistrate's self-direction on identification evidence which failed to consider the provisions of section 146 renders conviction unsafe — Whether magistrate failed to properly take into account appellant's good character — Accomplice evidence — Issue of corroboration — Sentencing — Whether delay in the hearing of a matter is a mitigating factor in sentencing

The appellant, Violet Hodge ("Mrs. Hodge") was convicted in the Magistrates' Court for the offence of conspiring with persons unknown to import cocaine into the Territory of the

Virgin Islands ("the Territory"). She was sentenced to six years' imprisonment and fined $100,000.00. The proceedings which led to this appeal commenced with information provided by four accomplices: James Springette ("Springette"), Eduardo Diaz ("Diaz"), Roberto Hurtado ("Hurtado") and Elton Turnbull ("Turnbull"), all were convicted in different jurisdictions in relation to drug trafficking. At the trial, the Crown adduced evidence of a conspiracy involving Mrs. Hodge, who acted as a translator in discussions concerning drug trafficking and air drops into the Territory and passed coded messages to her husband, Earl "Bob" Hodge. Mrs. Hodge denied the allegations of conspiracy and refuted knowing the accomplices, except her childhood acquaintance, Turnbull.

The magistrate found that Mrs. Hodge was part of the agreement to import cocaine into the Territory and accepted the evidence of the accomplices that she acted as translator during discussions on drug trafficking and passed messages relating to drug trafficking to her husband.

Mrs. Hodge, dissatisfied with the magistrate's decision, appealed against her conviction and sentence. The issues arising in this appeal can be broadly summarised as follows: whether section 217 of the Magistrate's Code of Procedure Act proscribes against objecting to a complaint or information, not only in substance or in form, but also for any variance between the complaint or information and the evidence adduced at trial; whether the magistrate properly directed herself on section 146 of the Evidence Act 2006 (the "Evidence Act") and on the issue of corroboration; whether the magistrate's direction on accomplice evidence was wrong in law; whether the magistrate correctly treated with the issue of identification evidence; whether the magistrate dealt adequately or at all with the inconsistencies in the prosecution's case; whether the magistrate failed to properly take into account the appellant's good character; and whether the sentence imposed is excessive having regard to the appellant's age and health, and the delay between the appellant's initial charge and her conviction and sentence.

Held: dismissing the appeal against conviction; affirming the conviction; allowing the appeal against sentence to the extent that the sentence of six years' imprisonment is varied to five years' imprisonment, that:

1. Section 217 of the **Magistrate's Code of Procedure Act** appears to proscribe against objecting to a complaint, not only in substance or in form, but also for any variance between the complaint or information and the evidence adduced at trial. However, in construing section 217, the courts have adopted the following approach: in the case of a slight variance between the evidence and the information, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is of a substantial nature, issues of justice and fairness would be engaged, with the prosecution being required to amend the information.

   Section 217 of the Magistrate's Code of Procedure Act, Cap. 44, Revised Laws of the Virgin Islands considered; **Garfield v Maddocks** 1974 QB 7 applied; **R v Graham** [1997] 1 Cr App R 302 applied.

2. To determine whether a conviction should be upheld, the primary consideration for this Court is the safety of the conviction. The court should adopt a purposive examination of the matter and a very weighty consideration would be the question of whether material unfairness has been caused to the appellant. In this case, no material unfairness or prejudice has been caused to the appellant and this Court is reluctant to take too technical or formalistic an approach to the complaint laid against the appellant as such an approach could result in quashing the conviction where there is clear evidence in support of it. A mere technical flaw in the drafting of the particulars cannot invalidate the complaint or vitiate the appellant's conviction. Additionally, such procedural and technical points should be taken at the time of the trial when they can be properly and fairly addressed.

   R v Graham [1997] 1 Cr App R 302 applied; **R v White** [2014] 2 Cr App. R 14 applied; **R v Stocker** [2013] EWCA Crim 1993 applied.

3. The dangers of dock identification are that it lacks the safeguards that are offered by an identification parade and the accused's position in the dock positively increases the risk of a wrong identification. In this case, the identification of the appellant in the dock was a formality and cannot be said to be a dock identification properly so called. The dangers inherent in a dock identification were certainly not present in the case at bar. There was no unfairness to the appellant as Springette had known her for 30 years and indicated the circumstances under which that knowledge was acquired. There was no danger of Springette assuming simply because of the appellant's presence in the dock, she was the person whom he had met and had known for 30 years. Therefore, the complaint that the magistrate did not consider whether there were exceptional circumstances justifying the admission of the dock identification is without merit.

   France and Vassel v the Queen [2012] UKPC 28 applied; **R v Popat** [1998] 2 Cr App R 208 applied; **John v The State of Trinidad and Tobago** [2009] UKPC 12 applied.

4. Where criminal matters are determined without a jury, a magistrate has the conjoint role as judge of law and facts. In this case, the magistrate correctly advised herself of the law and appropriately treated with the issues of corroboration and accomplice evidence. Upon review of her decision, this Court is satisfied that her treatment and appreciation of section 146 of the **Evidence Act** was unassailable.

   France and Vassel v the Queen [2012] UKPC 28 applied; **Stewart (Andrew) v R** [2015] JMCA Crim 4 applied.

5. The good character direction comprises two elements: the credibility limb which signifies that a person of good character is more likely to be truthful than one of bad character, and the propensity limb, that a person of good character

is less likely to commit a crime, especially one of the nature charged. In the instant case, the magistrate clearly articulated the two limbs of the good character direction and fully took into account the good character of the appellant. The magistrate assessed the evidence before her and, as the judge of the facts, made important findings as to credibility and reliability having accepted that the accomplice witnesses were truthful. Therefore, there is no merit in the complaint that the magistrate's treatment of the appellant's good character rendered the appellant's conviction unsafe.

6. In cases where the offender is a mature individual with no apparent propensity for the commission of the offence, the sentencer may take this into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances. In the instant case, given the seriousness of the offence charged, the appellant's age would be of little relevance as a mitigating factor. As it relates to the appellant's health, her condition is now in remission and provides no adequate basis for a reduction in the sentence imposed.

   Desmond Baptiste v The Queen Saint Vincent and the Grenadines Criminal Appeal No. 8 of 2003 (delivered 6th December 2004, unreported) applied.

7. In determining the sentence to be imposed, it is necessary to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be considered in sentencing and its effects can be recognised by a reduction in sentence. In the instant case, the magistrate gave no reason for not examining delay as a mitigating factor. The delay between the appellant's initial charge and subsequent conviction and sentence spans a period of five years, for which no fault can be attributed to the appellant. In the circumstances, the Court in exercise of its discretion considers that a one year reduction for delay would be fair.

   Andre Penn v The Director of Public Prosecutions BVIHCR2009/0031 (delivered 18th February 2015, unreported) considered; **Mills v Her Majesty's Advocate** [2004] 1 AC 379 441 applied; **Regina v Kerrigan** [2014] EWCA Crim 2348 applied; **Attorney General's Reference No. 79 of 2009** [2010] EWCA Crim 338 applied; **R v Phillips et al** [2015] EWCA Crim 427 applied; **Mills v HM Advocate** [2004] 1 AC 441 applied.

JUDGMENT

[1] **BAPTISTE JA**: Violet Hodge ('the appellant"), a successful business woman and well known citizen of the Territory of the Virgin Islands ("the Territory"), was convicted in the Magistrates' Court in Tortola, for the offence of conspiring with persons unknown to import cocaine into the Territory. The presiding magistrate, Her Honour Ayanna Dabreo-Baptiste, sentenced the appellant to six years imprisonment and fined her $100,000.00.

[2] The appellant was bilingual, being a fluent Spanish speaker. Her role in the conspiracy was the discrete one of acting as a translator and taking coded messages for her husband (Earl "Bob" Hodge) another well-known citizen, when they met in South America and Tortola with named persons in relation to the smuggling of cocaine.

[3] The evidence against the appellant came from four accomplices: James Springette ("Springette"), Eduardo Diaz ("Diaz"), Roberto Hurtado ("Hurtado") and Elton Turnbull ("Turnbull"), who were all convicted in different jurisdictions in relation to drug trafficking. They all spoke to the appellant's role in the conspiracy. In a nutshell, the Crown's evidence was that the appellant, her husband and Springette were present in Venezuela in 2000-2001, where she translated discussions concerning drug trafficking in the British Virgin Islands. The appellant was present and assisted in translating discussions involving her husband and Diaz that concerned drug trafficking and airdrops. The appellant had phone conversations with Turnbull about the airdrops to her husband. The appellant was one of the translators who assisted and facilitated conversations between Hurtado and her husband which concerned the coordination of airdrops and transporting drugs to the Puerto Ricans.

[4] The appellant denied participating in any conversation about drug trafficking or being a translator for her husband or serving as a translator to facilitate conversations in drug trafficking. The appellant stated that her husband was "ok"

in the Spanish language. She had heard of Springette but had never met him; and she had never met Hurtado and what he stated was untrue and she denied meeting Diaz. The appellant testified to knowing Turnbull as a child but denied receiving any calls or messages from him to give to her to husband and never received any coded messages to pass on to her husband.

[5] The magistrate believed the evidence of the accomplices, rejected the appellant's evidence and found as a fact that the appellant was part of the agreement to import cocaine into the Territory of the Virgin Islands; acted as translator during discussions on drug trafficking and passed messages relating to drug trafficking to her husband. The appellant was accordingly found guilty and has appealed her conviction and sentence.

The Appeal

[6] Several grounds of appeal are advanced against conviction. The issues arising in this appeal can be broadly summarised as follows: whether there was evidence to support the charge against the appellant; whether the magistrate properly directed herself on section 146 of the **Evidence Act 2006**[1] (the "Evidence Act") and on the issue of corroboration; whether the magistrate's direction on accomplice evidence was wrong in law; whether the magistrate correctly treated with the issue of identification evidence, Turnbull directions and dock identification; whether the magistrate dealt adequately or at all with the inconsistencies in the prosecution's case; and whether the magistrate failed to properly take into account the appellant's good character.

Submissions

[7] Mr. Knowles, QC, the appellant's counsel, contended that in order to prove the case against the appellant, the prosecution had to prove beyond reasonable doubt that the appellant conspired with a person or persons unknown. In developing that theme, he posited that although the appellant was accused in the complaint of

[1] Act No. 15 of 2006, Laws of the Virgin Islands.

conspiring with Lucien Smith and persons unknown, no evidence was led that she conspired with persons unknown. Further, the case against Lucien Smith was dismissed at the end of the prosecution's case, following a no case submission. Mr. Knowles asserted that the prosecution's case at trial and the conspiracy they attempted to prove was that the appellant conspired with her husband Earl "Bob" Hodge and other known persons (namely, Springette, Diaz, Hurtado and Turnbull) to import cocaine. Mr. Knowles argued that this was the conspiracy which ought to have been alleged against the appellant. The appellant was accordingly charged with the wrong conspiracy and this constituted a fundamental defect which should result in the quashing of the conviction. In the circumstances, Mr. Knowles submitted that there was no evidence to support the complaint laid and as such the appellant should be acquitted.

[8] Mr. Knowles also contended that the magistrate misdirected herself as to what the prosecution had to prove by way of conspiracy. That contention is derived from the magistrate's statement that the prosecution had to provide evidence that the appellant participated in the agreement in the sense that she agreed with one or more of the persons referred to in the complaint, including persons unknown, that the unlawful object of the conspiracy should be carried out. In that regard, Mr. Knowles observed that there was no known person referred to in the complaint except Lucien Smith, and he was acquitted at the close of the prosecution's case.

[9] In reply, Mrs. Scatliffe Esprit, the respondent's counsel, invited the court to reject the submissions of the appellant as being unmeritorious. This invitation is predicated on three bases: first, Mrs. Scatliffe Esprit prayed in aid sections 217 and 218 of the **Magistrate's Code of Procedure Act**[2] and submitted that the effect of these sections is that no objection is capable of being sustained against any form of complaint laid before the Magistrates' Court. Secondly, Mrs. Scatliffe Esprit relied on **Archbold: Criminal Pleading, Evidence and Practice 2017**[3]

[2] Cap. 44, Revised Laws of the Virgin Islands.
[3] Archbold: Criminal Pleading, Evidence and Practice 2017 at paras. 33-47.

which provides:

> "Where the evidence discloses that the accused conspired with other persons who are not before the court, this should be averred in the indictment. If they cannot be identified, it is sufficient to identify them as "persons unknown". Sometimes, the evidence may be unclear as to which identifiable persons were involved. In such circumstances, there can be no objection either to "other persons unknown", or to "other persons". However where, during the course of the trial, the uncertainty is resolved by evidence which is capable of founding the assertion that an identifiable person not before the court was a conspirator with the accused, then the indictment should be amended accordingly."

I doubt whether this extract from **Archbold** assists the Crown. Mrs. Scatliffe Esprit however argued that it was entirely within the Crown's right to say "persons unknown", as those persons were not before the court in these proceedings, and it would not be necessary to name those persons once the evidence revealed who they were.

[10] Thirdly, Mrs. Scatliffe Esprit dismissed as fallacious, the argument that there was no evidence led as to persons unknown who conspired with the appellant to traffic drugs into the Territory. She posited that several parts of the evidence led by the Crown spoke to persons not before the court who were involved in the conspiracy: Merinda Rojas ("Rojas"), who was present when there were conversations between Hurtado, Earl Hodge and the appellant; as well as Sarah (Hurtado's wife), who was present when Hurtado, Diaz, Hodge and the appellant had conversations about drug trafficking; Juan Boscan ("Boscan") – Springette's assistant, present when the appellant and Hodge met Springette in Venezuela to discuss logistics and other things about drug trafficking; and the numerous references to Carlton Beazer ("Beazer"), Tico Harrigan ("Harrigan"), and Chad Skelton ("Skelton"), who were subject of extradition proceedings. In the premises, Mrs. Scatliffe Esprit submitted that the complaint was proper and the appellant failed to demonstrate how she was prejudiced by the complaint containing the phrase "with persons known and unknown". Further, the Record of Appeal does not reflect any objection raised by the appellant's counsel at trial.

Discussion

[11] It would be useful to begin with the circumstances giving rise to Mr. Knowles' submissions with respect to the evidence and correctness of the complaint laid. The appellant was originally charged with conspiring with her husband, Earl "Bob" Hodge and four other men - Harrigan, Beazer, Skelton, and Valdez - and with persons unknown to import cocaine. The five named men had been simultaneously subject to extradition proceedings in the United States in respect of the same offence. A decision was taken not to proceed against them locally and the Crown discontinued the case against them. The complaint was amended, their names were deleted from it and Smith was added as a conspirator. The amended complaint alleged that the appellant conspired with Smith (the charge against him was dismissed at the close of the prosecution's case) and other persons known and unknown to unlawfully import cocaine into the Territory. Mr. Knowles argued that although the charges against the five men were dropped because of United States extradition proceedings against them, there is no reason why their names had to be deleted as conspirators on the written complaint against the appellant.

[12] It appears to me that Mr. Knowles' basal contention is with the charging process in the Magistrates' Court and whether the complaint was correctly laid. This is illustrated in his contentions that the wrong conspiracy was charged; the complaint was correct in its original form but became incorrect when the names were deleted; and that the evidence led does not support the amended complaint. Mr. Knowles' complaints call for a closer examination of the complaint without oath and the evidence.

[13] In the complaint without oath, the Commissioner of Police is named as the complainant and the defendants are the appellant, Smith "and other persons known and unknown". The body of the complaint also speaks to the appellant, as well as Smith "and other persons known and unknown". Then follows the statement of offence: conspiracy to import a controlled drug contrary to section

311 (1) of the **Criminal Code 1997**.[4] The particulars of offence are that the appellant and Smith between the 1st day of January 1998 and 29th day of September 2010 in the Territory and Territorial waters of the Virgin Islands together "and with other persons unknown" did conspire to unlawfully import into the Territory a control drug to wit cocaine. It is seen that there is no reference in the particulars to "other persons known and unknown". It speaks to: "with other persons unknown".

[14] The evidence shows that Springette was arrested in Venezuela in 2002 and was convicted of drug trafficking and conspiracy to traffic narcotics in 2005 and sentenced to 35 years imprisonment. His sentence was reduced to 17 years and 10 months as he agreed to testify in a number of cases in the United States. Springette is serving time in California at a federal correctional facility. He received immunity from prosecution in the British Virgin Islands. Springette's evidence was that the appellant's husband came to Venezuela while he was there to discuss logistics like where plane drops would be, percentages for him, storage fees and codes they would speak in and to let him (Springette) know that he would be working directly with Turnbull, his (Springette's) cousin, as a facilitator to bring the drugs. The appellant was present with her husband during the discussions and she was very fluent in Spanish. The other person present during the discussions was Juan Boscan, Springette's assistant. Springette also said that he had discussions on a number of topics with the appellant including sending her exotic birds, as she liked birds.

[15] Diaz testified that he rented a property in Tortola belonging to the appellant and her husband. The appellant was in charge of the property and provided silverware and other things needed at the property. Diaz first met the appellant at the house he was arrested in Tortola and had also interacted with her at a house belonging to her husband. Diaz took Hurtado's wife (Sarah) and Hurtado there. They discussed airdrops and investments in the British Virgin Islands. The appellant

[4] Act No. 1 of 1997 of the Virgin Islands.

was present at the table when they spoke about the airdrop. Spanish and English were used during the conversation and he (Diaz) and the appellant were translating.

[16] Hurtado, a Colombian national, was serving a term of prison in Miami, having entered a plea deal in relation to drug-trafficking offences in the United States. Hurtado became involved in drug trafficking in 1987 and used to carry drugs by boats and planes to Tortola and some other Caribbean islands. He met the appellant's husband in 1998. The appellant's husband could not speak Spanish and he, Hurtado could not speak English. He had to communicate with "Bob" – the appellant's husband, by way of the appellant. In 2009 he was in Tortola coordinating airdrops of drugs. He would send the drugs by planes and boats to Tortola. The appellant's husband would transship them to Puerto Rico. He went to the appellant's husband's house. The appellant and her husband were there. They discussed drug trafficking, hiding the drugs and getting them to the Puerto Ricans. The appellant would translate the conversations. The other accomplice witness was Turnbull, who indicated that sometimes when he called the Hodge's residence, he would pass messages to the appellant for her husband in relation to proposed shipments.

[17] It is an opportune time to assess Mr. Knowles' complaint that Springette provided no evidence of the appellant's involvement in drug trafficking and the magistrate was wrong to treat his evidence as if he had. Mr. Knowles asserted that Springette did not give any clear evidence that the appellant acted as a translator for her husband in relation to drugs. He said he spoke to her about exotic birds. Mr. Knowles argument may have had some merit, if the appellant's presence at the meeting was considered in a vacuum or was merely passive. That, however, was not the situation that obtained. Once the magistrate accepted, as she did, that the appellant's role was to act as a translator for her husband and that Springette and her husband engaged in discussions about drug trafficking and that the appellant was present during those discussions, there was more than an

adequate evidential basis upon which the magistrate could find as a fact or at the very least, draw a very strong inference of fact, that Springette provided evidence of the appellant's involvement in drug trafficking. It was clearly open on the evidence for the magistrate to so find. The suggestion that the magistrate misapprehended Springette's evidence does not commend itself to me and is unmeritorious.

[18] The statement of offence and the particulars of offence speak to a known and existing criminal offence: conspiracy to import a controlled drug-cocaine contrary to section 311 (1) of the **Criminal Code 1997**. While recognising that the case against Smith was dismissed and the particulars refer to "other persons unknown", the evidence led by the Crown shows that a number of known persons were involved in the conspiracy including the five men whose names originally appeared on the complaint but were later deleted. At the highest, there seems to be a variance between the evidence led and the particulars of offence in so far as the particulars refer to "other persons unknown" whereas the evidence showed that the appellant conspired with known persons. Does that lead to the conclusion that the wrong conspiracy was charged or there was no evidence to support the conspiracy charged? What is the effect of the variance between the evidence led and the particulars of offence?

[19] I will consider the variance between the evidence led and the particulars of the offence. This necessarily engages section 217 of the **Magistrate's Code of Procedure Act**; it provides:

> "No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein in substance or in form for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint."

[20] Section 217 is undoubtedly wide and appears to proscribe against objecting to a complaint, not only in substance or in form, but also for any variance between the complaint or information and the evidence adduced at the trial. Despite its

amplitude, section 217 is given a more constrictive berth in its construct. Guidance as to its construction is derived from **Garfield v Maddocks**.[5] There, in referring to the similar wording in section 100 of the **Magistrate's Court Act 1952** in England, the court explained that though the words of the section are extremely wide and on their face seem to legalise almost any discrepancy between the evidence and the information, they have in fact always been given a more restricted meaning. The court went on to articulate the modern approach in construing section 217. In the case of a slight variance between the evidence and the information, the information may be allowed to stand notwithstanding the variance which occurred. If, however, the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend in order to bring the information into line.

[21] It is seen that the modern approach does not call for the quashing or setting aside of the complaint when there is variance between the evidence and the information. A slight variance between the two would not jeopardise the propriety of the information. If the variation is of a substantial nature, issues of justice and fairness would be necessarily engaged, with the prosecution being required to amend the information. In that regard, I note that Mrs. Scatliffe Esprit stated that the prosecution is not seeking to amend the information.

[22] The concern for the court is the safety of the conviction. I do not regard the variance between the complaint and the evidence to be that substantial so as to result in unfairness to the appellant. As previously indicated, the prosecution's evidence showed that the appellant played a very discrete role in the conspiracy, that of a translator and passing coded messages. The appellant's role in the conspiracy remained the same whether under the complaint as originally filed or as later amended and the evidence led supported that role. The appellant could not have been misled by any variance in the evidence led and the particulars of

[5] [1974] QB 7.

offence. No material unfairness or prejudice has been caused to the appellant. I would describe the situation here as a technical flaw in the drafting of the particulars, not invalidating the complaint or vitiating the conviction.

[23] The test for the court remains that of the safety of the conviction. In that regard, **R v Graham**[6] is instructive.

[24] In **Graham**, Lord Bingham stated at page 309:

> "Our sole obligation is to consider whether a conviction is unsafe. We would deprecate resort to undue technicality. A conviction will not be regarded as unsafe because it is possible to point to some drafting or clerical error, or omission, or discrepancy, or departure from good or prescribed practice… But if it is clear as a matter of law that the particulars of the offence specified in the indictment cannot, even if established, support a conviction of the offence of which the defendant is accused, a conviction for such an offence must in our opinion be considered unsafe. If a defendant could not in law be guilty of the offence charged on the facts relied on, no conviction of that offence could be other than unsafe."

[25] In **R v White**,[7] at paragraph 20, the court posited:

> "The recent trend has been to look at indictments purposively, that is to say, as safeguards against unfairness. Where no material unfairness is caused to the defendant, the courts are increasingly reluctant to take too technical or formalistic an approach. Thus in R v Stocker [2013] EWCA Crim 1993 … this court surveyed the authorities on nullity, and noted (per Hallet LJ at [42]) "a clear judicial and legislative steer away from quashing an indictment and allowing appeals on a purely technical defect".

[26] It is recognised that the case at bar is not dealing with an indictment, but like the English court, the approach of this Court should be geared towards giving priority to substance over form. It should encompass a purposive look at the matter and a very weighty consideration would be the question whether material unfairness has been caused to an appellant. It is recognised, of course, that cases differ, so the inquiry would of necessity be fact sensitive. Absent a finding of material unfairness, the court should eschew adopting an approach that is too technical or

[6] [1997] 1 Cr App R 302.
[7] [2014] 2 Cr App R 14.

formalistic. Mr. Knowles' submissions that the prosecution procured the wrong charge, the charge is fundamentally defective, there is no evidence to support the charge and the conviction cannot stand, would, if accepted, result in the court taking a too technical or formalistic approach to the complaint laid against the appellant, in a case where no material unfairness has been caused to her and there is clear evidence to support the conviction. The court should not countenance such an approach. For all the reasons given I would dismiss Mr. Knowles' complaints.

[27] Mrs. Scatliffe Esprit quite validly contended that the issues Mr. Knowles raised about the complaint were not taken before the magistrate but are being ventilated for the first time on appeal. The taking of procedural and technical points for the first time on appeal should be firmly discouraged. The proper time for the taking of such points should be during the trial. In **R v Stocker**,[8] Lady Hallett addressed that issue in terms of the overriding objective of the criminal justice system. Her words are instructive and I respectfully adopt them:

> "The overriding objective of the criminal justice system is to do justice - to ensure the acquittal of the innocent and the conviction of the guilty. To that end, procedural and technical points should be taken at the time of the trial when they can be properly and fairly addressed."

I would urge counsel to be guided by Lady Hallett's salutary counsel and take technical and procedural points at the time of the trial.

Dock identification

[28] Mr. Knowles complains that the magistrate wrongly allowed Springette to make a dock identification of the appellant and having done so, did not direct herself correctly in relation thereto. Springette gave his evidence by video link and stated during his evidence: "[i]t is a distance but I think that I almost recognise Mrs. Hodge directly behind you in the Court Room". The appellant's evidence was that she never met or spoke to Springette. Springette's evidence was that he knew the appellant by the name of Lettie. He knew her for 30 years, a longer

[8] [2013] EWCA Crim 1993 at para.42.

period than he knew her husband, Earl Hodge. Springette also testified to a closer relationship with the appellant for at least 20 years while she was the girlfriend of Earl Hodge, whom she eventually married. He testified that the appellant was the sister of his brother's friend and while growing up, his brother Ronnie dated the appellant's sister and his sister Pam dated the appellant's cousin in St. Thomas.

[29] Mr. Knowles contended that on the evidence, there was an issue between the parties as to whether Springette had ever met the appellant. Mr. Knowles argued that the magistrate had to decide the issue whether Springette had properly identified the appellant, in accordance with relevant legal principles. Mr. Knowles asserted that the magistrate permitted the Crown, over the objections of the defence, to ask Springette whether he saw the appellant in court. The magistrate therefore relied on dock identification as support for Springette's evidence. Mr. Knowles submitted that the Crown should not have been permitted to adduce this dock identification, as it was unfair and prejudicial to the appellant and provided spurious support for Springette's evidence that he and the appellant had met. If the magistrate was going to allow the evidence, she should have directed herself appropriately, not having done so, the conviction is unsafe.

Discussion

[30] A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified, per Lord Kerr in **France and Vassel v The Queen**.[9] Where there was no identification parade, dock identification is not in itself inadmissible evidence but if the evidence is admitted, the judge should warn the jury to approach such evidence with great care. The dangers of dock identification are that it lacks the safeguards that are offered by an identification parade; and the accused's position in the dock positively increases the risk of a wrong identification: see **Holland v H M Advocate**;[10]

[9] [2012] UKPC 28 at para. 33.
[10] [2005] UKPC D1.

Tido v The Queen.[11] The dangers present when identification takes place for the first time in court, looms larger than a confirmation of an identification already made before trial. The nature of the warning that should be given is not the same in both instances. In **France and Vassel v The Queen**,[12] Lord Kerr explained:

> "Where the so-called dock identification is a confirmation of an identification previously made, the witness is not saying for the first time, "This is the person who committed the crime". He is saying that "the person whom I have identified to police as the person who committed the crime is the person who stands in the dock"".

[31] I regard Springette's identification of the appellant in the dock as a formality. It could not be said to be a dock identification properly so called. It was not a case where the appellant was previously unknown to Springette; he had known her for 30 years and indicated the circumstances under which that knowledge was acquired. I do not accept Mr. Knowles' submission that the identification provided spurious support for Springette's evidence that he had met the appellant. The dangers inherent in a dock identification were certainly not present in this case. There was no danger of Springette assuming simply because of the appellant's presence in the dock, she was the person whom he had met and had known for 30 years. There was no unfairness to the appellant. In the circumstances, Mr. Knowles' criticism that the magistrate did not consider whether there were exceptional circumstances justifying the admission of dock identification inevitably falls away.

Identification Parade

[32] I now discuss the issue of an identification parade. The normal function of an identification parade is to test the accuracy of the witness' recollection of the person whom he says he saw commit the offence. It is settled that in cases of disputed identification, an identification parade should be held where it would serve a useful purpose per **R v Popat**.[13] This principle is not all embracing, as a situation may arise where there is no point in holding an identification parade. An

[11] [2012] 1 WLR 115.
[12] [2012] UKPC 28 at para. 34.
[13] [1998] 2 Cr App R 208.

example would be a case where it is incapable of serious dispute that the defendant was known to the witness. The situation, as emerged in this case, where a witness claims to know the accused and the accused denies this, was foreshadowed by the Board in **John v The State of Trinidad and Tobago**.[14] In addressing the question as to whether an identification parade would serve a useful purpose, Lord Browne considered three possible situations: first, where a suspect is in custody and a witness with no previous knowledge of him claims to be able to identify the perpetrator of the crime; second, where the witness and the suspect are well known to each other and neither disputes this; and the third, where the witness claims to know the suspect and the suspect denies this (as in the present case).

[33] Lord Browne stated that in the first scenario, an identification parade would obviously serve a useful purpose. In the second it will not, as it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by the witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice.

[34] In my judgment, an identification parade would not have contributed to the testing of the accuracy of Springette's evidence of identification. Given the cogency of Springette's evidence that he had known the appellant for 30 years and having detailed the circumstances under which he knew her, it is pellucid that an identification parade would merely confirm that he knew and was well acquainted with the appellant. In the premises, no useful purpose would be served in the circumstances of this case by holding an identification parade. Furthermore, an identification parade in the present case would not be in fulfilment of the normal function of such a parade. It would be in essence to test the honesty of

[14] [2009] UKPC 12 at para.28.

Springette's evidence that he knew the appellant. That, however, is "not a claim that could be tested by a parade". The magistrate was presented here with a stark issue of credibility between Springette and the appellant.

[35] The testing of the honesty or credibility of a witness is quintessentially a matter for the tribunal of fact - here, the magistrate. Therefore, the issue of credibility between Springette and the appellant had to be resolved by the magistrate as the judge of the facts. The magistrate was aptly positioned to make a determination as to credibility, having seen and heard the witnesses. Not only does this Court lack that advantage, nothing has been presented to show that the magistrate misused or did not make proper use of the undoubted advantage she possessed. If the magistrate thought that Springette was lying, she would attach no weight to his evidence. If Springette were truthful there would have been no need for an identification parade and the dock identification would have been the purely formal confirmation that he knew the accused in the dock. The magistrate may have come to the conclusion that the appellant's denial of any knowledge of Springette was incredible. The fact is that the magistrate was obliged to consider the question of credibility and found as a fact that Springette was a credible witness; this Court finds no basis for interfering with that finding.

Warning of danger in relying on identification evidence

[36] Mr. Knowles also levelled the criticism that the magistrate failed to warn herself of the dangers of identification evidence generally and nowhere directed herself in relation to the Turnbull principles. As a starting point, in addressing Mr. Knowles' criticism, two factors must be recognised, both of which are important in this case. Firstly, one must not lose sight of the fact that this was not a trial before a judge and jury. The magistrate had the conjoint role as the judge of the law and the judge of the facts. The magistrate is assumed to be conversant with the legal principles relating to identification evidence and should demonstrate that those principles were applied. I am not of the view that such demonstration is only achieved by a magistrate expressly stating that those principles have been taken

into account. There may be cases where there is no such express statement by the magistrate, yet, upon a review of the matter, it can be concluded that the magistrate took such principles into account. This Court, necessarily, has to look at the relevant factual and legal issues under consideration.

[37] This leads to a consideration of the second factor which is: the possible dangers of relying on identification evidence have to be assessed at a practical rather than a theoretical level and as such should be directly related to the actual circumstances of the case. This is borne out in the observation of the Board in **France and Vassel v The Queen**:[15]

> "…that a formulaic recital of possible dangers of relying on identification evidence, if pitched at a hypothetical rather than a practical level (in the sense of being directly related to the circumstances of the actual case the jury has to consider) may do more to mislead. The purpose of what has been known as a Turnbull direction is to bring to the jury's attention possible dangers associated with identification evidence but that purpose is not achieved by rehearsing before the jury difficulties that might attend that evidence on a purely theoretical basis. A trial judge should always be conscious of the need to relate conceivable difficulties in relying on this type of evidence to the actual circumstances of the case on which they have to reach a verdict."

[38] The factual and legal issues under consideration in relation to identification and identification parade have been considered by the court. Having regard to the court's analysis of and conclusions on these matters and the fact that the Turnbull directions have to be pitched at a practical, rather than a theoretical level, and the magistrate's dual capacity as the judge of the law and of the facts, the criticism levelled against the magistrate is unwarranted. I accordingly find no merit in Mr. Knowles' complaint.

[15] [2012] UKPC 28 at para.14.

Section 146 of the Evidence Act

[39] In so far as is material, section 146 (1) of the **Evidence Act** applies to hearsay and identification evidence and evidence, the reliability of which may be tainted by self-interest, age or ill health. Section 146 (2) of the **Evidence Act** states that:

> "(2) Where there is a jury, the court shall, unless there are good reasons for not doing so,
>
> (a) warn the jury that the evidence may be reliable;
> (b) inform the jury of matters that may cause the evidence to be unreliable; and
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

[40] Mr. Knowles relied on the self-interest limb and complained that the magistrate did not properly direct herself on section 146 of the **Evidence Act**, as the prosecution witnesses Springette, Turnbull, Diaz and Hurtado were all accomplices motivated by self-interest. Mr. Knowles asserted that that interest was their desire to incriminate the appellant so that they could receive reduced sentences or other favourable treatment.

[41] Mr. Knowles contended that the magistrate's directions on accomplice evidence were manifestly inadequate and were little more than the sort of generalized warnings which the courts have said are insufficient. Mr. Knowles posited that the magistrate failed to specifically and explicitly direct herself that it would be dangerous to convict on the uncorroborated evidence of the prosecution's witnesses, and to analyze the evidence in light of the approach.

[42] Mrs. Scatliffe Esprit quite properly argued that Mr. Knowles' submissions persistently and erroneously sought to convert and equate the role of the magistrate with that of a trial judge. Mrs. Scatliffe Esprit correctly submitted that the magistrate advised herself of the law and demonstrated that she applied the

correct legal principles. In that regard **Stewart (Andrew) v R**[16] was relied on. The Court of Appeal of Jamaica stated:

> "Whilst it is true that a judge sitting as both judge and jury is assumed to be conversant with legal principles, he must nevertheless demonstrate that he applied those principles."[17]

[43] Upon reviewing the magistrate's decision, I am satisfied that her treatment and appreciation of section 146 of the **Evidence Act** was unassailable. The magistrate considered the issues of self-interest and accomplice evidence. At paragraph 445, the magistrate noted that the Crown's case relied on accomplice evidence and stated: "[t]he Court is conscious of the danger of relying on evidence of accomplices and is cognizant of section 146 of the Evidence Act 2006", especially section 146 (1) which speaks to evidence, the reliability of which may be affected by self-interest etcetera. The magistrate also referred to section 146 (2) of the Act relating to unreliability of evidence, reasons for unreliability, the need for caution and the weight to be attached to the evidence.

[44] At paragraph 471, the magistrate stated that she bore in mind her composite capacity of judge and jury and again warned herself of the danger of convicting upon the uncorroborated evidence of any of the accomplice witnesses. Critically, the magistrate stated that although there is no jury, the court must direct itself in similar terms to section 146 and must act in accordance with similar principles. The magistrate referred to the court's duty to evaluate the evidence, keeping in mind the principles of law in relation to reliability and credibility of the evidence proferred by the accomplice witnesses. In my judgment, the magistrate was fully alive to the fact that the Crown's case relied on accomplice evidence and properly advised herself of the danger of relying on accomplice evidence and convicting on the uncorroborated evidence of accomplices in the circumstances.

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[16] [2015] JMCA Crim 4.
[17] Ibid. at para.26.

[45] The magistrate considered the issue of self-interest in relation to Springette, Turnbull, Diaz and Hurtado and the submission by the defence that they would do or say anything in return for a reduced punishment or sentence. The magistrate paid regard to the uncontradicted assertion of Springette that his sentence was not going to be reduced any further by giving testimony at the trial. The magistrate noted that Diaz was in protective custody and his statement that none of his 37 months sentence in the United States has been reduced. The magistrate was cognizant of Hurtado's understanding that continued co-operation with the prosecution can lead to a request for his prison sentence to be reduced. Further, the more evidence he gives at the request of the prosecution agencies, the more his position improves, and he wanted to get out of prison as quickly as possible.

[46] The magistrate rejected the contention that the accomplice witnesses would say anything in order to reduce their sentences. In that regard she pointed out that this was not a case in which they were convicted and awaiting sentence. The accomplices had all been sentenced and had already received any reduction before the trial commenced. In the circumstances, the criticisms of the magistrate's directions on section 146 are unmeritorious. The magistrate more than amply demonstrated an appreciation for and proper application of the section.

[47] Mr. Knowles criticized, as being wrong, the two-tier approach adopted by the magistrate (at paragraph 463 of her decision) in evaluating the evidence of the accomplice witnesses. Mr. Knowles stated that the magistrate should have taken the following approach in her analysis of the evidence of each accomplice: she should have reminded herself that the evidence might be unreliable because they were accomplices; she should have identified those matters which might cause it to be unreliable; she should have borne in mind the need for caution in accepting the evidence and the weight to be given to it, as required by section 146; then in the circumstances of this case should have taken into account that it is dangerous to convict on the uncorroborated evidence of an accomplice. In my judgment, the magistrate's directions on accomplice evidence taken as a whole, clearly

encapsulated the approach suggested by Mr. Knowles. To my mind, Mr. Knowles' complaint appears to be a repetition of the unmeritorious assertion that the magistrate's directions with respect to section 146 of the **Evidence Act** were substantially inadequate.

Corroboration

[48] Mr. Knowles also complained that the magistrate's legal analysis of the issue of corroboration was obviously flawed. Mr. Knowles seeks to derive support for this contention by reference to paragraph 481 of the judgment, in which the magistrate stated:

> "while they cannot corroborate each other, given there is no suggestion of collusion, the court notes that the evidence of all four defendants is that the defendant assisted her husband whether by translating or by passing on messages to him."

Mr. Knowles argued that by saying "there is no suggestion of collusion" the magistrate effectively treated the evidence of the four witnesses as being mutually corroborative, but that was simply wrong. Mr. Knowles posited that it was central to the appellant's case that the evidence of each of the four accomplices was uncorroborated and that they could not corroborate each other's evidence, precisely because they were said to be co-conspirators in the same conspiracy and hence the possibility that they had colluded could be ruled out.

[49] In assessing the viability of Mr. Knowles' complaint, one cannot look at paragraph 481 in a vacuum. The narrative leading to paragraph 481 is instructive. At paragraph 464 of her decision, the magistrate stated the common law rule that one accomplice cannot corroborate another, particularly where the accomplices are persons who are principes criminis. At paragraph 466, the magistrate further highlighted that by saying that the evidence in this case made it necessary for her to point out that under the common law, one accomplice cannot corroborate another. At paragraph 471 the magistrate warned herself of the danger of acting on the evidence of any of the accomplice witnesses. The magistrate identified the accomplice witnesses and stated that she will bear their status in mind when

making factual findings in respect of the appellant. At paragraph 479, the magistrate found the evidence of the accomplice witnesses to be reliable, "after having advised [herself] of the danger of relying on the testimony of admitted accomplices to a drug trafficking ring".

[50] It is indisputable, from the foregoing, that the magistrate was fully alive to the principle that one accomplice cannot corroborate another and that it is dangerous to convict on accomplice evidence. The magistrate's statement in paragraph 481 "given that there is no question of collusion" cannot be taken out of context and does not have the effect contended for by Mr. Knowles. The magistrate was simply restating the summary of her earlier findings on reliability and credibility of the Crown's witnesses and that the accomplice witnesses cannot corroborate each other. It certainly would be a quantum leap to conclude that the magistrate treated the evidence of the four accomplice witnesses as being mutually corroborative. In my judgment, she did not. I would also add that it is insufficient for there to have been some misdirection or error in the conduct of a trial. What is critical is whether the verdict is thereby rendered unsafe. The position was stated by Lord Bingham in **R v Graham**:[18]

> "If the court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe."

Good Character

[51] Mr. Knowles submitted that the magistrate did not direct herself properly on the appellant's good character and hence the conviction is unsafe. Mr. Knowles asserted that the judgment did not demonstrate that the magistrate weighed the appellant's good character in her favour. The appellant's good character made it less likely that she committed the offence and more likely that she was telling the

[18] [1997] 1 Cr App R 302.

truth. He contended that the fact that the appellant had no previous conviction ought to have an important bearing on the assessment which the court must make of the prosecution's evidence and of the appellant's credibility and her denials of any involvement in drug trafficking.

Analysis

[52] Mr. Knowles' complaints call for an examination of the magistrate's treatment of the appellant's good character in the consideration of her evidence. The case presented a direct clash regarding the truthfulness of the main prosecution witnesses and the appellant, highlighted by the fact that these main witnesses were all accomplices. There was a stark issue of credibility as between the appellant and the prosecution witnesses. In that situation, the good character of the appellant was critical. It is well settled that the good character direction comprises two elements: the credibility limb which signifies that a person of good character is more likely to be truthful than one of bad character, and the propensity limb, that a person of good character is less likely to commit a crime, especially one of the nature charged. At paragraph 448 of the judgment, the magistrate referred to the defence's indication that the appellant's good character should be taken into account, as the fact of no previous conviction has an important bearing on the assessment the court should make of the prosecution's evidence and the assessment of the appellant's credibility and denial in wrongdoing. The magistrate expressly recognised the two limbs of the good character direction and proceeded to say that she will keep the appellant's good character in mind when assessing the evidence. To my mind, no issue can be taken with that approach.

[53] Having established the legal position, the magistrate proceeded to consider the appellant's evidence that: she had never met Springette or Hurtado and all what Hurtado stated was untrue; she knew Turnbull as a child but had never received any calls or messages from him to give to her husband; she never received any coded messages to pass on to her husband and that she had never translated for drug trafficking or drug dealing. The magistrate analyzed the evidence of the

accomplice witnesses and found that they were quite open about their role in the conspiracy to traffic drugs through the Territory. The magistrate noted that most of their evidence cantered around the appellant's husband and his role in the conspiracy. It was, however, clear from their evidence that the appellant's role was to translate for him or to pass messages to him. The magistrate rejected any assertion that the accomplices went out of their way to implicate the appellant. The magistrate advised herself of the danger of relying on the evidence of the accomplices and made the critical finding that their evidence was credible and reliable.

[54] In conclusion, the magistrate clearly articulated the two limbs of the good character direction and fully took into account the good character of the appellant. The magistrate demonstrated consciousness of the frailties of accomplice evidence. The magistrate analyzed and assessed the evidence before her and as the judge of the facts made important findings as to credibility and reliability, having accepted that the accomplice witnesses were truthful. In the circumstances I find no merit in the complaints that the magistrate's treatment of the appellant's good character rendered the judgment fatally flawed or the conviction unsafe.

Frailties in prosecution's case

[55] Mr. Knowles argued that there were a number of frailties in the prosecution's case. The appellant's principal role was that of a translator, but her uncontradicted evidence is that Mr. Hodge speaks Spanish, "He is okay, he can defend himself." Mr. Knowles contended that this evidence undermined the prosecution's case that the appellant's role was to act as translator as there would be no need for her to translate as her husband spoke Spanish.

[56] It is interesting to see how the magistrate treated with the appellant's evidence as to her husband's proficiency in that romance language. The magistrate assessed the appellant's evidence and noted that when the appellant was asked about her ability to speak Spanish she stated that she was fluent and when asked about her

husband's ability to speak Spanish she stated that "he is ok. He can defend himself" and when asked if he was always able to speak Spanish, the appellant stated "a little". The magistrate concluded that the evidence indicated that while the appellant's husband could speak a little Spanish, he was not a fluent Spanish speaker. This was a factual inference clearly open to the magistrate on the evidence and which the court has no basis for disturbing. This effectively undercuts the potency of Mr. Knowles' contention, the attraction of which lies in its superficiality.

[57] Mr. Knowles also highlighted the fact that Springette called the appellant, Letticia. Springette's evidence is that the appellant was called Letticia and this is the name he called her in the affidavits he signed. He said Letticia is the Spanish for Lettie. Mr. Knowles pointed out that the appellant said in her evidence that she has never been known as Letticia. Her name is not Letticia; it is Violet or Lettie.

[58] In the scheme of things the nomenclature of the appellant is of miniscule importance. The magistrate addressed Mr. Knowles' criticism by observing that despite the fact that Springette referred to the appellant as Letticia in his witness statement, during his testimony, he indicated that he knew her as Lettie. The magistrate noted that Turnbull also referred to the appellant as Lettie. Both Diaz and Hurtado referred to the appellant as "Bob's" wife. The court found that the witnesses were all referring to the appellant. It was clearly open to the magistrate to so find on the evidence.

[59] The magistrate also referred to Hurtado's description of the appellant as white, fat, being from Puerto Rico and having blonde hair. The magistrate acknowledged Mr. Knowles' contention that if the Hurtado knew the appellant and had spoken to her regularly for 15 years and had engaged in discussions regarding high level international crime with her, he would have known her name or where she was from. The magistrate noted that the appellant's grandparents are from Puerto Rico and the appellant admitted that people from the United States Virgin Islands

can be mistaken for Puerto Ricans and vice versa. Further, in the age of wigs and weaves, it is not necessary to have blonde hair to be blonde.

[60] The magistrate addressed the issue of the appellant's denial that she was called "La Gata", "the Blond", "the Monkey," "Letticia". The magistrate stated that Diaz indicated that he knew someone named Violet Hodge and Hurtado referred to her as La Gata. Hurtado stated that the appellant was presented to him by Bennito as "the Blond" or "the Monkey" but kept referring to her as "Bob's" wife. The magistrate observed that "oftentimes people refer to others by a nickname that they would not mention in that person's face and that "it cannot be the case that if the concerned person does not know of the nickname then the nickname does not exist." Additionally, the fact that the witnesses may not have known of the appellant's name does not mean that they never have met or interacted with her. The magistrate pointed out that Turnbull knew the appellant from childhood but did not know that her name was Violet until these proceedings. I see no reason to upset the magistrate's reasoning and conclusion.

[61] Mr. Knowles took issue with evidence that he asserted was given for the first time in the witness box and had invited the magistrate to disregard such evidence. The magistrate rejected that invitation. Mr. Knowles pointed to Turnbull's evidence concerning airdrops and posited that Turnbull's evidence that he passed coded messages through the appellant to her husband about airdrops came for the very first time in the witness box. There was nothing in his witness statement about it. Further, nowhere did Turnbull say that the appellant knew what the coded messages were about. Mr. Knowles also stated that Diaz never gave evidence before that the appellant was involved as a translator when there were discussions at the appellant's husband's home about airdrops and construction / purchase of a mall. Mr. Knowles submitted that when a witness says something for the first time in oral evidence in the witness box, not having mentioned it in his witness statement or in his affidavit, there is serious ground for doubting the credibility of the oral evidence. Mr. Knowles also labelled as defective, the magistrate's

treatment of "inconsistencies" between evidence given in the witness box and what was deposed to in the affidavits of witnesses.

[62] The issues raised by Mr. Knowles were all matters falling within the competence of the magistrate as the judge of the law and of the facts and it has not been demonstrated that the magistrate erred in her treatment of them. Mr. Knowles submitted that when a witness says something for the first time in oral evidence in the witness box, not having mentioned it in his witness statement or in his affidavit, there is serious ground for doubting the credibility of the oral evidence. The magistrate rejected Mr. Knowles' invitation to reject the evidence given for the first time in the witness box. The magistrate pointed out that the evidence the court relies on is the evidence given in the witness stand, the reliability of which is subject to testing by cross-examination. She also noted that the court does not depend on witness statements unless circumstances make it impossible for the witness to attend. The magistrate demonstrated consciousness of the rule that the previous statement of a witness can be used to show inconsistencies with his evidence given on the stand and to assist the court in assessing credibility and reliability. The magistrate stated that the extradition proceedings in relation to the appellant's husband have nothing to do with the current case. The magistrate however recognised the relevance of an affidavit given in the extradition proceedings if it contains evidence pertaining to the appellant, inconsistent with the evidence given by Hurtado in the case before her. In my judgment, the magistrate fairly, adequately and properly dealt with the issues raised by Mr. Knowles. Appellate reversal is unwarranted.

Sentence

[63] Mr. Knowles criticized the sentence imposed as too severe having regard to the appellant's age and state of health and for the failure of the magistrate to take into account the delay between the initial charge in August 2011, her subsequent conviction in 2015 and sentence in 2016 as a mitigating factor conducing to a reduction in sentence.

[64] The sole mitigating factor relied on by the magistrate, was the appellant's previous good character. The issues of the appellant's age and health can be disposed of before considering the question of delay. The appellant was a mature individual when she committed the crime and was 59 years old when sentenced. In cases where the offender is a mature individual with no apparent propensity for the commission of the offence, the sentencer may take this into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances: per Byron CJ in **Desmond Baptiste v The Queen**.[19] Given the seriousness of the offence charged, the appellant's age would be of little relevance as a mitigating factor. Regarding the appellant's health, though previously suffering from cancer, the appellant is now in remission. In the circumstances, Mr. Knowles' submissions based on the appellant's health, fall away.

Delay

[65] The issue of delay was ventilated before the magistrate. The magistrate specifically referred to the submission of the appellant's counsel that the court is empowered to consider the delay between the appellant's initial charge in 2011 and her conviction in 2015 and sentence in 2016. The magistrate referred to the fact that the local case of **Andre Penn v The Director of Public Prosecutions**[20] was cited as authority for the proposition that a prolonged delay in the hearing of a matter may have the effect of mitigating and reducing the sentence: **R v Kerrigan**[21] was cited with approval in that judgment. Although delay was canvassed before the magistrate, it would appear that the magistrate failed to give effect to it in sentencing the appellant.

[66] The principles regarding delay can be summarized as follows. In determining sentence, there is a need to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the

[19] Criminal Appeal No 8 of 2003, St. Vincent and the Grenadines.
[20] R v Andre Penn BVIHCR2009/0031 (delivered 18th February 2015, unreported).
[21] [2014] EWCA Crim 2348.

sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of **Mills v Her Majesty's Advocate**.[22] "A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly" per Lady Hallett in **R v Kerrigan** at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in **Attorney General's Reference No. 79 of 2009**.[23] He emphasised that applications for reductions in sentence would be unusual.

[67] With the guidance provided by the cases, this Court has to consider whether the magistrate erred in failing to make a specific allowance for delay in imposing sentence. There was ample material to support the assessment that the magistrate should have considered the issue of delay as a mitigating factor conducing to a reduction in sentence. The question of whether delay is excessive is really fact sensitive. The magistrate gave no reason for not factoring in delay as a mitigating factor. It is therefore open to this Court to exercise its discretion by assessing the facts and making a judgment as to what is required. There is no automatic right to a reduction in sentence on the ground of delay. As has been seen, the court possesses a residual discretion in the matter, per Mr. Justice King in **R v Phillips et al**:[24]

> "Discretion by definition requires a court to exercise an assessment of the facts and to make a judgment as to what is required"

[68] This was an extensive conspiracy spanning a number of years, involving many individuals, cross-border collaboration and lengthy investigations. This is part of

[22] [2004] 1 AC 441.
[23] [2010] EWCA Crim 338 at para. 19.
[24] [2015] EWCA Crim 427 at para. 23.

the context in which the issue of delay has to be seen. This however does not detract from the force of Mr. Knowles' submissions. The delay between the appellant's initial charge in August 2011, subsequent conviction in 2015 and sentence in 2016 span a period of five years. I recognise Mr. Knowles' assertion that the appellant did not unreasonably delay the hearing of her trial. When the Crown discontinued proceedings against the appellant's husband and others and pursued extradition proceedings, the proceedings against the appellant were effectively stayed. The matter went on hiatus until it was revived in or about 2014 and no fault can be attributed to the appellant.

[69] There was undoubted delay for which the appellant was not responsible. There would be anxiety resulting from the prolongation of the proceedings. Delay related grounds may justify an adjustment to sentence; one of the grounds would be the anxiety resulting from prolongation of the proceedings per Lord Hope in **Mills v HM Advocate**.[25] Reference has already been made to the appellant's state of health. In the circumstances, the court in the exercise of its discretion considers that a one year reduction for delay would be fair. The sentence of six years is accordingly reduced to five years.

[25] [2004] 1 AC 441 at para. 54.

[70] In conclusion, the appeal against conviction is dismissed and the conviction affirmed. The appeal against sentence is allowed to the extent that the sentence of six years' imprisonment is varied to five years' imprisonment.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
John Carrington, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar