



**IN THE CAYMAN ISLANDS COURT OF APPEAL**

**CRIMINAL APPEAL 20, 24 and 25 of 2020**

IND.30/2019

SC#0172/2019

**BETWEEN:**

**BARTON ELSWORTH RIVERS  
DENO KALIFA MCINNIS  
JONATHON ASHLEY MOORE**

**Appellants**

**v**

**HER MAJESTY THE QUEEN**

**Respondent**

**BEFORE:**

The Rt. Hon Sir John Goldring President,  
The Hon C Dennis Morrison, Justice of Appeal  
The Rt. Hon Sir Alan Moses, Justice of Appeal

**Appearances:**

Mr Keith Myers for Mr Rivers  
Ms Lee Halliday-Davis for Mr McInnis  
Mr Jonathon Hughes for Mr Moore  
Mr Scott Wainwright for the Crown

**Heard:**

10 September 2021

**Judgment Delivered:**

12 November 2021

**JUDGMENT**

**MORRISON JA**

**Introduction**

1. The appellants (Messrs Rivers, McInnis and Moore) and one other person were indicted for the offence of conspiracy to import ganja, contrary to section 321 of the Penal Code (2018 Revision).  
The particulars of the alleged conspiracy were that:

*“... [the defendants] on or before the 23<sup>rd</sup> day of June 2018, in the jurisdiction of the Cayman Islands, conspired together and with others to import a controlled drug, namely, a quantity of ganja.”*

2. On 5 August 2020, after a trial before Carter J (Ag) ('the judge') and a jury, the appellants were convicted, but the fourth defendant was acquitted.
3. On 1 October 2020, the judge sentenced Mr Rivers to three years and nine months' imprisonment, Mr McInnis to three years and six months' imprisonment, and Mr Moore to three years' imprisonment. The judge also ordered that time spent on remand should be deducted from the sentence of each of the appellants.
4. All three appellants now appeal against their convictions and sentences. In relation to the convictions, Mr Rivers contends that the verdict against him was contrary to the weight of the evidence. Mr McInnis contends that the judge erred in permitting prejudicial documentary material to be placed before the jury. And Mr Moore contends that the judge erred in (i) declining to exclude the record of his police interview from evidence in accordance with section 40 of the Evidence Act; (ii) ruling that, in the event that he elected to give evidence in his defence, he would be subject to cross-examination on his previous convictions, notwithstanding the expungement of his criminal record under the provisions of the Criminal Records (Spent Convictions) Act ('the Act'); and (iii) ruling that, he having adduced evidence of his good character, he should have the benefit of a modified good character direction only.
5. The three appellants have all filed appeals against the sentences imposed by the judge.
6. For convenience, we will deal with the appeals against conviction before considering the appeals against sentence.

### **The evidence in summary**

#### For the Crown

7. The Crown's case against the appellants may be summarised as follows. On 23 June 2018, at approximately 5:40 am, officers from the Drugs and Serious Crime Taskforce of the Royal Cayman Islands Police Service (RCIPS) were on duty along the Queen's Highway, in the vicinity of the Morritt's Resort, East End Park, Grand Cayman. It was already daylight and the visibility was clear. The officers observed two boats out to sea, a small white boat and a larger dark-coloured vessel. A number of packages were seen being passed from the larger vessel to the smaller one. This process lasted some four to five minutes, at the end of which the larger vessel headed out to sea.

8. The small white boat, with one occupant on board, then made its way in to shore, coming ashore in the vicinity of the Morritt's Resort. Approximately four men, including the occupant of the small white boat, were observed off-loading packages from it and placing them in a bushy area close by. All four men scattered in different directions when approached by the officers. But Mr Moore, whom one of the officers said was the person who he had been seen steering the small white boat, fell in a bushy area just off the beach and was apprehended as he tried to escape. A number of bags containing ganja, the approximate weight of which was 200 lbs, were recovered from the beach.
9. Two cellular telephones ('cellphones') were also found in the bushes close to the area in which the small white boat came ashore. These cellphones were admitted in evidence as RT Cell 1 and RT Cell 2. The numbers associated with them were 327 7911 and 922 8011 respectively. In separate interviews under caution, Mr Rivers accepted that the former was the number assigned to his cellphone, while Mr Moore accepted that the latter was the number assigned to his.
10. Both cellphones were forensically examined and analysis of their usage led the police to Mr McInnis. Based on this evidence, the prosecution attributed two other numbers to Mr McInnis, who acknowledged that one of them (324 5342) was his; but denied ownership of the other (924 6942). As the judge did at the trial, we will refer to the latter number as 'the disputed number'.
11. Communications data for all four cellphones was obtained for the period 21-23 June 2018. The data revealed in excess of 300 communications between them during that time period. There was also contact with a cellphone number attributed to a resident of Jamaica. Cellular site evidence suggested that, during the period between approximately 12:30 am and 6:00 am on 23 June 2018, the cellphones belonging to Messrs Moore and Rivers were in the vicinity of the Morritt's Resort.
12. Schedules setting out the combined communications data for the cellphones which the prosecution alleged was used in the conspiracy were admitted in evidence as exhibits. These schedules formed part of the jury bundles which members of the jury were given.
13. As part of the investigation, the engine tiller handle from the smaller vessel was swabbed for the purpose of DNA analysis. A partial multiple source DNA profile was obtained from the swab. When this profile was tested against a DNA profile obtained from a mouth swab taken from Mr Moore, a match was obtained. It was said to be 5.3–56 billion times more likely to observe this partial multiple source profile if the contributors were Mr Moore and an unknown, unrelated, individual, rather than if the contributors were two unknown, unrelated, individuals.

14. The prosecution also adduced evidence of statements made under caution by each of the appellants. Nothing now turns on the statements made by Messrs Rivers and McInnis, in which they both denied any involvement in the offence of conspiracy to import ganja into the islands. However, Mr Moore, who also denied involvement in the alleged conspiracy, strongly contends, as he did unsuccessfully at the trial, that the judge ought to have excluded everything said by him in his interview. We will come back to this aspect of the matter in due course.

#### For the defence

15. Mr Rivers testified that he did not know his fellow defendants before meeting them in the course of these proceedings. He stated that while he was in fact in the vicinity of Morrith's Hotel on 22-23 June 2018, he did not make any of the impugned calls. He had been drinking steadily over that period and had twice lent his cellphone to a gentleman, "a local guy", who kept it for several hours each time before returning it. However, he accepted that he had himself also used the cellphone to make at calls at certain points during that period.
16. For his part, Mr McInnis accepted that he was in the East End area between 21 and 22 June 2018. He also accepted that he was familiar with some of the numbers called from the number which he acknowledged was his, but denied knowledge of others. He also denied knowledge of any of the calls made from the disputed number.
17. Mr Moore did not give evidence. However, he relied on evidence of his good character from a witness who was said to have known him for a long time.
18. As we have said, all three appellants were convicted and sentenced in the manner indicated.

#### **The appeals against conviction**

##### Mr Rivers

19. Mr Rivers relies on two grounds of appeal. Firstly, that the jury's finding that he used his cellphone in furtherance of the alleged conspiracy on 22 and 23 June 2018 was perverse and inconsistent with the evidence, thereby making the conviction unsafe and unsatisfactory. Secondly, that the sentence which the judge imposed was manifestly excessive.

20. On the first ground, which Mr Myers described in his skeleton argument as raising “*a very subtle point*”, it was submitted that, had Mr Rivers been using his cellphone at around the time when the officers were observing the small white boat come in to shore on the morning of 23 June 2018, that phone would not have been found in the bushes next to the officers.
21. We reject this submission. In addition to his own admissions as regards ownership of the number attributed to him, the case against Mr Rivers was purely circumstantial. As was pointed out to Mr Myers during the hearing, he did not – indeed, could not - make a submission of no-case to answer at the close of the prosecution’s case. Mr Rivers accordingly based his defence squarely on his evidence that he had twice lent out his cellphone on the night in question, and the resultant implication that the incriminating calls were made during one of the periods when it was out of his possession. This was, in our view, plainly a matter for the jury.
22. In her summing-up, the judge adverted to Mr Rivers’ defence more than once. First, having reminded them of the Crown’s case against him, she said that<sup>1</sup>:

*“You’ve heard Mr. Rivers. You heard his account of where he was that evening, why he says he wasn’t in possession of the phone with that number. It is a matter for you but really that is the nub of the issue with regard to Mr. Rivers.”*

23. The judge then gave the jury a final reminder:<sup>2</sup>

*“And with regard to the volumes of calls and the persons that the Crown ask you to look at in terms of finding the agreement, counsel for Mr. Rivers emphasized to you that really, the ... list of all the calls and all the persons that he spoke to, that they really only show one thing and that is, that the Rivers phone received and made some calls. That was the phone – when we say the Rivers phone – that Mr. Rivers had a contract for. He said but really those calls or the schedule – sorry – does not show who made the calls. That’s what he emphasized, doesn’t show who made the calls, it just shows the number and the calls being made to and from that number. And remember he said to you, you have to be sure because nothing less than sure is guilty, that it was in fact Mr. Rivers who had the phone with that number using that night. So, those are the matters, ladies and gentlemen of the jury, with regard to Mr. Rivers, the issues raised, Mr. Rivers’ evidence before you.”*

24. In light of the evidence, and these very careful directions, we are quite satisfied that, as Mr Wainwright observed in the Crown’s skeleton argument<sup>3</sup>, the jury must have rejected the points put forward on Mr Rivers’ behalf. Having done so, it seems to us that there was more than sufficient

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<sup>1</sup> Summing-up, page 146

<sup>2</sup> Summing-up, pages 154-155.

<sup>3</sup> Crown’s skeleton argument, para 62

evidence from which they could be satisfied of Mr Rivers' guilt. Nothing has been shown in this appeal that could possibly render their verdict unsafe.

25. We therefore dismiss Mr Rivers' appeal against conviction.

#### Mr McInnis

26. The single point argued by Mrs Halliday-Davis on Mr McInnis' behalf was that the judge erred in allowing material prejudicial to him to be placed before the jury. The background to the complaint is that, as we have already indicated, schedules setting out the combined communications data for the cellphones which the prosecution alleged to have been used in the conspiracy were admitted in evidence as exhibits and placed in the jury bundle<sup>4</sup>. It will also be recalled that, while Mr McInnis accepted that one of the numbers attributed to him by the prosecution was his, he maintained that the disputed number was not. At the trial, over objection from Mrs Halliday-Davis, this was reflected in the schedules by the placing of the words "*McInnis disputed*" next to each entry relating to that number.

27. Before us, Mrs Halliday-Davis submitted that the effect of showing the jury the schedules with Mr McInnis' name next to the disputed number was to leave them with the impression that that number was his. Further, it also elevated the evidence of the prosecution witness who prepared the schedules to that of an expert, which it was common ground that she was not.

28. In response to these submissions, the prosecution referred us to the decision of the Court of Appeal of England and Wales in **R v Jurecka and Others**<sup>5</sup>, in which the three appellants were convicted of conspiracy to defraud by false representations. This is how the court summarised the case against the appellants:<sup>6</sup>

*"The prosecution case was that the Appellants were all three party to an agreement to commit fraud involving the sale of substandard, injured or unreliable horses to unsuspecting members of the public by making false representations as to the qualities of the animals or their suitability for novice or unconfident riders. It was alleged that they dishonestly gave false descriptions of horses in advertisements and in documents for sale, in sales patter and in answers to prospective purchasers' questions. Typically, the false representations would relate to the horse's health, temperament, history, behaviour and particularly to their suitability for novice or inexperienced riders."*

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<sup>4</sup> At para 10 above

<sup>5</sup> [2017] EWCA Crim 1007, 2017 WL 03049050

<sup>6</sup> At para 4

29. The prosecution relied upon 17 specific transactions as evidence of the conspiracy. The evidence was complex, and the exhibit file included “*many thousands of text messages ... in addition to notes, e-mails and letters concerning other horses sold during the indictment period*”<sup>7</sup>. There was also “*a great quantity of evidence from veterinary surgeons, farriers and other professionals, as to the animals’ defects and whether they were likely to have been pre-existing*”<sup>8</sup>.
30. At the suggestion of the trial judge, the prosecution prepared a ‘working document’, or note summarising the relevant evidence for the benefit of the jury, and this document was placed in the jury bundle alongside other documents in the case, including photographs and the like. Counsel for one of the appellants also prepared their own working document.
31. In refusing a renewed application for leave to appeal on the ground that these documents ought not to have been placed before the jury, the court said this<sup>9</sup>:

*“Cases of this kind represent a considerable case management problem. Working documents of all kinds are regularly admitted before jurors, often agreed but also quite often as explicitly coming from one side. There is no absolute objection to proceeding in such a fashion, provided the source and nature of such documents are clear and the jury are at all stages reminded, where appropriate, that such documents are not agreed and are there as aides memoire of the evidence bearing on the particular aspect of the case. Such documents must be handled with care. In our judgment, their proper use should be confined to a convenient reminder to the jury of the facts relied on by a given party and, in brief and neutral terms, of the conclusions sought to be drawn from those facts.”*

32. **Jurecka** therefore demonstrates that, once their status and effect are made clear to the jury, there is no objection in principle to schedules such as those which were relied on in this case being placed before them. Properly deployed, they can obviously be of great assistance to the jury in navigating complex evidence, such as the detailed evidence of cell phone traffic between the numbers attributed to the appellants and others over the relevant period in this case.
33. At our request, Mrs Halliday-Davis showed us (albeit rather belatedly, we are bound to say) one of the schedules of which she complained. This was Exhibit 1D/1A/1b, which showed call data involving 924 6924, the number which Mr McInnis accepted as his, and 324 5342, the disputed number, over the period 21-22 June 2018. On the face of the document, the words “*McInnis*

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<sup>7</sup> Para 6

<sup>8</sup> Ibid

<sup>9</sup> At para 79

*disputed*” were plainly visible next to the disputed number, while no such notation appears next to the number which he accepted as his.

34. The judge went through the schedules in considerable detail in the summing-up, particularly during her summary of the evidence given by Ms Delaney, who was the prosecution witness who actually prepared them.

35. First, in introducing Ms Delaney’s evidence, the judge said this<sup>10</sup>:

*“The next witness is Officer Delaney. Officer Delaney prepared what is court exhibit five which is the bundle with the telephone evidence. It might be that you want to have that at hand in case there is something that I might refer to that you would want to have in front of you as I deal with it.”*

36. Next, taking the jury to that part of the exhibit dealing with Mr McInnis, the judge said this<sup>11</sup>:

*“Now, you see from ... JD/1A/4B which is at tab 4 and it’s what she called an attribution document but from that document, you can see clearly the numbers which were obviously of interest – McInnis accepted number on the first page, McInnis disputed number as you turn the page ... Now we know that Mr McInnis accepts that that number ... is his number, the 324 number is the accepted McInnis number ... She gave evidence as well about the McInnis disputed number ...”*

37. The remainder of the judge’s lengthy summary of Ms Delaney’s evidence as conveyed by the schedules continued in the same vein, with a careful distinction being made at every stage between the “*McInnis accepted number*” and the “*McInnis disputed number*”.

38. In due course, when the judge came to deal with Mr McInnis’ evidence in her summing-up, she reiterated the point to the jury<sup>12</sup>:

*“Now, he accepted that what we’ve called the McInnis accepted number, the 424 number was his. He said that the McInnis disputed number was never his number ...”*

39. Finally, on this point, while we were not shown an actual transcript of the evidence given at the trial, it is clear that, as was to be expected, these matters were fully canvassed before the jury. So much so, that the judge was moved<sup>13</sup> to observe to the jury at one point that<sup>13</sup>:

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<sup>10</sup> Summing-up, page 80

<sup>11</sup> Summing-up, pages 82-84

<sup>12</sup> Summing-up, page 156

<sup>13</sup> Summing-up, page 89

*“If you look at that document we’ve gone through this document extensively. Counsel has referred to the document again and again – counsel for the Crown, counsel for Mr. McInnis in particular ...”*

40. In all the circumstances, it seems to us that, given the evidence and the judge’s very clear directions, the jury could not possibly have been misled into thinking that the words “*McInnis disputed*” in the schedule meant anything other than that which they plainly conveyed.
41. We therefore dismiss Mr McInnis’ appeal against conviction.

#### Mr Moore

42. Mr Moore appealed against the judge’s decisions (i) not to exclude his police interview from evidence (‘the police interview issue’); (ii) to allow questions regarding his previous convictions to be put to him in cross-examination, should he choose to give evidence (‘the cross-examination issue’); and (iii) not to afford him the benefit of a full good character direction (‘the full good character direction issue’). Each of these decisions was the subject of a separate written ruling at various stages of the trial, and the judge is to be commended for producing them at short notice, while at the same time managing a jury trial based on complex evidence.

#### The police interview issue

43. After his arrest on 23 June 2018, Mr Moore was interviewed under caution by DC 418 Dwayne Simpson (‘DC Simpson’) and DC 426 Ricardo Lauder (‘DC Lauder’). Close to the beginning of the interview, the following exchange took place between the police officers and Mr Moore:

*“[DC Simpson]: ... we talked to you earlier and you said that you wouldn’t need a lawyer present*

*[Mr Moore]: I have a lawyer*

*[DC Simpson]: At the time, right, is there any reason you do not need your lawyer to be present Sir?*

*[Mr Moore]: Is there any reason wah, repeat the question*

*[DC Simpson]: Is there any reason..*

*[Mr Moore]: Uh huh*

*[DC Simpson]: Do you, that you do not need a lawyer to be present at this particular time*

*[Mr Moore]: No special reason*

*[DC Simpson]: Okay well I must inform you we have free legal advice, so you want to speak to a free legal adviser, a free attorney, a free lawyer before we commence the interview*

*[Mr Moore]: Can proceed*

*[DC Simpson]: Okay Sir*

*[DC Lauder]: Remember you know Mr. umm, sorry to cut you Mr Simpson, remember this is an ongoing and continued right at any point in time you wish to speak to an attorney Mr. Moore it is your right to do so, indicate to Mr. Simpson or myself and you will be given the privilege to speak to an attorney, right*

*[Mr Moore]: (Shakes head)*

*[Mr Lauder]: Okay so you want to go ahead without an attorney at this time?*

*[Mr Moore]: Yeah”*

44. Further on in the interview, there was this exchange:

*“[DC Simpson]: So we gave you the chance to call or speak to an attorney you said you do not need an attorney present at the moment, is that correct?*

*[Mr Moore]: Yeah that correct*

*[DC Simpson]: Alright so you are ready to go on with the interview then*

*[Mr Moore] Yeah cool”*

45. The interview then continued, during which Mr Moore answered the questions which were put to him. He also gave an account of his whereabouts and his actions in the early morning of 23 June 2018.

46. At the trial, Mr Moore’s counsel applied to the court for the police interview to be excluded, on the ground that allowing it in evidence would operate unfairly against him by prejudicing his right to a fair trial. The application was made pursuant to section 40 of the Evidence Act (2019 Revision), which provides as follows:

*“Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of such court, would, if allowed, operate unfairly against the accused person.”*

47. The judge conducted a *voir dire* in order to determine the issue. Giving evidence on the *voir dire*, Mr Moore stated that, when he was told by the police that “*we have free legal advice, a free legal advisor, a free attorney, a free lawyer*”, he “*took it to mean I would be given a lawyer of their choice. I was not content with that*”. Further, that when he agreed to proceed with the interview, it was because he was under the impression that this was the only choice available to him, and that he “*would have reached out to [his lawyer of choice] to continue if he had been told that [he] was available to me*”<sup>14</sup>.
48. The judge also recorded Mr Moore’s evidence under cross-examination on the *voir dire* as follows:<sup>15</sup>

*“I am no stranger to the Police. I have been interviewed under caution with the Police before. Mr. Collins had represented me before and as a lawyer before at interviews. I do know how to contact him to get in touch with him. Previously I called him and he came and assisted me when I was being interviewed on a few occasions.*

*I was not given the opportunity of a phone call.*

... ..

*I requested a couple of phone calls on the day ... I did not stipulate who I was going to call.*

*I knew I could call Mr. Collins ... I did not have his number at that point in time. I requested, asked for a phone call and it was refused. I don’t remember which officer at this time, but officers.’*

*‘I told [the police officers] I did not need a lawyer. I did not mention Mr. Collins. I did not ask for Mr. Collins during the interview no. I know Mr. Collins would represent me if I called because he had done so several times.’*

*‘At the present time [referring to the time at which he was being interviewed] I did not need an attorney. At the time I was in a mode of shock and wanted to try to get out of there. I was arrested and wanted to get out of there. This is why I did not mention Mr. Collins. I wanted to get out of there as quickly as possible ... I did tell the Police that I was happy to proceed without an attorney.’”*

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<sup>14</sup> This account is taken from the judge’s summary at paras 7-9 of the Judgment on Voir Dire given on 9 July 2020

<sup>15</sup> Judgment on Voir Dire, paras 10-12

49. The judge also had before her a ‘Prisoner’s Rights’ document, which recorded that Mr Moore had confirmed that he had been informed of his right “*to communicate with an attorney-at-law at any time in private and free of charge for legal advice, prior to questioning by the police*”<sup>16</sup>. In the same document, Mr Moore was also asked if he wished to speak to a lawyer, to which his response was, “*Not at the moment*”<sup>17</sup>.
50. Having considered the evidence and the legal submissions, the judge concluded that this was not a fit case for the exercise of her discretion to exclude Mr Moore’s record of interview under section 40 of the Evidence Act:

“41. *Taking all of these factors into account, I find that [Mr Moore] was well aware that he could communicate, and call his own legal advisor, that he could consult with such legal advisor and that such legal advisor could be present during the interview if he wished him to be. He was fully advised of these rights by the Police through the Prisoner’s rights document and by the officers who conducted the interview on the 23<sup>rd</sup> June 2018. I also find that he effectively waived those rights when he gave his unequivocal indication that he wished the interview to continue without the assistance of an attorney.*

42. *With regard to the provisions of s.40 of the Evidence Law I do not find that this is a case in which the court should exercise its discretion to exclude the record of interview because to admit it would be unfair to [Mr Moore]. There is no issue of lack of voluntariness and indeed there is no suggestion by [Mr Moore] of any mala fides on the part of the officers who contacted the interview with regard to anything concerning the taking of the interview.”*

51. Mr Hughes set his submissions against the backdrop of (a) section 5(4) of the Bill of Rights<sup>18</sup> (under the rubric “*Personal liberty*”), which provides that “[a]ny person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his own choice ...”; and (b) section 7(2)(d) (under the rubric “*Fair trial*”), which provides that everyone charged with a criminal offence has the right “*to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense ...*”.

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<sup>16</sup> Judgment on Voir Dire, para 27

<sup>17</sup> At para 28

<sup>18</sup> Constitution of the Cayman Islands, Part 1, Bill of Rights, Freedoms and Responsibilities

52. On this basis, Mr Hughes submitted that the judge was wrong not to exclude Mr Moore's record of interview. With reference to the notes of the interview which we have set out at paragraphs 39-40 above, Mr Hughes complained that the police officers did not make it clear to Mr Moore that he had a right to an independent lawyer.
53. With regard to the judge's finding that Mr Moore effectively waived his right to a lawyer before and during the interview, Mr Hughes directed our attention to the decision of Henderson J in the case of **R v Anderson**<sup>19</sup>.
54. That was a case in which, after she was arrested, but before she was charged, the defendant was interviewed by two police officers. She was told that she was entitled to independent legal advice, but was not told that she was entitled to free legal advice. The defendant did not request legal advice and, after caution, answered all the questions she was asked, making at least one relevant admission in the process.
55. At the trial, the defendant contended that, although she had opted to continue with the interview without asking for legal advice, she did so because she did not think she would have been able to afford it. Accordingly, her right to a fair trial had been prejudiced and the evidence of her statements in the interview was therefore inadmissible. The Crown's response was that although she was not told that she was entitled to free legal advice, she had effectively waived her right to such advice by proceeding with the interview.
56. After a full discussion of the right to a fair trial enshrined in section 7 of the Bill of Rights, and a review of relevant authorities from the European Court of Human Rights, Henderson J concluded that a trial "*may suffer the taint of unfairness from something which occurred during the investigatory phase even though the trial itself is conducted with scrupulous procedural fairness*"<sup>20</sup>. But he rejected the Crown's submission that the defendant had waived her right to legal advice and assistance before her police interview, on the ground that she was not given complete and correct information about the extent of that right<sup>21</sup>:

*"30 ... While the exact parameters of a valid waiver of a fair-trial requirement are still under debate, it is clear that such a waiver must be voluntary, informed and unequivocal ...*

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<sup>19</sup> [2014] (2) CILR 60

<sup>20</sup> Para 21

<sup>21</sup> At paras 30-31

31 *Ms. Anderson was not told of her right to receive legal advice and assistance before and after the police interview for the understandable reason that no organized system exists for providing it. The police investigators cannot be criticized for failing to offer something which, if accepted, might have failed to materialize. I accept the evidence of Ms. Anderson that she wanted the assistance of a lawyer but failed to make that clear because she believed she could not afford one. Since she was not given complete and correct information about the extent of her right to legal assistance, her willingness to proceed with the interview cannot be treated as a waiver of her right.”*

57. Mr Hughes accordingly contended that, because Mr Moore was not told clearly that he was entitled to independent legal advice, he was effectively in the same position as the defendant in **Anderson v R**, and could not therefore give a valid waiver. On this basis, Mr Hughes invited us to give effect to the “*general rule*” confirmed by the Supreme Court in **Cadder v HM Advocate (HM Advocate General for Scotland and another intervening)**<sup>22</sup>, applying the established jurisprudence on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: that is, “*to preclude the admission in evidence of any incriminating answers obtained from the police from a detainee who is subjected to questioning without access to legal advice*”<sup>23</sup>.
58. As he had done at the trial, Mr Wainwright for the Crown submitted that Mr Moore’s answers in response to the questions asked by the police officers at the outset of his interview clearly revealed that he had waived his right to legal advice of any kind.
59. We agree with the Mr Wainwright. First, it seems to us that the contention that Mr Moore was not told that he was entitled to independent legal advice is, in the light of his own answers to the police at the interview, wholly untenable. Having volunteered the information that he had a lawyer, and when pressed as to whether he had any reason not to want the lawyer present at the interview, Mr Moore’s answer was “*No special reason*”. Pressed further, and now told that he could also have a “*free legal adviser*”, Mr Moore indicated to the police officers that they could “*proceed*”. Then, when reminded that he had “*an ongoing and continued right at any point in time ... to speak to an attorney*”, Mr Moore again indicated his willingness to proceed. And, finally, when asked to confirm that he had been given “*the chance to call or speak to an attorney*”, Mr Moore answered affirmatively and said he was ready to go on with the interview. In our view, it cannot be said in light of these answers that, as in **R v Anderson**, Mr Moore was not given complete and correct information as to the extent of his right to legal assistance.

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<sup>22</sup> [2010] UKSC 43

<sup>23</sup> At para 55. And see **Salduz v Turkey** (2008) 49 EHRR 421

60. Second, against this distinctly unpromising background, Mr Moore's own evidence before the judge on the *voir dire* served to confirm, rather than explain away his answers to the police officers at the interview. His early attempt to suggest that he took the police offer of "*free legal advice, a free legal advisor, a free attorney, a free lawyer*", to mean that he was being offered a lawyer of their choice, was, in our judgment, completely undermined by his own further answers in cross-examination. Having agreed that he knew that his own lawyer, Mr Collins, would represent him if called, he explained that he did not need an attorney and only wanted to "*get out of there as quickly as possible*". Consequently, he said, "*I did tell the Police that I was happy to proceed without an attorney*".
61. We therefore consider that, on this evidence, as well as the contents of the Police Rights document, it was entirely open to the judge to conclude as she did that the police officers advised Mr Moore fully of his rights; and further, that he effectively waived them by his voluntary, informed, unequivocal and repeated indication that he wished the interview to continue without the assistance of an attorney.

The cross-examination issue

The full good character direction issue

62. We will take these issues together.
63. As at the beginning of the trial, Mr Moore had nine previous criminal convictions ('the previous convictions'). The previous convictions were for cruelty to animals, consumption of a controlled drug (ganja) (two separate convictions), taking a conveyance without authority (two separate convictions), consuming ganja, possession of a controlled drug (ganja), taking conch during closed season, and taking conch from Cayman waters.
64. These convictions, which took place between 1998 - 2002, all resulted in non-custodial sentences, and the judge accepted that they were irrelevant to the issue of propensity.
65. During his cross-examination of the police witnesses, counsel for Mr Moore put to them that they had been guilty of collusion, fabrication of evidence and tampering with witness statements.
66. As a result of these clear imputations, counsel for the Crown indicated to the court that he would wish to cross-examine Mr Moore on the previous convictions.

67. Counsel for Mr Moore resisted this application, on the ground that, under the provisions of the Act, the previous convictions fell to be treated as spent and expunged from the record. Accordingly, it was submitted, Mr Moore should be regarded for all purposes as a person of good character and was therefore not open to cross-examination on the previous convictions.
68. In a ruling given on 27 July 2020 (‘the expungement ruling’), the judge held that the Crown would be permitted to ask Mr Moore questions in cross-examination regarding the previous convictions. In the judge’s view, “*the [Act] maintains the discretion in the Court, in the context of ensuring fairness in judicial proceedings, to allow a defendant’s expunged record to be required or admitted*”<sup>24</sup>.
69. The judge also ruled that, in that event, Mr Moore should have the benefit of a modified good character direction, “*to reflect the particular circumstances as they apply to [Mr Moore]*”<sup>25</sup>.
70. We have already indicated that Mr Moore did not give evidence. However, his counsel alerted the court to the fact that he would rely on evidence of good character called on his behalf. So, the judge was now asked to determine whether the Crown should be allowed to present evidence of the previous convictions to the jury as a result of his having raised his good character; and, in that event, what directions should be given to the jury.
71. In a further ruling given on 30 July 2020 (‘*the good character ruling*’), the judge ruled that (i) if Mr Moore’s good character was raised by him before the jury, evidence of the previous convictions should also be before the jury; and (ii) in that case, Mr Moore would be entitled to a modified good character direction. This is how the judge explained her decision:<sup>26</sup>

*“I find that the introduction of this evidence that goes towards establishing the defendant’s good character, opens the door for the prosecution to be given the opportunity to rebut by presenting evidence of the defendant’s previous convictions and that it would not be in the interests of justice were the Court not to permit the prosecution to do so – even in the circumstance where the defendant’s record can be considered to be expunged.”*

72. As part of Mr Moore’s case, the statement of his character witness, Mr Dwayne Seymore, was read to the jury. Mr Seymore described Mr Moore as “*a person who is faithful to his friends, family and community ... a very reliable and honest person who always keeps his commitment*”.

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<sup>24</sup> Expungement ruling, para 29

<sup>25</sup> Expungement ruling, para 38

<sup>26</sup> Good character ruling, para 10

73. Accordingly, as the judge had ruled that it might be, evidence of the previous convictions was placed before the jury in the form of a formal admission.

74. Before turning to counsel's submissions, we will first consider briefly the relevant provisions the Act, which came into force on 28 March 2017. Section 4 states its objective in these terms:

*“The primary object of this [Act] is to implement a scheme to limit the effect of a person's conviction for a range of offences if the person, having served that person's sentence, subsequently completed a period of crime-free behaviour and, on completion of that period, the conviction shall be regarded as spent and, subject to some exceptions, a person is eligible to apply for the expungement of the criminal record.”*

75. Not all criminal records can be expunged. Section 12(1) and Schedule 2 set out the excluded offences, which include treason, murder, manslaughter, and a range of the most serious offences. However, there is no question that the previous convictions and the sentences imposed on Mr Moore in this case put him in the category of persons whose convictions may be expunged under the Act.

76. Section 5 establishes an Expungement Board, for the purpose of receiving, considering and determining applications for expungement of spent convictions. However, section 15 provides for, in effect, automatic expungement of criminal records in certain cases, once the “*prescribed crime-free period*” since conviction has elapsed<sup>27</sup>.

77. Section 26 deals with the effect of expungement as follows:

*“A person shall, where the criminal record of that person has been expunged, be treated, for all purposes in law, as a person who has not –*

- (a) committed;*
- (b) been charged with;*
- (c) been prosecuted for;*
- (d) been convicted of; or*
- (e) been sentenced for,*

*the offence which was the subject of that criminal record.”*

78. Section 27(1) goes on to provide that:

*“(1) Notwithstanding any other written or unwritten law –*

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<sup>27</sup> The prescribed crime-free periods are set out in Schedule 3 to the Act.

(a) *no evidence shall be admissible in proceedings before a judicial authority to prove that a person has –*

- (i) *committed;*
- (ii) *been charged with;*
- (iii) *been prosecuted for;*
- (iv) *been convicted of; or*
- (v) *been sentenced for,*

*the offence which was the subject of an expunged criminal record; and*

(b) *a person shall not, in any proceedings, be asked and, if asked, may answer in the negative any question relating to the person’s criminal record which cannot be answered without acknowledging or referring to a conviction which forms the basis of an expunged criminal record or any ancillary circumstances.”*

79. Section 27(2) then provides that:

*“(2) If, in judicial proceedings the judicial authority is satisfied that justice cannot be done except by requiring or admitting evidence relating to a person’s expunged criminal record or to ancillary circumstances to it, that authority may –*

*(a) require or admit the evidence in question, but a court before which such evidence is admitted shall, in appropriate circumstances, take reasonable steps to prevent or minimise publication of that evidence; and*

*(b) determine any issue to which the evidence relates.”*

80. The result of these provisions is that, after a specified period of crime-free behaviour, a previous offender will have his or her offences treated as spent, thereby making him eligible to apply for expungement of his criminal record. A person whose criminal record has been expunged, either by the determination of the Expungement Board under section 5, or the operation of law under section 15, must be treated as a person who has not “*committed ... [etc]*” the expunged offences (section 26). Accordingly, no evidence shall be admissible to prove that he or she has “*committed ... [etc]*” the expunged offences, and he or she shall not be asked any question, and if asked may answer in the negative, any question the answer to which will require a reference to the expunged conviction (section 27(1)). However, in any case in which the court is satisfied that justice cannot be done without requiring or admitting evidence of a person’s expunged criminal record, the court may require or admit the evidence, subject to certain safeguards in appropriate circumstances (section 27(2)).

81. Mr Hughes submitted that, in light of these provisions and the clear intendment of the Act, the judge’s decision that the Crown would be allowed to cross-examine Mr Moore on the previous convictions was wrong, in that the interests of justice did not require it in circumstances of this case. Further, that in coming to her decision on this point, the judge did not consider the fact that she retained a discretion whether or not to allow cross-examination. And, further still, that given the potential for the ruling to affect Mr Moore’s decision to give evidence in his defence, “*it had the effect of prejudicing the fairness of the proceedings*”.
82. On the good character issue, Mr Hughes submitted that the Crown should not have been permitted to rebut Mr Moore’s “*regained good character, by reading his old criminal history to the jury*”<sup>28</sup>, thus defeating the purposes of the Act.
83. Mr Wainwright submitted that the judge’s decision to allow cross-examination on the previous convictions was fully justified by section 27(2), in light of the imputations of improper conduct put to the police witnesses by counsel for Mr Moore. The previous convictions were in any event old and irrelevant and the judge dealt with them properly in the summing-up. The matters complained of did not render the conviction unsafe, given the very strong case against Mr Moore.
84. We were shown very little by way of authority on how these provisions, in particular section 27(2), were intended to operate. In the expungement ruling, the judge made reference to **Supervisor of Elections v Candidate X**<sup>29</sup>, in which the Chief Justice described the Act as “*based on a philosophy that recognizes that while rehabilitated persons must be allowed to overcome past delinquencies for which they have atoned, there are competing public interests of such importance that those interests will continue to require the disclosure and citation of otherwise spent convictions or expunged records*”<sup>30</sup>. Among these public interests, the Chief Justice listed “*the limitation that requires that a spent conviction or expunged records may be disclosed in evidence on the direction of the court, ‘if the interests of justice so require*”.
85. Mr Hughes also referred us to the decision of the Court of Appeal of England and Wales in **Thomas v Commissioner of Police of the Metropolis**<sup>31</sup>, a case decided under the Rehabilitation of Offenders Act 1974 (‘the ROA’). The issue in that case was whether the trial judge had correctly allowed cross-examination of the plaintiff on his two spent convictions, one for unlawful wounding

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<sup>28</sup> Skeleton argument dated 5 August 2021, para [51] d

<sup>29</sup> [2017] 1 CILR 307

<sup>30</sup> At para 59

<sup>31</sup> [1997] Q.B. 813

and the other for criminal damage, at the trial of his action against the police for damages for assault and malicious prosecution.

86. The court considered the effect of section 7(3) of the ROA, which deals with the admissibility of evidence of spent convictions in civil proceedings in terms very similar to section 27(2) of the Act. By a majority<sup>32</sup>, it was held that section 7(3) gave the trial judge a broad discretion to permit cross-examination or admit evidence of the spent convictions once the statutory criterion that “*justice cannot be done ... except by permitting cross-examination or admitting the evidence*” was satisfied, the overriding objective being that justice should be done.

87. Evans LJ, with whom Saville LJ agreed, went on to explain that –

*“In the context of civil proceedings, this means taking account of the interests of both parties, and justice requires that there shall be a fair trial between them.*

*This marks a clear distinction from criminal cases where the interests of the defendant tend to be pre-eminent ...”*

88. After discussing the more restrictive criteria for the admission of evidence of prior misconduct in criminal cases, Evans LJ summarised his conclusions with regard to permitting cross-examination or admitting evidence of spent convictions under section 7(3) of the RTA in this way<sup>33</sup>:

*“... some degree of relevance, including relevance to credit, is a sine qua non requirement for admitting the evidence. If it has any relevance, then it has some potential for prejudice. The degree of relevance can be weighed against the amount of prejudice, and other factors may be taken into account. The judge must be satisfied that the parties will not have a fair trial, or that a witness's credit cannot be fairly assessed, unless the evidence is admitted. The statutory exclusion does not apply if, in his view, the interests of justice otherwise dictate.*

*In the present case the more serious of the convictions was of marginal relevance, even to credit, but of limited prejudice also ... [The trial judge] decided that it was necessary in the interests of justice that the jury should have a full picture of the plaintiff and his past history, not limited by his deemed good character under section 4(1) of the Act. It cannot be said, in my judgment, that that was not a valid exercise of his discretion under section 7(3).”*

89. In dissent, Sir Richard Scott V.C. doubted whether, given the highly restrictive criterion for admitting the evidence of spent convictions, section 7(3) conferred a discretion in any real sense of the word. In any event, he considered that the trial judge’s ruling that the spent convictions could

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<sup>32</sup> Evans and Saville LJ

<sup>33</sup> At page 833

be put to the plaintiff was based on an error of law, in that there were “*no circumstances in the case which could have enabled the judge to be satisfied that justice could not be done unless the spent convictions were admitted*”<sup>34</sup>.

90. In our view, the judge was correct in her decision that section 27(2) does in fact confer a discretion on the trial judge to allow disclosure of or reference to spent convictions in cases in which he or she considers that justice cannot otherwise be done. It seems to us that there is no other way to give effect to the clear language of section 27(2).
91. But we also consider that, in the exercise of that discretion, it will be necessary for the trial judge in every case to have particular regard to the rights of the defendant to a fair trial.
92. As the judge recognised, it seems clear from the language of section 27(2) that the legislature must also have had in mind section 18(d) of the Evidence Act. Section 18(d) restricts cross-examination of a defendant as to his criminal record by providing that, save in certain specified circumstances, a defendant giving evidence “*shall not be asked, or required to answer, any question tending to show that he has **committed or been convicted or been charged with** any offence other than that wherewith he is charged or is of bad character*” (emphasis ours).
93. Of particular relevance in this case is section 18(d)(ii), which lists among the circumstances in which a defendant can be cross-examined as to his criminal record cases in which he “*...has given evidence of such good character, or the nature or conduct of the defence is such as to involve imputations on the character of any other person ...*”. In such cases, “*evidence tending to show that he has committed, been convicted, or been charged with any offence other than that with which he is charged, or is of bad character, may be adduced whether or not he has given evidence in his own defence; ...*”
94. This is, of course, the familiar language of section 1(f)(ii) of the old English Criminal Evidence Act 1898, under which a defendant under cross-examination was shielded from questions relating to his bad character, save where he lost his shield by, among other possibilities, casting imputations against the character of prosecution witnesses.
95. But, even in that circumstance, as the judge observed, the court retained a discretion “*whether to allow such questions to be led*”<sup>35</sup>, the objective always being to ensure the fairness of the trial. In

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<sup>34</sup> At page 826

<sup>35</sup> Expungement ruling, para 33

this regard, the judge referred to **Archbold** 2018, 13-80, where the learned editors cite the following statement from **R v Jenkins**<sup>36</sup>:

*“[The judge] may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked.”*

96. In this case, therefore, the judge was faced with dual – though obviously related - calls on her discretion, in respect of both section 27(2) of the Act and section 18(d)(ii) of the Evidence Act. That the judge recognised this appears clearly from her observation<sup>37</sup>, after considering the latter provision, that:

*“The application of s.18 is not at odds with the provisions of s.27(1) ... The issue for this Court is whether it would be fair to allow [Mr Moore’s] previous convictions to be put in this case keeping these principles firmly in mind.”*

97. In our view, therefore, it is not correct to say that, as Mr Hughes complained, the judge failed to appreciate that, section 27(2) notwithstanding, the court retained a discretion to disallow cross-examination of Mr Moore.

98. On general principle, that would, of course, ordinarily be the end of the matter: as Evans LJ put it in **Thomas**<sup>38</sup>, *“this court cannot interfere unless ... the judge misdirected himself as to the test he should apply or his decision was obviously wrong”*. We must therefore consider whether the judge’s decision to permit cross-examination of Mr Moore on the previous convictions in this case can be said to have been obviously wrong.

99. This is how the judge stated her conclusions on the cross-examination issue<sup>39</sup>:

*“35. The Court has considered the submissions made by defence counsel and also by the Crown on this issue. I agree that serious imputations have been made against the prosecution witnesses’ characters, police officers, in this case. I also consider that the defendant’s previous convictions are of some vintage,*

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<sup>36</sup> (1945) 31 Cr App R 1, per Singleton J at 15

<sup>37</sup> At para 34

<sup>38</sup> At page 833

<sup>39</sup> At paras 35-37

*to the extent that were it not for this application, the court in this case would treat them as expunged and not inquire further into them.*

36. *Counsel for [Mr Moore] submits that the questions asked of the officers were questions that the defence were entitled to ask. However, even in instances where the questions asked of the prosecution witnesses are necessary to enable a defendant to establish his defence, cross-examination of the defendant with regard to his previous convictions may be permissible and in the interests of justice.*
37. *The Crown will be permitted to ask questions in cross-examination regarding [Mr Moore's] previous convictions."*

100. Regrettably, we have been unable to discern from this passage what considerations might have led the judge to the decision to exercise her discretion in favour of permitting cross-examination of Mr Moore on the previous convictions. It seems to us that the judge's observation that "*even in instances where the questions asked of the prosecution witnesses are necessary to enable a defendant to establish his defence, cross-examination of the defendant with regard to his previous convictions may be permissible and in the interests of justice*", though correct<sup>40</sup>, takes the matter no further in terms of the exercise of the discretion in this case.

101. As Evans LJ observed in the passage which we have already cited from **Thomas**<sup>41</sup>, "*some degree of relevance, including relevance to credit, is a sine qua non requirement for admitting the evidence*". In this case, given the age and nature of the previous convictions, their accepted irrelevance to propensity, and their very dubious relevance, if any, to the issue of credibility (indeed, Mr Wainwright made no real attempt to suggest any), it seems to us that reference to them in cross-examination was apt to serve no other purpose but prejudice to Mr Moore. We therefore think that, in the circumstances of this case (and naturally with the greatest of respect to the great care with which the judge obviously approached the matter), the decision to permit cross-examination of Mr Moore on the previous convictions was obviously wrong.

102. It follows from this that, as Mr Hughes submitted, the Crown should not have been permitted to read Mr Moore's criminal record to the jury. The clear objective of the Act, as the Chief Justice explained in the **Supervisor of Elections** case, is to allow "*rehabilitated persons ... to overcome past delinquencies for which they have atoned*". Accordingly, no reason having been shown why justice could not have been done in this case without requiring or admitting evidence of the previous

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<sup>40</sup> As to which, see *Selvey v Director of Public Prosecutions* [1970] AC 304

<sup>41</sup> See para 89n above

convictions, there was nothing to contradict the evidence of Mr Moore’s good character. In these circumstances, he was in our view entitled to a full good character direction: that is, a direction as to the relevance of his good character to his propensity to commit the offence for which he was charged and, in the event that he gave evidence or made pre-trial statements, to his credibility<sup>42</sup>.

103. So the question which now arises is how should Mr Moore’s appeal be disposed of, given our conclusion that the judge erred in respect of both the cross-examination and the full good character direction issues.
104. On the cross-examination issue, Mr Hughes submitted in his skeleton argument<sup>43</sup> that Mr Moore was “*inhibited in giving evidence at the trial*” by the judge’s ruling. In oral argument before us, he initially said that “*a substantial reason for not giving evidence was that the judge had ruled that he would be cross-examined on the previous convictions if he gave evidence*”. However, in reply, when pressed by the court on the point, Mr Hughes candidly told us that he could not say that Mr Moore would have given evidence had it not been for the judge’s ruling. However, Mr Hughes added, it was “*a factor*” in his decision.
105. (Mr Hughes also pointed out that the fourth defendant, Mr Sanderson, against whom the evidence was factually similar to that against Mr Moore, gave evidence, received a full good character direction and was acquitted<sup>44</sup>.)
106. Mr Wainwright submitted that the matters complained of did not render the conviction unsafe and that, given the significant strength of the case against him, Mr Moore would inevitably have been convicted.
107. On the cross-examination issue, were we satisfied that the effect of the judge’s erroneous ruling was to prevent Mr Moore from putting his defence fairly, in other words, to deny him the substance of a fair trial, it is clear that the inevitable result, on a long line of authority, would have to be the quashing of his conviction. (See, for instance, **Mohammed v The State (Trinidad & Tobago)**<sup>45</sup> - “... a breach of a defendant’s constitutional right to a fair trial must inevitably result in the conviction being quashed”; **Crosdale v The Queen**<sup>46</sup> - “... even a defendant against whom the

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<sup>42</sup> **R v Hunter and others** [2015] EWCA Crim 631

<sup>43</sup> Skeleton argument, para [51] c.

<sup>44</sup> Skeleton argument, para [50]

<sup>45</sup> [1998] UKPC 49, para 29, per Lord Steyn

<sup>46</sup> [1995] UKPC 14, page 12, per Lord Steyn

*cards are stacked is entitled to have his case fairly presented to the jury”*; and **Randall v The Queen**<sup>47</sup> - “... *the right of a criminal defendant to a fair trial is absolute*”.)

108. However, in our view, in light of Mr Hughes’ submissions of decreasing conviction on the point, and the complete absence of anything either on the record or on affidavit from Mr Moore to support them, we have found it impossible to conclude that the judge’s ruling either prevented or inhibited Mr Moore from giving evidence.
109. It seems to us that the real problem in this case arose from the prosecution’s attempt to rely on Mr Moore’s old, irrelevant and spent convictions in the first place. Given all the other evidence in the case against Mr Moore, it was, as Mr Wainwright frankly conceded before us, an unnecessary and, as events turned out, purely distracting waste of effort.
110. In relation to the full good character direction issue, the judge gave, as she said she would, a modified good character direction to the jury<sup>48</sup>:

*“... you have heard and so it’s a part of the formal admissions before you, that it is the admission that [Mr Moore] has a number of previous convictions, dating back to when he was 22 years of age. Mr. Moore is now 40 years of age. These offences were minor in nature, are now spent, meaning the convictions, and are not relevant at this stage ... these offences were committed more than 18 years ago. Because of their nature and age, Mr. Moore is to be regarded as if he were a person of previous good character. Now what does this mean? Sorry ... as a person of previous good character and I should say added to that of course is the statement which comes from Mr. Seymore. You also have that with regard to his character or his personal qualities. Now, what does this mean, that he is to be regarded as a person of good character? It does not mean that Mr. Moore could not have committed the offence with which he is charged. But the law says that it should be taken into account in Mr. Moore’s favour in two ways. First, although Mr. Moore did not give evidence, Mr. Moore did give an account to the police when he was interviewed and Mr. Moore relies on that. You should take Mr. Moore’s good character into account when you are deciding whether you accept what he said in that interview. Bear in mind that this account was not given under oath or affirmation, and was not tested in cross-examination.*

*Secondly, the fact that Mr. Moore is now 40 years old and has not committed any other offence for over 18 years, may mean that he is less likely ... sorry ... that it is less likely that Mr. Moore would have committed the offence for which he is charged. Now, you should take the fact that Mr. Moore is to be regarded as a person of good character into account in his favour in those two ways that I have just explained, when you consider the evidence in this case. It is for you, ladies*

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<sup>47</sup> [2002] UKPC 19, para 28, per Lord Bingham

<sup>48</sup> Judge’s summation, pages 188-189

*and gentlemen on the jury, to decide how important or what importance you attach to it ...”*

111. In our view, while the judge did refer to the previous convictions, these directions were not on the whole ungenerous to Mr Moore. First, the jury were expressly told that the previous convictions were for offences committed over 18 years ago and that, because of their nature and age, Mr Moore should be regarded as if he were a person of previous good character. And second, Mr Moore was given the benefit of the standard good character warning as to the effect of his good character on both his propensity to commit the offence for which he was charged and his credibility in his pre-trial interview.
112. As Mr Wainwright submitted, the case against Mr Moore was very strong indeed. He was positively identified by the police officers as the person who was seen piloting the small white boat containing the ganja as it came into shore on the morning of 23 June 2018. He was seen to run when the police arrived, and was detained after he fell and sought to hide in the bushes. In addition, there was evidence that DNA matching his was found on the handle of the tiller of the boat.
113. Further, on the other side of the coin, the judge reminded the jury in detail in her summing-up of the contents of Mr Moore’s police interview, in which he admitted being in the vicinity of the Morritt’s Hotel on 23 June 2018, but said that he was alone at the time. On his account, while there on the beach, he saw a white boat on the shore and considered using it to go fishing at sea. He touched the boat to check the engine and discovered that there was no gas in it. So, in the end he did not go to sea in the white boat at any point. But he did see two bags of ganja on the beach and considered “*taking a chance*” with them. He ran when he saw the police and accepted that he was hiding when he was arrested, but he denied acting with anyone else or being involved in the importation of ganja.
114. So the cases for both the Crown and Mr Moore were before the jury, who accepted the former. In these circumstances, it seems to us that, in respect of both the cross-examination and the full good character direction issues, this is a fit case for the application of the proviso to section 9(1) of the Court of Appeal Act, which permits the court, “*notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, [to] dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred*”. In our view,

even if the judge had dealt with both issues correctly, the jury “*would inevitably have come to the same conclusion upon a review of all the evidence*”<sup>49</sup>.

115. We therefore dismiss Mr Moore’s appeal against conviction.

## **The appeals against sentence**

### The judge’s approach

116. Under section 321 of the Penal Code, a person who conspires with another or others to commit an offence punishable with imprisonment in the Cayman Islands is liable, if no other punishment is provided, to 10 years’ imprisonment. However, if the maximum punishment for the substantive offence is less than 10 years, the maximum sentence for the offence of conspiracy is the maximum prescribed for that offence.
117. Under section 16(3) of the Misuse of Drugs Act, the maximum sentence for importation of a controlled drug, such as ganja, is seven years’ imprisonment, and it is therefore common ground that the maximum sentence for the offence of conspiracy to import ganja is seven years’ imprisonment.<sup>50</sup>
118. The judge approached the sentencing process on the basis suggested by Smellie CJ in **Comrie v R** (*‘Comrie’*)<sup>51</sup>, which was an appeal to the Grand Court from the Summary Court. In that case, in which the appellant pleaded guilty to being concerned with the importation of drugs, the Chief Justice had regard to the quantity of drugs involved (50 lbs of ganja), the appellant’s secondary role in the commission of the offence, and his lack of any previous convictions. The Chief Justice considered that in such a case a starting point of 3-4 years’ imprisonment was appropriate.
119. In this case, the judge observed that there was no controversy about either the quantity of drugs involved, or the fact that none of the appellants had any previous convictions for offences relating to the supply or importation of drugs.

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<sup>49</sup> **Woolmington v Director of Public Prosecutions** [1935] AC 462, 483, per Viscount Sankey LC; see also **Stafford v The State (Note)** [1999] 1 WLR 2026, per Lord Hope at 2029-2030

<sup>50</sup> By virtue of section 321 of the Penal Code, a person who conspires with another or others to commit an offence is liable to 10 years’ imprisonment, but the

<sup>51</sup> [2012] (1) CILR Note 3, SCA 1/2011

120. As regards the third factor, that is, the role played by each of the appellants in the conspiracy, the judge referred to, among other cases, the decision of Richards J in **R v Pillarchie (Linton Nypole), Vaughans (Geranimo Antonio), Cranston (Jerry Barrows) ('Pillarchie')**<sup>52</sup>. In that case, as the judge observed, the court considered the issue of the varying roles played by the defendants “*within the categories of leading, significant or lesser roles – carefully assessing the evidence to determine into which categorization each defendant should be considered in terms of culpability*”<sup>53</sup>.

121. As an example of a case in which the defendant clearly played no more than a lesser role, the judge referred to **R v Corey Brown**<sup>54</sup>, in which the Magistrate found on the evidence that “*it would be inappropriate to infer that the defendant was anything other than a boatman*”.

122. But, in this case, the judge’s conclusion was that:

“45. ... *there is sufficient evidence for this court to find that these defendants had more than a lesser role in the conspiracy to import ganja. The Crown’s case was based on inferences to be drawn from phone calls and movements of the defendants. There were others not before the court involved in the conspiracy. The evidence was of at least two others having been involved and with whom some or each of these defendants had contact during the relevant period between the 21<sup>st</sup> and 23<sup>rd</sup> of June 2018.*

46. *The fact of these contacts, and the sheer volume of the calls, point decisively to an inference that the defendants ... were involved at a level higher than boatmen or crewmen who would be considered as performing only a limited function or with very little understanding or awareness of the scale of the operation.*”<sup>55</sup>

123. The judge therefore treated the appellants as offenders who had played significant, though not leading, roles in the conspiracy. On this basis, following the guidance given in **Comrie**, the judge took a four-year custodial sentence as her starting point in relation to each appellant.

124. The judge gave all three appellants credit of six months’ imprisonment for “*personal mitigation*”. However, with regard to Mr Rivers, the judge said this<sup>56</sup>:

“... *I bear in mind that although he has no relevant convictions for offences relating [sic] the supply of drugs, he does have a previous conviction for a serious firearm offence. While I do not think that this fact merits an uplift in the starting point in*

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<sup>52</sup> Indictment #24/2020

<sup>53</sup> Sentence judgment, para 44

<sup>54</sup> SCA 29/19 (C#01698/19)

<sup>55</sup> Sentence judgment, paras 45-46

<sup>56</sup> *Ibid*, at para 51

*this case, the deduction for personal mitigation will be less than that of the other defendants. He will serve a sentence of 3 years and 9 months' imprisonment."*

125. Mr Moore was then given a further credit of six months for the time during which he was obliged to wear an electronic monitoring device while on bail, thus effectively curtailing his liberty during curfew periods.
126. The upshot of all of this was that Mr Rivers was ordered to serve three years and nine months' imprisonment, Mr McInnis three years and six months' imprisonment, and Mr Moore three years' imprisonment.

#### Mr Rivers' sentence appeal

127. Mr Myers complained, firstly, that the sentence of three years and nine months' imprisonment imposed on Mr Rivers was manifestly excessive. But he also complained that the judge gave no justification for the three-month disparity between Mr Rivers' sentence and that of the other appellants, Mr McInnis in particular; and that, in any event, there was none.
128. This was a case involving a conspiracy to import fair quantity of drugs. There is no real challenge to the judge's assessment of Mr Rivers' role in the enterprise as "*significant*". As can be seen from the authorities relied on by the judge, this was a finding that was clearly open to her: in **Pillarchie**, for instance, Richards J stated, applying the United Kingdom Sentencing Guidelines, that "[a] *significant role would involve an operational or management function within a chain, motivation by financial or other advantage, whether or not operating alone, or some awareness and understanding of the scale of the operation*"<sup>57</sup>.
129. In these circumstances, a starting point of four years' imprisonment was entirely in keeping with the guidance given by the Chief Justice in **Comrie**, albeit in the context of offences tried in the Summary Court. This was, in any event, entirely a matter for the judge's sentencing discretion and nothing has been shown to suggest that she exercised it on any wrong principle.
130. Mr Myers second complaint was that the judge failed to provide any justification for the three-month disparity between the sentence imposed on Mr Rivers and that of the others. This is, of course, incorrect. As indicated at paragraph 123 above, the judge did explain that it was based on Mr Rivers previous conviction for what she described as "*a serious firearm offence*". Accordingly,

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<sup>57</sup> At para 25

in order to reflect this fact, the judge reduced the level of credit for personal mitigation in Mr Rivers' case from the six months given to the other appellants to three months.

131. Although this is not a point which Mr Myers made, it might be said, in our view, that the judge's approach on this point was not entirely orthodox (and this may well be the basis of Mr Wainwright's comment in his skeleton argument<sup>58</sup> that “[w]hether such a reduction can be justified on these grounds is entirely a matter for the judgement of the Court”). The Cayman Islands Sentencing Guidelines lists previous convictions as a potentially aggravating factor, “*relevant to both the offence itself and the offender*”<sup>59</sup>. On this basis, it would clearly have been open to the judge to treat Mr Rivers' previous conviction as a factor increasing the starting point. And this, in our respectful view, is the way in which the matter should have been approached in this case.
132. But, be that as it may, it seems to us that the judge would inevitably have ended up at the same level of sentence, that is three years and nine months' imprisonment. Since it is clear that this was what she intended, we see no reason to disturb Mr Rivers' sentence on the basis of what was, by any measure, a minor misstep in arriving at a completely unexceptionable result.
133. We therefore dismiss Mr Rivers' appeal against sentence.

#### Mr McInnis' sentence appeal

134. On Mr McInnis' behalf, Mrs Halliday-Davis also contended that the sentence of three years and six months' imprisonment was manifestly excessive. Her single point was that the judge failed to take into account the fact that the weight of the drugs involved in this case (200 lbs) was “*significantly lower*” than that involved in some of the other comparable cases from this jurisdiction.
135. In this regard, Mrs Halliday-Davis referred us to (i) **Pillarchie**<sup>60</sup>, in which Richards J reviewed a number of sentences imposed in the Summary Court for cases involving ganja, ranging from a low of two years and four months' imprisonment to a high of five years and four months' imprisonment, for offences involving quantities of drugs significantly higher than 200 lbs; (ii) **Comrie**, in which (according to Mrs Halliday-Davis) the Chief Justice reduced a sentence of five years' imprisonment in the Summary Court on a plea of guilty for importation of 395.2 lbs of ganja to three years; and (iii) the UK Sentencing Guidelines, under which cannabis weighing 200 lbs, or 90

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<sup>58</sup> Prosecution Response to Grounds of Appeal dated 27 August 2021, para 69

<sup>59</sup> Cayman Islands Sentencing Guidelines, section 8

<sup>60</sup> Para 15

kgs, would be considered to fall in category 2, thus attracting a starting point of two years' imprisonment, within a range of 18 months – three years, in respect of an offender who played a lesser role.

136. We reject these submissions. In the first place, it seems to us that the judge's assessment of the appellants' roles in the conspiracy as significant was amply grounded in the extensive telephonic evidence involving all of them. That evidence clearly suggested roles greater than that of mere boatmen or crewmen, involving, as Richards J put it in **Pillarchie**, "*some awareness and understanding of the scale of the operation*".
137. Secondly, if that is so, the starting point under the UK Sentencing Guidelines for an offence involving 200 lbs of ganja would be four years' imprisonment, in the category range two years and six months' to five years' imprisonment.
138. Thirdly, it appears to us to be clear from the very brief note of in **Comrie** which we were shown that, although the total amount of ganja involved was some 400 lbs, the Chief Justice sentenced the appellant on the basis of the 50 lbs of the drug which he admitted to be his. It is in these circumstances that the Chief Justice considered that, in light of the appellant's plea of guilty, his secondary role in the enterprise, his lack of previous convictions, and the small amount of ganja involved, a starting point of three to four years was appropriate, resulting in a reduction of the appellant's sentence from five to three years' imprisonment.
139. Against this background, we are clearly of the view that the judge's choice of a starting point of four years' imprisonment in Mr McInnis' case was well within the range of possibilities sanctioned by the authorities in comparable circumstances.
140. In arriving at this conclusion, we have not lost sight of Mrs Halliday-Davis' complaint about a perceived disparity between the sentence in this case for an offence involving 200 lbs of ganja, and previous sentences for offences involving greater quantities of the drug. However, in this regard, we think it suffices to reiterate the recent observation by Goldring P in **Rovan Johnson and Albert Campbell v The Queen**<sup>61</sup>, against the background of evidence of the continued high level of trafficking of ganja by boat from Jamaica to the Cayman Islands in the eight years since **Comrie** was decided, that –

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<sup>61</sup> Criminal Appeals 224/2019 and 25/2019, judgment delivered 26 November 2020,

*“It may well be that were [the Chief Justice] now considering the matter, he would have in mind a somewhat higher starting point than [the three to four years] suggested then ...”*

141. We therefore dismiss Mr McInnis’ appeal against sentence.

Mr Moore’s sentence appeal

142. Despite Mr Moore’s initial indication of an intention to seek leave to appeal against sentence, no ground of appeal was filed, nor was any submission made to us by Mr Hughes on his behalf. For the reasons we have given in respect of Mr Rivers and Mr McInnis’ sentence appeals, we think Mr Moore’s decision not to pursue his was sensible. We therefore treat the appeal against sentence as having been abandoned.

**Disposal**

143. The appellants’ appeals against conviction and sentence are dismissed.

**Rt. Hon Sir Alan Moses, Justice of Appeal**

144. I agree.

**Rt. Hon Sir John Goldring, President.**

145. I also agree.