COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 166 of 2023

B E T W E E N

GERALD FORBES
Intended Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS
Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane- Scott, JA

APPEARANCES: **Mr. Osman Johnson, Counsel for the Intended Appellant**

Ms. Cordell Frazier, Director of Public Prosecutions with Mr. Rashied Edgecombe, Counsel for the Intended Respondent

DATES: **20 February 2024; 10 April 2024; 29 May 2024**

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Criminal appeal – Application for an extension of time – Factors to be considered on an application for an extension of time - Overall justice of the case – Discovery – Whether the judge was required to ensure that the intended appellant was represented during the sentencing phase of the trial - Whether sentence unduly severe – Psychiatric history of the appellant in imposing sentence

Following a trial before a judge and jury, the intended appellant was convicted of rape and, having regard to the time spent on remand, sentenced to 12 years' imprisonment. The intended appellant now seeks to appeal both his conviction and sentence. He complains firstly, that the Judge ought not to have proceeded with the trial in the absence of certain reports and documents (i.e. the results of the details retrieved from his cell phone which, he submits, would have demonstrated that the sexual intercourse between himself and the virtual complainant was consensual), secondly, that the judge ought to have ensured that the intended appellant was represented by counsel for the sentencing phase of his trial and thirdly, that the sentence imposed was unduly severe and did not take in to consideration his psychiatric history.

Held (Barnett, P concurring): application for an extension of time refused. Conviction and sentence affirmed.

In determining extension of time applications the Court takes into account a number of factors and criteria: a) length of the delay; b) reason(s) for the delay; c) prospects of success; and d) prejudice to the respondent. The Court should also take into account the gravity of the offence, the severity of the sentence imposed, legal certainty, the public interest in the finality of

litigation, efficient use of judicial resources, good administration and the interests of other litigants. Consideration of all of the above factors is necessary to arrive at a decision which reflects the overall justice of the case.

The length of the delay is thirteen months which is unduly long. The intended appellant asserted that the reason for the delay was his suffering from a manic episode and his impecuniosity. There is no medical evidence submitted to substantiate this mental break and impecuniosity is not a reasonable excuse for a failure to make a timeous appeal. Notwithstanding, the undue delay and the partially accepted excuse therefor, the Court proceeded to consider the prospects of success.

There was no application to the court below for the cell phone or the results of any examination of it to be produced to the Defence. There is nothing disclosed to lead to a conclusion that a miscarriage of justice occurred or that the intended appellant did not get a fair trial.

In the court below, the intended appellant's counsel represented the intended appellant up to the time the probation officer had given her evidence. Counsel requested that the intended appellant be examined by personnel at Sandilands Rehabilitation Center ("SRC") as to his mental status prior to sentencing. At the time the report was produced from the doctor at SRC the intended appellant was still represented. Counsel sought an adjournment to study the report and call on the doctor to testify. Thereafter, counsel sought and was granted leave to withdraw. The intended appellant indicated that he would represent himself, the doctor's report was provided to him, and the judge adjourned the matter for two weeks. During the two weeks' adjournment the intended appellant was at liberty to retain another lawyer if he so wished; but he maintained his stance to represent himself, and he provided submissions as to the appropriate sentence he ought to receive. Having considered the circumstances of this case, the Court is satisfied that this ground is wholly without merit and holds no prospect of success.

It is the practice of an appellate court not to interfere with the exercise of a discretion by a tribunal unless it is shown that the tribunal has somehow fallen into error. Sentencing is an art and it is best left to the trial judge who has had the benefit of hearing the entire case, to determine the appropriate sentence an offender should receive. The sentence imposed on the intended appellant was not outside the range of sentences the Judge could have imposed and cannot lead to a conclusion that the judge applied a wrong principle of law or that the sentence is unduly severe.

Anthony Penn aka Anthony Smith v Regina SCCrApp. No. 180 of 2012 considered
Attorney General's Reference (Nos. 31, 45, 43, 42, 50 & 51 of 2003) [2004] EWCA Crim 1935 mentioned
Bain v The Queen [2020] UKPC 10 distinguished
Dustin Taylor v The Commissioner of Police MCCrApp & CAIS No. 63 of 2014 considered
Dwayne Dacosta v R SCCrApp. No. 19 of 2020 mentioned
Keith Jones v Regina SCCrApp. No. 11 of 2007 considered
R v Ball (1951) 35 Cr. App. Rep. 164 considered
R v Billam [1986] 1 All ER 985 considered
Rodriguez Jean Pierre v The King [2023] UKPC 15 applied
The Attorney General v Omar Chisholm MCCrApp. No. 303 of 2014 considered
The Director of Public Prosecutions v Dwayne Dacosta SCCrApp & CAIS No. 34 of 2020 mentioned

Wilson Balvin Taborda v Regina SCCrApp. No. 171 of 2017 considered

per Barnett, P: This case turned on whether the jury accepted the evidence of the virtual complainant over that of the intended appellant. The proposed grounds of appeal make no complaint about the judge's direction to the jury. By its 7-1 verdict the jury clearly accepted the evidence of the virtual complainant.

As to sentence, the sentence of 12 years is within the realm of reasonableness.

J U D G M E N T

<u>Judgment delivered by the Honourable Mr. Justice Isaacs, JA:</u>

Introduction

1. On 16 September 2022, the intended appellant was convicted of rape, contrary to section 6(a) of the Sexual Offences and Domestic Violence Act ("SODV") in a trial before Mr. Justice Bernard Turner, as he then was ("the Judge"). On 1 February 2023, the Judge sentenced him to twelve years' imprisonment as his time spent on remand had been taken into consideration during the sentencing phase of the trial.

2. On 5 September 2023, the intended appellant filed a Criminal Form No. 1 signaling the start of an appeal against his conviction and sentence. He set out some ten proposed grounds. They are proposed because he did not file his appeal within the period limited by statute for the filing of an appeal from the Supreme Court, that is, twenty-one days following the date of the decision being appealed was made. Section 17 of the Court of Appeal Act ("the COAA") provides as follows:

> **"17. (1) Where a person convicted desires to appeal to the court or to obtain the leave of the court to appeal under the provisions of this Part of this Act, he shall give notice of appeal or of his application for leave to appeal in such manner as may be prescribed by rules of court within twenty-one days of the conviction.**
>
> **(2) The time within which notice of appeal or of application for leave to appeal may be given, may be extended at any time by the court.**
>
> **(3) For the purposes of this section the date of conviction shall, where the Supreme Court has adjourned the trial of an**

information after conviction, be deemed to be the date on which such court has sentenced or otherwise dealt with the appellant."

3. Notwithstanding the intended appellant's failure to act within the mandated statutory period, section 17(2) of the COAA gives the Court the discretion to enlarge the period within which to appeal once an application for that purpose is made ("EOT application").

4. It is noted that the intended appellant filed a Supplementary Notice of Appeal on 28 March 2024, and an affidavit filed on the same date. These filings were necessitated because the intended appellant had not followed the usual process of an EOT application before filing his Criminal Form No. 1, to wit, supporting that Form with a Criminal Form No. 2, or as was belatedly done in this case, filing a Notice of Application for Extension of Time within which to appeal.

Leave to Appeal Out of Time

5. In determining EOT applications, the Court takes into account a number of factors and criteria. See **The Attorney General v Omar Chisholm** MCCrApp. No. 303 of 2014 and **Rodriguez Jean Pierre v The King** [2023] UKPC 15.

6. In **Chisholm**, this Court, differently constituted, identified four factors to be considered: a) length of the delay; b) reason(s) for the delay; c) prospects of success; and d) prejudice to the respondent.

7. In **Rodriguez Jean Pierre**, the Privy Council found that there were other matters for the Court to consider than those mentioned in **Chisholm**. At paragraph 27 they said:

> **"27. Furthermore, it should not be thought that the four criteria identified in [Alexander Williams v The Queen (SCCrApp. No. 155 of 2016)] are the only relevant criteria when considering an extension of time. It will be necessary to consider the overall justice of the case. In the Board's view, further relevant considerations will normally include the gravity of the offence and the severity of the sentence imposed. Considerations of legal certainty will also be highly relevant. There is an important public interest in the finality of legal proceedings, the efficient use of judicial resources, good administration and the interests of other litigants (Liburd v The Queen (Court of Appeal of the Eastern Caribbean) per Barrow JA at para 4; R v Thorsby [2015] 1 WLR 2901 per Pitchford LJ at para 13). It will also be necessary to take account of the interests of victims of crime and their families, and of witnesses."**

8. The takeaway from **Chisholm** and **Rodriguez Jean Pierre** is that the Court should consider the factors and criteria to arrive at a decision which reflects the "overall justice of the case".

9. Although the intended respondent offered no resistance to the EOT application based on any factor or criterium other than the prospects of success of the application, I hold the view that the Court ought to form its own view of whether the delay, the reasons therefor and the possibility of prejudice to the respondent are determinative or not.

Length of Delay

10. Since the intended appellant was sentenced on 1 February 2023, his appeal ought to have been made by 22 February 2023. His EOT application was not filed until 28 March 2024, some thirteen months after the time limited for appealing. I use 28 March 2024 date because strictly speaking, time continues to run until leave to appeal out of time is granted; but for present purposes, I am prepared to accept that time ceases to run once the EOT application is made.

Reasons for Delay

11. The explanation provided by the intended appellant in his affidavit in support of his EOT application may be found at paragraphs 4 through 10:

> **"4. THAT, I can recall that immediately following the Supreme Court's refusal of my application for bail on June 27th 2023, I was remanded to the Bahamas Department of Correctional Services and taken into custody. After my conviction and thereafter being remanded and eventually sentenced, my medical practice ceased operations and I had no income or other access to funds with which to properly instruct any Attorneys and I could not communicate with my immediate family to request their assistance with the payment of legal representation on my behalf, despite the fact that they had very limited financial resources themselves.**
>
> **5. THAT, at the material time of my conviction and/or sentencing neither myself nor my family had immediate access to funds, and we therefore could not properly instruct the firm of Ayse Rengin Dengizer Johnson & Co. and/or any other Attorneys to file the necessary Notice of Appeal Motion at the Court of Appeal Registry, within the requisite time limit following my conviction and/or sentencing.**
>
> **6. THAT, furthermore, I suffer from serious diagnosed mental conditions including bipolar disorder and other conditions, which following my conviction and eventual sentencing resulted in an acute psychotic episode that lasted several weeks and in which I was not mentally aware and/or lucid and therefore incapable of either instructing any Attorney and/or myself filling out the "Criminal Form No.1".**

7. THAT, after recovering from the manic episode, I prepared my "Criminal Form No.1" to appeal against my conviction and sentence and submitted this document to the prison officers on July 24th 2023, which I thought at the time was still within the legal deadline for filing an appeal, following my sentencing on July 19th 2023. I am not personally responsible for the fact that the relevant authorities did not have my "Criminal Form No. 1" filed at the Court of Appeal Registry until six (6) weeks later on September 5th 2023, and I humbly pray that your Lordships at the Court of Appeal do not hold me at fault for long delays in filing this appeal over which I had no control.

8. THAT, I attest and aver that I only received the "Criminal Form No. 1" from the authorities on or about July 21st 2023 and despite the fact that I had repeatedly requested this document since my conviction on or about September 16th 2022. I am advised by my Attorneys and verily believe that the authorities were under an obligation to provide me with the necessary documents for my appeal in a timely manner so that I could submit these documents within the legal time limit.

9. THAT, I am advised by my Attorneys and verily believe that the filing of the said "Criminal Form No. 1", dated by myself on July 24th 2023and filed on September 5th 2023 was not filed out of time as a result of any deliberate act on my part, who at all material times was in custody having been sentenced. Furthermore, I am advised by my Attorneys and verily believe that my ability to submit the present appeal within the statutory time period was prejudiced by matters outside of my control, including but not limited to, my status as a party in custody without freedom of movement and a total lack of access on my part and that of my family to funds with which to properly instruct Attorneys.

10. THAT, I am advised by the Appellant's Attorneys and verily believe that the grounds of the substantive appeal against my conviction and sentencing are compelling, and make specific reference to mistakes on the part of the presiding Justice as it concerns the failure to apply the relevant statutory provisions to his adjudication of my matter."

12. Other than the intended appellant's assertion of a manic episode, there is no medical evidence submitted to substantiate this mental break. Further, impecuniosity is not a

reasonable excuse for a failure to make a timeous appeal. I consider that the time period involved in this case is unduly long. The position taken by the intended respondent that the intended appellant could have written a letter to the Court expressing his desire to appeal his conviction and sentence and not await receiving the appeal forms from the Prison authorities is not without merit because there is a history of appeals having been launched in the Court by epistolary applications. Notwithstanding, the undue delay and the partially accepted excuse therefor, I proceed to consider other factors.

Prejudice to the Intendent Respondent

13. The intended respondent submitted that in relation to any prejudice enuring to the intended respondent, there is an important interest to be served in bringing finality to legal proceedings, the efficient use of judicial resources and the interest of the virtual complainant and the witnesses in the case. They posit that the virtual complainant deserves closure. While prejudice to the intended respondent is an important consideration, it cannot be afforded a place of prominence over the prospects of success as it would not be doing justice to deprive an appellant an opportunity to appeal his case if one or more of his grounds would meet with success and he would otherwise suffer an injustice if his grounds were not ventilated.

Prospects of Success

14. In seeking to persuade us that his proposed appeal had good prospects of success, the intended appellant enumerated his supplementary grounds of appeal as follows:

> **"1. The Learned Judge erred in law and/or in practice by failing and/or refusing to give effect the Appellant's rights under Section 203 of the Criminal Procedure Code, Chapter 91 in to so far as he refused to allow the Appellant to present any arguments and/or submissions in support of the Appellant's contention that there was no case to answer with respect to the charges against him.**
>
> **2. The learned judge erred in law and/or in practice by failing and/or refusing to consider whether or not a sufficient case was made out against the Appellant by the Crown, such as to require him to make a defence and these acts and/or omissions were in breach of the Appellant's statutory rights under Section 203 of the Criminal Procedure Code, Chapter 91.**
>
> **3. The learned judge erred in law and/or in practice by compelling the Appellant to submit a Defence to the charges against him in circumstances where the Appellant was not afforded an opportunity to present a submission of no case to answer to the Court as he is entitled to under the law.**
>
> **4. The learned judge ought to have held, on the basis of the evidence before the Court, that a sufficient case was not made out as against the Appellant by the Crown and**

in consequence thereof the charges should have been dismissed and the Appellant acquitted and discharged. The learned judge did not hear any arguments from the Appellant pursuant to Section 203.

5. The learned judge did not hear any arguments from the Appellant pursuant to Section 203 of the Criminal Procedure Code, Chapter 91 and the Appellant was left with the options of either calling witnesses, testifying in his own defence or remaining silent.

6. The learned judge erred in law and/or in practice by failing to consider properly or at all the impact on the proceedings caused by the unavailability of the original police file in the matter and the fact that various portions of the said file, including medical reports, doctor's notes and other documents were not available to the Court or the Appellant's Counsel.

7. The learned judge ought not to have allowed the prosecution of this matter to proceed in the absence of a complete file in the matter and ought to have directed the Crown to produce a complete file, either in original form or duplicate, prior to compelling the Appellant to face the charges.

8. The learned judge erred in law and/or practice by not ensuring that the Appellant was represented by either private or Crown appointed Counsel after the termination of the Appellant's original Attorneys prior to his sentencing. The learned judge ought to have held that the Appellant was entitled to the benefit of professional representation in lieu of the severity of the proceedings and potential penalties that he was facing and ought not to have proceeded to sentencing the Appellant in the absence thereof.

9. The learned judge erred in law and/or in practice by way of his failure to consider properly or at all the Appellant's psychiatric history and/or diagnoses for Bipolarism and other serious mental conditions in his overall adjudication of the relevant scope of sentencing and/or penalty to apply in this matter following conviction.

10. The learned judge ought to have held that there was an aspect of diminished responsibility on the Appellant's part, given his documented mental condition and ought to have accordingly reduced any sentence handed down

> **to the Appellant on the basis of the said diminished responsibility.**
>
> **11. The learned judge erred in law and/or in practice by failing to consider properly or at all the Appellant's lack of antecedents for offences of a similar nature and/or category and/or general lack of a criminal history with respect to his adjudication of the appropriate sentence to be imposed. The learned judge ought to have held that the Appellant was entitled to a more lenient sentence given his character and lack of antecedents, whether for offences of a similar nature and/or category or criminal offences generally."**

15. When a person convicted in the Supreme Court appeals to this Court, he does so pursuant to section 12 of the COAA. Section 12(1) provides that:

> **"12. (1) A person convicted on information in the Supreme Court after the coming into operation of this subsection, may appeal under the provisions of this Act to the Court on any of the following grounds —**
>
> > **(a) that evidence was wrongly rejected or inadmissible evidence was wrongly admitted;**
> >
> > **(b) that the verdict was unreasonable or could not be supported having regard to the evidence;**
> >
> > **(c) that under all the circumstances of the case, the verdict is unsafe or unsatisfactory;**
> >
> > **(d) that the conviction was erroneous in point of law;**
> >
> > **(e) that some specific illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the trial;**
> >
> > **(f) that the sentence passed was based on a wrong principle of law; or**
> >
> > **(g) that the sentence passed was unduly severe."**

16. Mr. Johnson opened his submissions by invoking sub-sub sections (a), (c), (e) and (g) of section 12(1) of the COAA and turning to his first ground. However, before he began his full throated arguments, his attention was drawn to the fact that section 203 of the Criminal Procedure Code ("CPC") upon which grounds 1 through 5 were predicated, fell within PART VIII of the CPC which bears the rubric "Procedure in Trials Before Magistrates' Courts". Mr. Johnson was constrained to concede that the proposed grounds 1 through 5

were not viable since the intended appellant was tried in the Supreme Court under an entirely different statutory regime; and he resiled from pursuing them. In the premises grounds 1, 2, 3, 4 and 5 of the Supplementary Notice of Appeal have no prospects of success. Hence, insofar as the success of the EOT application depends on those grounds, the application must fail to that extent.

Ground 6 - The learned judge erred in law and/or in practice by failing to consider properly or at all the impact on the proceedings caused by the unavailability of the original police file in the matter and the fact that various portions of the said file, including medical reports, doctor's notes and other documents were not available to the Court or the Appellant's Counsel

Ground 7 - The learned judge ought not to have allowed the prosecution of this matter to proceed in the absence of a complete file in the matter and ought to have directed the Crown to produce a complete file, either in original form or duplicate, prior to compelling the Appellant to face the charges

17. Grounds 6 and 7 canvass the same complaint, to wit, the Judge should not have proceeded with the trial in the absence of certain reports and documents. Hence, I address both grounds together.

18. Mr. Johnson submitted that section 12(1)(a) and (c) of the COAA was involved with these grounds; and made heavy weather of the fact that there were missing pieces of evidence which he considered of great importance to the intended appellant's defence, for example, the contents of the intended appellant's Blackberry cell phone that was collected by the police for examination but the result of such examination was not provided to Counsel or to the court. Mr. Johnson contended that the messages alleged to have been in the phone were of a sexual nature exchanged between the intended appellant and the virtual complainant; and had this material been disclosed, it would have had an impact on the credibility of the virtual complainant.

19. Mr. Johnson describes this as "an insufficiency of evidence before the court" and ought to have been addressed by the Judge at the material time. When asked if an application to stay the proceedings due to this lack of information was made, Mr. Johnson responded that none was made. I would add that apparently, throughout the course of conduct of the case prior to the start of the trial itself, no application for the discovery of any items of evidence [see page 7 of the trial record] said to be in the possession of the police was made by the Defence. Mr. Johnson attempted to impugn Counsel, Mr. Francis' and Ms. Adderley's, conduct of the intended appellant's case during the trial. However, that attempt must be short-circuited. There is no ground challenging the adequacy of Counsel's defence of the intended appellant or even a trace of an allegation of incompetence of the trial lawyers in any ground.

20. Mr. Johnson also complained about the absence of medical notes initially however, he did admit that the doctor appeared in the trial and testified as to her observations when she examined the virtual complainant. He admitted that "there is no evidence that it caused prejudice to the intended appellant. Despite this concession by Mr. Johnson, he maintained that the nonproduction of the text messages in the cell phone was crucial to his client's

defence. He argued that had the contents of the text messages been produced into evidence, the result of the trial may have been different.

21. The investigating officer, Assistant Superintendent Anthony McCartney ("ASP McCartney"), referred to the collection of a Blackberry cell phone from the intended appellant. The following appears at page 118 lines 13-24 of the transcripts:

> **"A: …He was taken to the Carmichael Road Police Station where he was booked in. While there I collected from him a Blackberry cell phone for further investigation purposes. I later handed this cell phone over to Detective Constable 3308 Pickstock at the Central Detective Unit.**
>
> **Q. And Officer McCartney could you indicate what if anything or what result came out of the cellphone that you collected?**
>
> **A. I got no feedback with respect to that cell phone. His cell phone was collected to assist with the investigation but there was no feedback from that."**

22. ASP McCartney testified that during his interview with the intended appellant, in the presence of his lawyer, the intended appellant mentioned that he and the virtual complainant exchanged cell phone numbers and he would communicate with her via text from time to time.

23. Under cross-examination by Ms. Adderley, ASP McCartney was asked about the cell phone at page 122 of the transcripts:

> **"Q. Okay. And you said that a Blackberry cellphone ws (sic) collected, correct?**
>
> **A. Yes.**
>
> **Q. That was collected from the suspect Dr. Forbes?**
>
> **A. Correct.**
>
> **Q. Which he voluntarily gave to you?**
>
> **A. While he was in custody. Yes.**
>
> **Q. And messages were alleged to be on the phone between the suspect and the alleged victim, correct?**
>
> **A. It was alleged to have been but I was not provided with any.**
>
> **Q. When you say "you were not provided". What does that mean?**

A. The purpose of handing over the cellphone to our technical is to either retrieved (sic) information, call logs and text messages - - like I say depending on the make and model he would be able to retrieved (sic) that information from the phone but I was not provided with any.

Q. Can you say whether the messages were downloaded?

A. I can't speak to them. I didn't get any.

Q. So, as a part of your investigation even though you collected the phone no messages were retrieved?

A. No. That's correct. No messages were retrieved.”

24. Ms. Adderley returned to the issue of the cell phone and at page 129 of the record the following appears:

“Q. And he give (sic) you the cellphone so, that you could check the information that he gave you during the interview, correct?

A. It was collected.

Q. So, it could have been checked to see whether these phone calls happened and whether these text (sic) happened as he had told you?

A. Yes.

Q. But you are saying it wasn't checked?

A. I'm saying I was not provided—it was handed over to the person responsible but there is no information regarding that.

Q. There's no information regarding that?

A. No.”

25. The missing text messages was a matter before the jury. Also before the jury was the intended appellant’s testimony at page 150 of the record that he had shown the messages on his phone to three police officers at the Carmichael Road police station after he was arrested:

“…But I can tell you this: When I was arrested, the first thing - - The guy who testified yesterday, he was in the background, he wasn't the primary person. There were three other police officers with him who knew me from Carmichael Medical Center - - I mean, from Carmichael Road Police Station, they were the ones who called me and say Doc, bey, this gen cost you. I say what you mean. Right. They say she looking for money.

> **I say no man that ain' how it go. I say y'all trying to get in on whatever going on here, you know?**
>
> **I say but, you know, my lawyer, you know, gen deal with the situation.**
>
> **I took one of the officers who knew me, and I know him, I say look in my phone at my text messages and the calls that was sent from Friday, Saturday, Sunday, Monday. Must have been 100 of that, if not. All of the texts, they looked at it. <u>They all was looking at the text messages. All of them</u>." [Emphasis added]**

26. The **"guy who testified yesterday"** was ASP McCartney and, according to the intended appellant's testimony "all" of the officers looked at the text messages on the cell phone. This, by inference, would have included ASP McCartney. The inference is strengthened by the following response of the intended appellant when he was being cross-examined at page 174 of the record:

> **"A. It wasn't like Mr. McCartney didn't know or wasn't a part of it. He was quite aware of what was going on. He was quite aware of what was going on and he knew all of the information that was in that phone, and I still ain' get my phone to this day."**

27. Yet, in cross-examination of ASP McCartney, nothing was put to the officer that he had seen these messages; and that there was, therefore, no need for the cell phone to be sent for the purpose of retrieving text messages from it **"to assist with the investigation".**

28. The tenor of the intended appellant's testimony suggested that he was being "shaken down" by the police and that the virtual complainant was a liar. The jury heard all of this evidence.

29. These two grounds attempt to place the responsibility on the Judge to adjudicate on the completeness or otherwise of a police file and to determine that the prosecution could not proceed until and unless a complete police file was provided to the Defence. Mr. Johnson was unable to provide any authority for this rather startling submission. It must be noted that the case against the intended appellant was via a voluntary bill of indictment pursuant to section 258 of the CPC. The Prosecution is obliged to provide an accused with statements of the evidence of witnesses whom it is proposed to call in support of the charge: S. 258(2)(a) of the CPC. Thus, the accused person is given forewarning of what each witness may say and accorded an early opportunity to raise any objection or make any request for material they believe may assist them at trial.

30. As an aside I note that when Inspector Mario Darrell, a crime scene investigator responsible for processing any crime scene where evidence would have been left, testified, he said he had collected a used condom from a waste basket in the bathroom/restroom where the incident was alleged to have happened; and that he had submitted it to the police forensic lab without doing any follow up on what may have resulted from an examination of the condom.

31. It is by no means unusual in criminal trials for the results of forensic examinations to go uncommunicated to the persons submitting them for analysis. The importance or lack thereof of the results vary from case to case depending on how crucial that evidence is to the case. Mr. Johnson has argued that the text messages on the intended appellant's cell phone were crucial to his case because they would have provided support for the intended appellant's assertion that the sexual intercourse was consensual and may have impacted the jury's view of the virtual complainant's credibility. In light of the intended appellant's testimony that he showed at least four police officers the texts and that there was no application to the court below for the cell phone or the results of any examination of it to be produced to the Defence, in my judgment, there is nothing disclosed to lead to a conclusion that a miscarriage of justice occurred or that the intended appellant did not get a fair trial.

Ground 8 – The learned judge erred in law and/or practice by not ensuring that the Appellant was represented by either private or Crown appointed Counsel after the termination of the Appellant's original Attorneys prior to his sentencing. The learned judge ought to have held that the Appellant was entitled to the benefit of professional representation in lieu of the severity of the proceedings and potential penalties that he was facing and ought not to have proceeded to sentencing the Appellant in the absence thereof.

32. Mr. Johnson contended that the Judge ought to have ensured that the intended appellant was represented by a lawyer after the intended appellant was convicted and then terminated Mr. Francis' services prior to the sentencing phase of the trial. Mr. Johnson admitted that the intended appellant did not request that the Judge appoint a lawyer for him; and that the intended appellant said that he would represent himself. Mr. Johnson argued that the Judge ought to have advised the intended appellant of the dangers of representing himself, which the Judge had failed to do. Mr. Johnson relied on the Privy Council's decision in **Bain v The Queen** [2020] UKPC 10.

33. In **Bain,** the appellant had been convicted of offences of kidnapping, robbery, housebreaking and murder. His appeal against conviction was dismissed by this Court (differently constituted) but his sentence was varied from life imprisonment to fifty-five years' imprisonment. He appealed to their Lordships in the Judicial Committee of the Privy Council against the dismissal of his appeal and the sentence of fifty-five years.

34. The principal ground of appeal against conviction as identified by their Lordships was that **"following counsel's withdrawal the appellant was unrepresented for nearly all of his trial. It is contended that counsel's withdrawal was mismanaged by the trial judge, resulting in an unfair trial."** Their Lordships focused on the exchange between Counsel for the appellant, the appellant and the trial judge and opined, inter alia at paragraph 26 that:

> **"26. …There was then a discussion about the provision of disclosed material and how the Crown was only obliged to provide one set, which culminated in the appellant stating that, as he understood it, he was being told that the only way he could get a copy of the material was if Mr**

> **Seymour was not representing him anymore and "for that reason" he would represent himself…"**

35. Lord Hamblen, who delivered the Privy Council's decision, observed at paragraph 31 that:

> **"31. Robinson shows that under a Constitution such as that of The Bahamas there is no absolute right to legal representation. As the majority point out, any such right could "all too easily lead to manipulation and abuse" (p 966). Whether to allow the trial to continue without legal representation for the defendant is a matter for the discretion of the judge. In the exercise of that discretion relevant considerations identified in that case include whether the lack of representation is due to the fault or choice of the defendant and the impact of any adjournment on the availability of witnesses." [Emphasis added]**

36. Lord Hamblen then distilled from the authorities he had referred to in his judgment the following guidance at paragraph 40:

> **"40. The guidance provided by Robinson, Dunkley and Mitchell may be summarised as follows:**
>
> > **(1) There is no absolute right to legal representation.**
> >
> > **(2) When counsel seeks to withdraw during the course of a trial consideration should be given to (i) persuading counsel to remain; (ii) explaining clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation; (iii) affording, where appropriate, time for reflection or a cooling-off period; (iv) the prejudice that the defendant will suffer if counsel withdraws, and (v) whether there should be an adjournment to enable the defendant to try to obtain alternative representation.**
> >
> > **(3) The decision to allow a trial to continue with an unrepresented defendant is a matter of the trial judge's discretion, but it is a discretion which must be carefully exercised. Relevant factors will include (i) whether the defendant is at fault and, if so, the degree of such fault; (ii) whether there is any suggestion of manipulation or abuse; (iii) whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice; (iv) the history of the proceedings and the stage which the trial has reached; (v) the**

> **apparent abilities of the defendant; (vi) the seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed; (vii) the availability of alternative representation; (viii) whether an adjournment will be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses.**
>
> **(4) The fact that a defendant is unrepresented does not in itself mean that the trial is unfair. If it is the result of the free and informed choice of the defendant or if he has brought it upon himself, as, for example, if he is judged to be manipulating the system, then it is unlikely to be unfair. Even if there is no such choice or fault, the prejudicial effect of the lack of representation needs to be considered. All relevant circumstances must be taken into account, including the impact of the defendant's lack of representation on the conduct of the trial, the evidence and the outcome.**

> **The Board would expand upon (2) to say that if there appears to be an impasse between the defendant and his counsel, consideration should be given to exploring whether there are any ways in which it might be overcome, if need be with a degree of compromise on both sides. This is especially important in a trial on a charge of murder or other grave offence, reflecting the observation in Dunkley (p 427) that it is highly desirable that a defendant in a murder trial should be continuously represented "where possible"."**

37. In my judgment, **Bain** is of little assistance to the intended appellant's case for a number of reasons. First, Bain faced a capital charge with a possibility of a death sentence. Second, Counsel deserted Bain at the start of the trial. Third, there had been no consideration to giving Bain an adjournment to enable him to secure alternative representation. Fourth, Bain was a man of limited education and reading ability. Fifth, their Lordships concluded that there had been mismanagement by the trial judge. Sixth, the provision of a skilled interrogator would have drawn out the various weaknesses in the Prosecution's case and Bain was prejudiced by this lack.

38. Lord Hamblen delivered the decision in **Bain** and at paragraphs 91-92 of his judgment concluded as follows:

> **"91. It is to be noted that in its ruling on section 13 of the CAA the two aspects of the evidence referred to by the**

> **Court of Appeal were the evidence of Davis and the appellant's confession. It is in relation to these two critical elements of the evidence that the appellant was seriously prejudiced by lack of representation.**
>
> **92. As to the Court of Appeal's decision to apply the section 13 proviso, the Board accepts that this was a justified conclusion on the basis of the evidence at trial. That evidence emerged, however, from a trial at which the appellant was unrepresented at all material times. For reasons already given, the appellant's lack of representation seriously prejudiced the appellant in relation to the evidence at trial and, in particular, the key evidence of Davis and of his confession. Had he been represented the evidence may well have been materially different. In such circumstances the Board does not consider that the proviso can be relied upon to dismiss the appeal. In the Board's view a miscarriage of justice has occurred." [Emphasis added]**

39. The intended appellant was facing a serious charge, but he "terminated" his lawyer, not at the start of his trial but during the sentencing phase. Mr. Francis represented the intended appellant up to the time the probation officer had given her evidence. Indeed, it was Mr. Francis who requested that the Judge order that the intended appellant **"be examined by the appropriate personnel in Sandilands Rehabilitation Center as to his mental status and possible treatment options, if any".** Mr. Francis was still Counsel for the intended appellant when he received a copy of the report from Dr. Jasmine Johnson and he requested an adjournment so he could study the report and for Dr. Johnson to attend the court to testify.

40. At page 293-4 of the trial transcript the following appears:

> **"THE COURT: Mr. Francis, you appear in this matter.**
>
> **MR. FRANCIS: Thank you.**
>
> **My Lord, yes in this matter, my Lord, I had a short conversation with my learned friend yesterday and for professional reasons I would humbly ask this court to withdraw from this matter.**
>
> **THE COURT: This is fairly late in the day. You feel that you cannot continue to represent the convict?**
>
> **Mr. Francis: My Lord, not at this point. I know me and my learned friend when we sit at this side and they sit on the front seat it may seem that we have some practical or theoretical incongruencies, but my Lord, there are just some personal convictions that I have and some incongruencies with the convict and I that leads me, my**

> **Lord –I can't take on this matter and I can't in good conscience continue with the matter, my Lord.”**

41. The Judge enquired of the intended appellant if he had any objection to Mr. Francis’ request and he responded, **“No, your Worship. His service was terminated.”** Similarly, the Prosecution offered no objection to the request. The Judge granted Mr. Francis leave to withdraw and enquired of the intended appellant whether it was his intention to get other counsel or to represent himself. The intended appellant told the Judge that he would represent himself.

42. As the matter proceeded, the intended appellant was provided with a letter from Dr. Jasmine Johnson and asked by the Judge whether he required Dr. Johnson to appear. Having been afforded an opportunity to read the letter, the intended appellant indicated to the Judge there was no need for the doctor to appear in court. The Judge asked when the intended appellant would be ready to make his submissions regarding sentence and the intended appellant replied that he was **“ready now”.** However, the Judge adjourned the case for two weeks while saying at page 296 of the record:

> **“THE COURT: In those circumstances I'm going to adjourn this matter to the 15th of February. As I said I could not do it today. I can't do for the rest of this week, certainly not next week. I will give he (sic) Prosecution an opportunity to present their submissions to you and for yourself, you have a chance when we return you would indicate what you consider to be the appropriate sentence that the Court should impose, if anything. The prosecution will have to do so as well. You might reference the report, the document, the probation report which you have.**
>
> **Was it your intention to call anybody as a witness on your behalf of character or otherwise? You don't have to do so, I'm just asking you. You have between now and the 15th to provide. If you do please let them know that they need to be here Wednesday the 15th at 10:00a.m. at which time we'll deal with this matter.”**

43. Having been reminded of another matter fixed for 10:00a.m. that day, the Judge told the intended appellant:

> **“So, Mr. Forbes, I will set it for 11:00, the 15th of February. We have another matter to deal with first and then we'll come to your matter.**
>
> **So if you are having anybody come here they can come for 11:00am. You will be brought down in person for that purpose.”**

44. During the two weeks' adjournment the intended appellant was at liberty to retain another lawyer if he so wished; but he maintained his stance to represent himself, and he provided submissions as to the appropriate sentence he ought to receive.

45. Having considered the circumstances of this case, I am satisfied that this ground is wholly without merit and holds no prospect of success.

Sentence

46. The intended appellant was convicted of rape, contrary to section 6(a) of the SODV and sentenced to twelve years' imprisonment. Section 6 of SODV provides as follows:

> **"6. Any person who —**
>
> **(a) commits rape;**
>
> **(b) attempts to commit rape; or**
>
> **(c) assaults any person with intent to commit rape,**
>
> **is guilty of an offence and liable to a term of imprisonment within the range of <u>fifteen years to imprisonment for life</u>." [Emphasis added]**

47. The Judge made his sentencing remarks between pages 302 line 7 and 306 line 6. They are as follows:

> **"THE COURT: Dr. Forbes, what I had started to say was that the question -- one of the things which you had said what was that this allegation all stemmed from precisely 13 years ago and you were convicted just short of six months ago in relation to this matter. And I have read all of the submissions you have given the court. I have read your character reference. I have considered the submissions of the prosecution in relation to this matter and I consider the time between allegation and conviction. And the principles of sentencing. In other words, I have considered the circumstances of the offence, and the circumstances of the offender. You are the offender. This Court has looked long and hard at whether there is any basis for any reduction in sentence based on this issue of these 13 years as you have described it. Now, you are requesting in your submissions and again just now that this Court give you a noncustodial sentence. The only basis upon which this Court can give you a noncustodial sentence is if I were to abdicate my professional duties and ignore an appropriate sentence for this type of matter. The court has to look at the offender. The offender is a medical doctor. The circumstances were, whether you accept it or not, an abuse of trust engendered by your professional status in respect of the relationship between your professional**

practice downstairs and where the Virtual Complainant worked upstairs. She did not say that she was your employee, and she does not put that in respect of she described it what you had described (sic) as the usual practice as between your office and the lab where she worked upstairs in respect of assisting by answering the telephone. In the context of that, she let you in that morning. But no type of employment arrangement, even if she was a full-time employee of yours would have given you the authority to request that she come into the bathroom. Because there is no part of any employment arrangement that anybody can be properly subjected to unwanted sexual advances. Much less sexual assault. You refer to the Virtual Complainant as (sic) liar. That she may be, but the process in this jurisdiction of criminal trials in the Supreme Court is that the persons who sit over here, the jurors, are the determinants of those facts. A jury of your peers, Bahamian electors, I believe, to serve as jurors, determined that you were guilty of the offence of rape. There was nothing extenuating about the circumstances of the rape. There was nothing extenuating or mitigating about your professional background . Indeed, unfortunately for you, it comes very much against you because it is a part of the subterfuge by which you came to be in the Virtual Complainant's work place on that morning. And so, your professional career has not been thrown away by the Virtual Complainant. Your professional career, Mr. Forbes, has been thrown away by yourself. You are the author and the finisher of your own fate. That is F-A-T-E.

In determining an appropriate sentence for you, therefore, you fall within the category of anybody else who has been convicted of rape which is that you have been convicted of a heinous offence. In looking at you, the court doesn't look with favour at your professional background, it is a matter of aggravation. However in respect of the length of time between the offence and conviction, I have determined that some time should be taken off for that. But the sentence requires a custodial sentence and one (sic) the arrangements of custodial sentences for this type of offence of rape. Counsel for (sic) prosecution has accurately and comprehensively summarized a range of sentences appropriate for these types of offences. That range which, as cited in counsel's submissions, range from persons who were in relationships but abused those relationships by nevertheless raping the person that they are family with or in a relationship with; to persons who broke into somebody's sacred space, their home and forced

themselves upon that person. You were not in a relationship, notwithstanding that you indicated a few minutes ago, at least according to the Virtual Complainant because the assertions that she made before the jury were not accepted, which you had said was that this was a rapidly developing relationship from the time that you met her, and all of this, as you have asserted, this reduced it -- those common denominators all of the sex talk over the week-end and then this arrangement for the following week. An arrangement which was culminated in the bathroom. The jury didn't accept that, so I am bound by the jury's verdict. The jury's verdict is based on the evidence of the Virtual Complainant. So that's what you leave me with to sentence you on. And having considered all that you have said, having considered this post event history that you described of psychiatric breaks, or the need for that type of treatment, that still does not absolve you of the gravity of the offence of which you have committed.

Counsel for the prosecution in submissions, suggested that a range of 15 to 20 years would have been appropriate. I will go beneath that, but not very far beneath that. The most that I can do in the circumstances of this matter, Gerald Mark Forbes, is to sentence you to a term of imprisonment of 12 years with effect from the 16th of September, 2022, which was the date of your conviction. You have a right of appeal against your conviction by the jury and this sentence or this sentence. (sic) You can appeal your conviction. You can appeal your conviction and your sentence or you can appeal your sentence. Three choices. That sentence, Mr. Forbes, also takes into consideration the short time you would have spent in custody prior to your conviction. In terms of calendar years, in respect of compliance with prison rules and regulations, you are looking at something like eight calendar years depending on the results of any appeal. You can get in the prison authority any necessary notice you wish to appeal any aspect of the matter.

Thank you, Mr. Forbes. You may have a seat.

Just so that it is very clear: The passage of time of this matter results in the court taking three years off of what I otherwise would have given you if this had been a conviction shortly after the offence, which would be a sentence of 15 years. In the circumstances of this particular matter, I have reduced it to 12 years due to this 13-year intermittent period. The prosecution will have

(sic) right of appeal. I need not tell them that. They have a right to appeal if they consider my sentence to be unduly lenient, they know how to appeal in respect of that."

48. Mr. Johnson submitted that although the Judge had before him the probation and psychiatric reports, he did not give sufficient weight to them and as a result, arrived at an unreasonable sentence. In his view, a sentence of seven or eight years would have been more appropriate. However, he was relying on the law as it was prior to the amendments to the SODV in 2009 which brought into effect the present sentencing regime.

49. I begin by recognising the practice of an appellate court not to interfere with the exercise of a discretion by a tribunal unless it is shown that the tribunal has somehow fallen into error. In **Keith Jones v Regina** SCCrApp. No. 11 of 2007, Osadebay, JA said at paragraph 23:

> **"23. It is not usual for this court to interfere with the exercise of discretion, by a trial judge below unless it is shown that the judge, in the exercise of that discretion failed to take into consideration those matters which he or she ought to have taken into consideration or took into consideration those matters which he or she ought not to have taken into consideration."**

50. Moreover, as sentencing is an art and it is best left to the trial judge who has had the benefit of hearing the entire case, to determine the appropriate sentence an offender should receive. In **R v Ball** (1951) 35 Cr. App. Rep. 164, Hilbery, J said at page 165:

> **"…In the first place, this Court does not alter a sentence which is the subject of an appeal merely because members of the Court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. <u>It is only when a sentencer appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this court will intervene</u>.**
>
> **In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways: It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an**

> **honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe." [Emphasis added]**

51. In **Anthony Penn aka Anthony Smith v Regina** SCCrApp. No. 180 of 2012, the appellant had been convicted for rape, burglary and armed robbery. He was sentenced for all of the offences, including twenty-five years for the rape. He appealed his sentence for rape as being excessive. Jones, JA rendered the decision of the Court, differently constituted, and said at paragraphs 45-6:

> **"45. In R. v Billam (Keith) [1986] 1 W.L.R. 349 at 351 the court speaking about sentencing for the offence of rape said:**
>
> > **'The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.'**
>
> **46. The crime was aggravated in this case as the appellant broke into the house of the complainant, used an imitation firearm to frighten her, and raped her while her young children slept in the bed with her. Furthermore, the complainant was put through the ordeal of giving evidence in a trial. Notwithstanding, we are of the view that a sentence of twentyfive years was unduly harsh for a first offence of rape and a proper starting point would be fifteen years to be increased to twenty years having regard to the aggravating factors referred to."**

52. It is immediately apparent that the present case is nowhere as egregious as Anthony Penn's case where the appellant ultimately received twenty years' imprisonment. Nevertheless, the Court must still determine whether or not the Judge crossed the threshold of undue severity when he sentenced the intend appellant to twelve years' imprisonment.

53. In **Wilson Balvin Taborda v Regina** SCCrApp. No. 171 of 2017, a Colombian national, pled guilty to the rape of a 79 year old woman, suffering from Alzheimer's disease. He did so after discussions with prosecuting Counsel who indicated that they would recommend a maximum ten year prison sentence, if he pleaded guilty. The offer was acceptable to his attorney. After hearing submissions from each side, the judge sentenced the appellant to twenty-eight years' imprisonment with a reduction of seven years for his guilty plea and a further one year for the time spent on remand awaiting trial. This amounted to twenty years' imprisonment. He appealed the sentence.

54. Barnett, JA (A'g), as he then was, writing the judgment with which the other members of the panel agreed, allowed the appeal, set aside the sentence and substituted a sentence of nine years' imprisonment. The sentence took into account the one year that the appellant spent on remand. In the course of his discussion, Barnett, JA (A'g) referred to a number of cases involving defendants who had been convicted of sexual offences. At paragraphs 20 through 26 the following appears:

> **"20. The range of 7 to 10 years was completely consistent with sentences of this court on charges for rape when the accused pleaded guilty and was a first offender.**
>
> **21. For example, in R v Comarcho [2011] 2 BHS J No. 48 an accused pled guilty to the rape of a woman after entering her home. He was sentenced to 4 years imprisonment, the judge having taken into account the fact that he has served 2 years on remand. This made it a total of 6 years that he was incarcerated.**
>
> **22. In R v Cooper [2008] 2 BHS J No. 21, the accused pled guilty to the rape of an 82 year old woman at the victim's home in early hours of the morning. He was a heavy cocaine user. He was sent to prison for 7 years.**
>
> **23. Attorney General v Campbell [2005] 4 BHS J. No 93 the accused, a mature male, was convicted after trial of unlawful sexual intercourse with an eleven year old girl. He was sentenced to 7 years' imprisonment.**
>
> **24. In R v Deon Ellis (2010) unreported the accused raped a 75 year old woman in her apartment. He was convicted after a full trial and sentenced to 13 years' imprisonment.**
>
> **25. More recently, in Bethel v R [2017] 1 BHS J 106 the Court of Appeal affirmed a sentence of 12 years when an appellant was sentenced after a conviction, after a full**

> **trial, of the rape of a dependent child who was 13 years old.**
>
> **26. During this appeal, counsel for the Crown candidly told the court in a recent case an accused was sentenced to 8 years for rape after a guilty plea, although it was her submission that the 8 year sentence was unduly lenient."**

55. To the above authorities referred to by Barnett, JA (A'g) I would add one cited in argument by Mr. Johnson, beginning with **Regina v Dwayne Benjamin DaCosta**. Mr. Johnson did not provide a citation for this case and the only cases published on the Court's website closely resembling that name are **The Director of Public Prosecutions v Dwayne Dacosta** SCCrApp. & CAIS No. 34 of 2020 which relates to an appeal that was withdrawn by the appellant and **Dwayne Dacosta v R** SCCrApp. No. 19 of 2020 which relates to an appeal against convictions for the offences of assault and abduction. The appellant in that case had been charged with unlawful sexual intercourse with a juvenile. During the trial, the virtual complainant was declared to be an adverse witness. At the close of the prosecution's case, a no case submission was made and acceded to. The Crown called upon the judge to leave the lesser offences which, they submit had been made out, to the jury. The judge left the alternative offences of abduction and assault to the jury and the appellant was convicted. His appeal to this Court was successful as the Crown did not apply to amend the indictment such that the appellant was not called upon to replead to the lesser charges. The appeal was allowed, the convictions quashed and a retrial was not ordered.

56. Mr. Johnson attempted to distinguish **Dwight Bethel v R** SCCrimApp. No. 58 of 2015 on its facts from the intended appellant's case insofar as in **Dwight Bethel**, the defendant was convicted of unlawful sexual intercourse with a dependent. He argued that the virtual complainant was an adult and not a dependent. He submitted further, that given the fact that the intended appellant had no antecedents and none of the aggravating factors mentioned in the case of **R v Billam** [1986] 1 All ER 985 were present in this case, the Judge ought to have imposed a sentence no greater than seven years.

57. Since Mr. Johnson has focused on the intended appellant's mental condition, he ought to be mindful of the dicta of Lord Lane CJ in **Billam** (ibid) where he said:

> **"…Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely to be a danger to women for an indefinite time, if he remains at large it will not be inappropriate to impose a life sentence."**

58. Also, the intended appellant should consider the further sentiments expressed by Lord Lane CJ in **Billam** (ibid):

> **"<u>The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction</u> from what would otherwise be the appropriate sentence. The amount of such reduction will depend on**

> **all the circumstances, including the likelihood of a finding of not guilty had the matter been contested." [Emphasis added]**

59. During the oral submissions before this Court Mr. Johnson submitted, inter alia, that:

> **"What we are saying is his Lordship applied that somewhat, but what we are arguing is that even though he acknowledged the discretion that he had to grant the sentence lower than 15 years, we do not feel that the discretion was exercised to the extent that it should have been, and that's in view, my Lords, of the psychiatric history of the intended appellant…"**.

60. The intended appellant faced a possible sentence of fifteen years to imprisonment for life. I readily accept that a life sentence would not have been appropriate in this case. I accept also that the fifteen year minimum sentence did not hamstring the Judge when sentencing the intended appellant so that he could not – as indeed he ultimately did – impose a sentence lesser than the minimum prescribed by the SODV.

61. It is pellucidly clear, however, that the Judge sentenced the intended appellant to a term of imprisonment below the time mandated by the statute. It is difficult to see how he can reasonably complain about the sentence being too severe since they fall within the range of sentences imposed on other defendants. In order for the Court to interfere with the sentence imposed by the Judge, the intended appellant would have to demonstrate that the sentence was due to an error in principle.

62. I harken to the caution expressed by Crane-Scott, JA in **Dustin Taylor v The Commissioner of Police** MCCrApp & CAIS No. 63 of 2014:

> **"16. That having been said, <u>the Court is always wary of placing too much weight on sentences passed in other cases not immediately before us</u>. Our cautiousness stems from the fact that we are only too well aware that in considering such cases, we may not be fully seized of all the facts and circumstances of the offence or of the offender which were before a particular sentencer at the time a sentence was passed." [Emphasis added]**

63. I am satisfied that the sentence imposed on the intended appellant was not outside the range of sentences the Judge could have imposed and cannot lead to a conclusion that the judge applied a wrong principle of law or that the sentence is unduly severe. In the premises, this ground has no prospect of success.

Ground 9 - The learned judge erred in law and/or in practice by way of his failure to consider properly or at all the Appellant's psychiatric history and/or diagnoses for Bipolarism and other serious mental conditions in his overall adjudication of the relevant scope of sentencing and/or penalty to apply in this matter following conviction.

Ground 10 - The learned judge ought to have held that there was an aspect of diminished responsibility on the Appellant's part, given his documented mental condition and ought to have accordingly reduced any sentence handed down to the Appellant on the basis of the said diminished responsibility.

64. Grounds 9 and 10 cover the same ground, that is, the Judge's failure to give proper consideration to the intended appellant's mental condition when he was considering the appropriate sentence to impose. Therefore, both grounds will be addressed together.

65. At page 305 of the transcript from the trial, the Judge said:

> **"…And having considered all that you have said, having considered this post event history that you described of psychiatric breaks, or the need for that type of treatment, that still does not absolve you of the gravity of the offence of which you have committed."**

66. While the Judge appeared to be aware of the intended appellant's **"psychiatric breaks"** he was of the view that same did not excuse the intended appellant's actions. There was nothing placed before the Judge other than a letter from Dr. Jasmine Johnson to require the Judge to take into account the intended appellant's alleged diminished mental capacity. There is a provision related to a defendant's mental capacity in the Penal Code, to wit, where he may be deemed insane: section 92 of the Penal Code; and other provisions in the CPC: sections 99 to 103. These are the means by which a defendant may be able to avail himself of a diminished responsibility or insanity plea. The intended appellant did not rely on any such plea.

67. Nevertheless, the trial record discloses that the Judge directed that the intended appellant receive a psychiatric evaluation and that he had it in his contemplation when sentencing the intended appellant. I cannot accept, therefore, Mr. Johnson's assertion that the Judge did not pay adequate consideration to the intended appellant's psychiatric history.

68. I am satisfied that this ground has no prospect of success and insofar as the appeal depends on it, it will fail.

Ground 11 - The learned judge erred in law and/or in practice by failing to consider properly or at all the Appellant's lack of antecedents for offences of a similar nature and/or category and/or general lack of a criminal history with respect to his adjudication of the appropriate sentence to be imposed. The learned judge ought to have held that the Appellant was entitled to a more lenient sentence given his character and lack of antecedents, whether for offences of a similar nature and/or category or criminal offences generally

69. There is no doubt that this Court can intervene to substitute a sentence it deems inappropriate pursuant to section 14 of the COAA but it **"should not intervene unless it was shown that there was some error of principle in the judge's sentence, so that public confidence would be damaged if the sentence were not altered". See Attorney General's Reference (Nos. 31, 45, 43, 42, 50 & 51 of 2003)** [2004] EWCA Crim 1935 per Lord Chief Justice of England and Wales).

70. I have perused the record of the trial and I do not find any error in principle in the Judge's sentence. There is nothing disclosed to warrant my interference with the sentence imposed by the Judge.

Conclusion

71. The EOT application is refused. The conviction, and the sentence imposed by the Judge, are affirmed.

The Honourable Mr. Justice Isaacs, JA

72. I agree.

The Honourable Madam Justice Crane-Scott, JA

Judgment delivered by the Honourable Sir Michael Barnett, P:

73. I have read in draft the judgment prepared by Isaacs JA.

74. I agree that the application for an extension of time should be refused as the appeal has no reasonable prospects of success.

75. At the end of the day, this case turned on whether the jury accepted the evidence of the virtual complainant over that of the intended appellant. The proposed grounds of appeal

make no complaint about the judge's direction to the jury. By its 7-1 verdict the jury clearly accepted the evidence of the virtual complainant.

76. The complaints about the fairness of the trial have been addressed by Isaacs JA in his judgment. There is no suggestion that any application for discovery was made and not complied with by the prosecution. There is nothing to suggest that the police downloaded messages from the intended appellant's telephone but refused to give them to the appellant or his counsel.

77. There is simply no basis for setting aside the conviction as unsafe.

78. As to sentencing, the failure of the intended appellant to have a lawyer at the sentencing does not affect the conviction. The intended appellant discharged his attorney and had an opportunity to retain new counsel. He elected not to do so. That is not a basis for quashing the sentence and remitting the matter back to the court for resentencing. The intended appellant had the opportunity to adduce medical evidence relating to his mental condition. He chose not to require Dr. Jasmine Johnson to attend court.

79. Moreover, the sentence of 12 years is well within the realm of reasonableness.

80. The proposed appeal has no realistic prospect of success and the application for an extension of time should be refused.

The Honourable Sir Michael Barnett, P