IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 11/2021, 13/2021 & 14/2021
SCA#0004/2020, 0005/2020 & 0006/2020
SC#00728/2017, SC#03675/2016 & SC#02851/2017 (1) & (2)

BETWEEN:

WAYNE CARLOS MYLES

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:
The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Appearances: **Mr. Jonathan Hughes of Samson Law for the Appellant**
Ms. Kerri-Ann Gillies, Office of the DPP for the Respondent

Date of Hearing: **18 May 2022**

Additional submissions Received: **12 June 2022**

Draft Judgment Circulated: **15 June 2022**

Judgment Delivered: **18 July 2022**

JUDGMENT

Birt, JA

1. On 12 June 2019, the appellant was convicted of four offences in connection with controlled drugs by Magistrate Gunn, sitting in the Summary Court. The appellant subsequently appealed against conviction and sentence to the Grand Court (Chapple J), who dismissed both appeals on 29 July 2021.

2. The appellant now appeals to this Court pursuant to section 29(1) of the Court of Appeal Act (2011 Revision) ("the Act") which provides for second tier appeals in the following terms:

> ***"29(1). Any person, including the prosecutor, aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate or revisional jurisdiction, whether such judgment has been given or made upon appeal or revision from a court of summary jurisdiction or any other court, board committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature, may appeal, subject to this Act, to the Court on any ground of appeal which involves a point of law alone, or against sentence but not upon any question of fact."*** [Emphasis added]

3. The appellant is appealing against both conviction and sentence. They were both dismissed at the conclusion of the hearing on 18 May and what follows constitutes our reasons. As can be seen, his appeal against conviction under section 29(1) can only be on a point of law, not on any question of fact. There is no such restriction on his appeal against sentence.

4. Section 29(1) is to be distinguished from section 7, which provides for first tier appeals to this Court against conviction in the Grand Court in the following terms:

> ***"Subject to this Act, the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a convicted person:***
>
> ***(a) against the conviction on any ground which involves a question of law alone;***
>
> *(b)* ***with the leave of the Court…….against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact…"*** [Emphasis added]

Background

5. The appellant faced four charges before the Magistrate as follows:

   (1) possession with intent to supply 1.88 g of cocaine on 15 June 2016 at the Lone Star parking lot;

(2) possession with intent to supply 3.89 g and 0.765 g of cocaine on 2 February 2017 at North Church Street;

(3) being concerned in the supply of cocaine between 10 October 2014 and 15 June 2016;

(4) being concerned in the supply of ganja between 10 October 2014 and 15 June 2016.

6. The prosecution case on each charge was helpfully summarised by Chapple J in his judgment and we gratefully draw on his description. As to charge 1, namely possession with intent to supply cocaine on 15 June 2016, the appellant was arrested in the Lone Star car park when standing beside a BMW motor vehicle. He was searched and officers seized a Samsung Galaxy 6 Edge Plus mobile phone and a black cardholder containing five Ziploc bags. Those bags contained a white powder which was subsequently analysed as 1.88 g of cocaine. He made no comment at interview and was subsequently released on bail.

7. As to charge 2, on 2 February 2017 police officers in North Church Street saw the appellant emerge from a BMW motor vehicle behaving suspiciously. They searched him and found three wraps of white powder concealed within the lining of his shoes. The powder was subsequently analysed as 4.655 g of cocaine.

8. As to charges 3 and 4, the prosecution relied substantially upon material downloaded from the Galaxy phone seized on 15 June 2016 and a detailed analysis of that material carried out by Ms Joanne Delaney, an intelligence analyst working with the Royal Cayman Islands Police Service (RCIPS). Ms Delaney gave as her opinion that the downloaded material demonstrated that the appellant was a street dealer involved in the supply of both cocaine and ganja.

9. The appellant's case at trial before the Magistrate was that, although he admitted being in possession of the amounts of cocaine on 15 June 2016 and 2 February 2017, they were for his own personal use. He had no intent to supply. As to charges 3 and 4, he said that the Galaxy phone did not belong to him but was simply on loan to him. He did not have exclusive use of it and estimated that between 12 and 15 people a day had access to it. The material downloaded was nothing to do with him and he denied ever sending any messages from the phone, whether via WhatsApp, SMS or any other means. He said that he had not been in any way concerned in the supply of any drugs. He was a drugs user, not a dealer.

10. The Magistrate rejected the appellant's account and convicted him of all four charges. She set out her reasons for so concluding in a 45 page judgment dated 12 July 2019. The Magistrate also issued a judgment dated 19 February 2019 ("the Rulings judgment") in connection with a number of arguments which the appellant had raised concerning the admissibility of some of the evidence, whether the prosecution was time-barred and certain other matters. We shall refer to those matters later in this judgment to the extent that it is necessary.

11. In his appeal to the Grand Court the appellant represented himself and raised a number of grounds for his appeal against conviction, including that the conviction was against the weight of the evidence. They were considered in detail by Chapple J but he dismissed all of the grounds relied upon. He also dismissed the appeal against sentence. Only certain of the grounds for the appeal against conviction are renewed before us and we shall summarise Chapple J's decision and that of the Magistrate as far as necessary when considering each of those grounds. But first, we must consider the limitations on an appeal under section 29(1).

The nature of an appeal under s 29(1).

12. We begin by considering the arguments on this aspect contained in the written and oral submissions on behalf of the appellant. We consider at para 26 et seq below a constitutional argument introduced by Mr Hughes only in his oral submissions.

13. As set out above, section 29(1) states that an appeal to this Court from a decision of the Grand Court in its appellate role may be brought on a ground *"which involves a point of law alone….. but not upon any question of fact"*.

14. In *Smith v The Queen* [2000] 1 WLR 1644, on appeal from the Court of Appeal of Bermuda, the Privy Council had to consider whether the Attorney General had a right of appeal against the ruling of the trial judge at the end of the prosecution case in a jury trial that there was no case to answer and that the defendant should be acquitted. The judge's decision was made on the ground that the evidence led by the prosecution, taken at its highest, was such that a jury properly directed could not properly convict upon it.

15. Under section 17(2)(a) of the Court of Appeal Act of Bermuda ("the Bermuda Act"), the Attorney General had a right of appeal against an acquittal *"on any ground of appeal which involves a question of law alone"*. This was to be distinguished from an appeal against conviction. Under

section 17(1) of the Bermuda Act (which so far as material was in similar terms to section 7 of the Act), such an appeal could be brought as of right where the ground of appeal involved *'a question of law alone'* or, with leave of the court below or the Court of Appeal of Bermuda, on any ground of appeal which involved *'a question of fact alone or a question of mixed law and fact'*.

16. In a judgment delivered by Lord Steyn, the Privy Council held that whether some issue involved a question of law depended on the context and therefore the expression had to be construed in the context of the Bermuda Act. Lord Steyn held that, given that section 17 distinguished between *'a question of law alone'* and *'a question of mixed fact and law'*, the Attorney General could appeal only on a pure question of law, not on a question of fact or of mixed law and fact.

17. As to whether a decision that there was no case to answer was a pure question of law, Lord Steyn explained the position as follows at 1653E-F:

> ***"It is now possible to apply this view to the type of situations which may arise on a no case submission that a statutory offence contains an ingredient of mens rea and that there is no evidence of mens rea. The prosecution may dispute the legal question. That would be a pure question of law which may be appealed under section 17(2) by the Attorney General. On the other hand, most no case submissions will simply involve an assessment of the strength of the evidence led by the prosecution. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt."***

18. The Privy Council held that, the trial judge having decided that the circumstantial evidence adduced by the prosecution was insufficient for a jury to properly convict, his decision was one of fact and degree; it did not involve a question of law alone. This was so even though (at 1653H) the Privy Council described the trial judge's decision that there was no case to answer as *'an astonishing one'*. It followed that the Attorney General was not entitled to appeal.

19. We were also referred to the decision of the Privy Council on appeal from Trinidad and Tobago in *The State v Boyce* [2006] UKPC 1. In that case, the trial judge had concluded that a particular witness was not qualified as an expert witness and that his evidence should be excluded. He further held that, without that evidence, there was no case to answer and directed the jury to acquit. The

DPP sought to appeal under the statutory provision which conferred a right of appeal against a decision of a trial judge to uphold a submission of no case to answer on the ground that the decision of the judge *'is erroneous in law'*.

20. In a judgment delivered by Lord Hoffmann, the Board distinguished the decision in *Smith* in the following terms:

> ***"23. Mr Hudson-Phillips next submitted that the matters of which the prosecution complained did not make the judge's decision "erroneous in point of law". The decision to exclude Dr des Vignes's evidence involved mixed law and fact. The judge applied what he considered to be the standard of expertise required by the law to the facts of Dr des Vignes's qualifications as a forensic pathologist. Likewise the decision to direct the jury to acquit was the application of a legal standard ("evidence upon which a reasonable jury could convict") to the judge's factual assessment of the evidence. "Erroneous in point of law", said Mr Hudson-Phillips, meant an error of pure law which did not involve any factual assessment. He referred to Smith v The Queen [2000] 1 WLR 1644 in which the Board, in advice delivered by Lord Steyn, had construed the words "question of law alone" in the Bermuda Court of Appeal Act as excluding questions of mixed law and fact, such as the question of whether there is a case to answer.***
>
> ***24. In that case however, the Bermuda statute used the terms "question of law alone" and "question of mixed law and fact" in such a way as to suggest that they had different meanings. In the Trinidad and Tobago statute, the words are "erroneous in point of law". Their Lordships consider that this expression, used in connection with proceedings before a jury, refers to the distinction between questions of law which are for the judge and questions of fact which are matters for the jury. It follows that any ruling which may properly be made by the judge (such as whether evidence is admissible or whether there is a case to go to the jury) is a ruling on a point of law and can be challenged as erroneous by appeal under section 65E. Their Lordships agree with the view of the Court of Appeal that "the expression 'erroneous in point of law'***

connotes a situation where the trial judge falls into error in any aspect of the case before him which calls for his determination"."

21. Mr Hughes submitted that the decision in *Boyce* was the relevant one for our purposes, but we consider we should follow the decision in *Smith*. The relevant wording of the Act is, for all material purposes, identical to the wording of the Bermuda Act. Thus, as in section 17(1) of the Bermuda Act, section 7(a) of the Act confers a right of appeal against conviction on a question of law alone and section 7(b) confers a right of appeal, with leave, on a ground of appeal which involves a question of fact alone or a question of mixed law and fact. Section 29(1) also uses similar wording to section 17(2) of the Bermuda Act in conferring a right of appeal on any ground which involves *'a point of law alone'*. We see no difference in meaning between a *'point'* of law (as in section 29(1)) and a *'question'* of law (as in section 17(2) of the Bermuda Act). Conversely the wording in *Boyce,* with its reference to *'erroneous in point of law'* differs from the wording in section 29(1) and from the wording in the Bermuda Act. Such wording is to be found in section 28(1) of the Act and accordingly the decision in *Boyce* may be of some relevance to appeals brought under that section.

22. Mr Hughes submitted that there was a material difference between the wording of section 29(1) and that of section 17(2) of the Bermuda Act considered by the Privy Council in *Smith*. Whereas section 17(2) just referred to an appeal on a question of law alone, section 29(1) permitted an appeal on a point of law alone but went on to specifically prohibit an appeal on a question of fact. Both statutes, he said, envisaged three types of appeal, namely on law alone, on mixed law and fact and on fact. Section 29(1) specifically excluded an appeal on fact but was silent about an appeal on mixed law and fact. The section must therefore be taken as not excluding an appeal on mixed law and fact.

23. We cannot accept that argument. The wording of section 29(1) could not be plainer; just as in the Bermuda Act, an appeal may be brought on a ground which involves a point (question) of law '*alone'*. By definition, a point of law alone cannot be a point of mixed law and fact. The fact that the legislature has chosen specifically to exclude an appeal on a question of fact cannot alter the plain meaning of the expression *'a point of law alone'* as construed by the Privy Council in *Smith*.

24. Section 29(1) also has to be construed in the context that it confers a right to a second appeal. A person convicted in the Summary Court has a right of appeal on general grounds to the Grand

Court. It is therefore not surprising that the legislature has limited a further appeal to this Court to pure questions of law.

25. For these reasons, subject to the constitutional argument discussed in the following paragraphs, we hold that the expression *'point of law alone'* in section 29(1) has the same meaning as the expression *'question of law alone'* in *Smith* and means an issue of pure law. The section does not permit an appeal on a ground of mixed law and fact.

26. During the course of his oral submissions, Mr Hughes sought to raise an argument under the Bill of Rights as contained in the Cayman Islands Constitution Order 2009. When it was pointed out to him that there was no mention of such an argument in his Grounds of Appeal or written submissions, he said that the point had only occurred to him very recently. That no doubt explains why he did not have copies of the Bill of Rights available and arrangements had to be made for the Court staff to provide copies.

27. His submission related to sections 7(1) and 26 of the Bill of Rights. Section 7(1) provides:

> ***"Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."***

28. Section 26 provides (so far as relevant):

> ***"26(1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time.***
>
> ***….***
>
> ***26(3) An appeal shall lie as of right to the Court of Appeal from any final determination of any issue by the Grand Court under the Bill of Rights…."***

29. Mr Hughes referred to the fact that, at paragraph 30 of his judgment (in the context of whether the delay in bringing the proceedings in this case amounted to an abuse of process), Chapple J said that a fair trial of the charges was possible despite the delay. Mr Hughes submitted that the appellant's right to fair trial under section 7(1) of the Bill of Rights was therefore engaged. It followed that an appeal lay as of right pursuant to section 26(3) of the Bill of Rights and the Court had to determine whether there had been a fair trial without regard to the limitation to a 'point of law' imposed by section 29(1) of the Act.

30. In our judgment, Mr Hughes' submission failed to take account of section 7(7) of the Bill of Rights which provides (so far as relevant):

> ***"(7) Every person who has been convicted by a Court of a criminal offence shall have the right to appeal to a superior Court against his or her conviction or his or her sentence or both as may be prescribed by law; but:***
> ***(a) Nothing in any law shall be held to contravene this subsection:***
> ***(i) ….***
> ***(ii) to the extent that it makes reasonable provision with respect to the grounds on which any such appeal may be made…."***

31. It is section 7 which confers the right to a fair trial and section 7(7) specifically enables a statute – in this case the Act – to make reasonable provision as to the grounds upon which an appeal against conviction may be brought. The Act does just that in sections 7 and 29(1) and such provisions are in our judgment entirely reasonable. Those contained in section 7 are commonplace in many jurisdictions and the restriction on appeals pursuant to section 29(1) is reasonable bearing in mind that it relates to a second appeal brought after a full right of appeal to the Grand Court.

32. In our judgment, section 26(3) of the Bill of Rights has to be read in the light of section 7(7), which deals specifically with appeals in criminal cases and provides that reasonable limitations can be imposed on the grounds on which an appeal against conviction may be brought. The provisions of sections 7 and 29(1) of the Act are entirely consistent with section 7(7) of the Bill of Rights and section 26(3) of the Bill of Rights cannot be construed as somehow overriding or expanding those provisions.

33. It follows that we reject Mr Hughes' last minute argument as being wholly inconsistent with the plain wording of section 7(7) of the Bill of Rights.

34. Having determined the basis upon which an appeal may be brought under section 29(1), we now turn to consider the grounds relied upon in this case.

Grounds of Appeal against conviction

35. Counsel for the appellant has filed amended grounds of appeal against conviction which raise the following three issues:

(1) The Magistrate erred in allowing Ms Delaney to give opinion evidence on matters which fell outside her established expertise.

(2) The Magistrate should have stayed proceedings as an abuse of process on the basis that the evidence contained in the Galaxy phone was '*sat on'* by the prosecution and used to mount a *'second bite of the cherry'* prosecution for charges 3 and 4 against the appellant for much the same offending as he had previously been prosecuted for.

(3) The Magistrate erred when she ruled that charge 3 was laid within the required period of 6 months and was therefore not statute barred.

All three of these issues were raised, together with others, before both the Magistrate and Chapple J in the Grand Court. We shall consider each in turn.

Ground 1 – opinion evidence

36. Before the Magistrate, the appellant challenged the admissibility of opinion evidence from Ms Delaney. The Magistrate summarized at [17] of the Rulings judgment those matters where the prosecution were relying on opinion evidence from Ms Delaney. These included in particular her opinion as to the meaning of certain words and expressions used in the messages downloaded from the Galaxy phone and whether such words and expressions referred to controlled drugs. The Magistrate described Ms Delaney's qualifications at [14] of the Rulings judgment and at [15] recorded her (the Magistrate's) understanding of the test for admitting expert opinion evidence, namely that the party seeking to adduce such evidence has to satisfy the court that:

> ***"(a) the subject-matter of the opinion was such that a person without expertise in that area would not be able to form a sound judgment on the matter without the***

assistance of an expert and that the area of expertise was in a sufficiently recognized field of knowledge; and

(b) the particular witness is qualified to express an opinion on the subject-matter and has sufficient knowledge to render his/her opinion valuable to the court."

37. At [13] and [23] of the Rulings judgment, the Magistrate found, contrary to the appellant's submissions, that the opinion evidence of Ms Delaney covered areas in which magistrates did not have the necessary expertise and furthermore that, through her training and experience as well as her access to intelligence material, Ms Delaney was qualified to give opinion evidence as an expert in the areas in question.

38. On appeal to the Grand Court, the appellant submitted that the Magistrate had erred in concluding that Ms Delaney was an expert as she did not have sufficient qualifications, experience or expertise either in analyzing/interpreting telephone data or in deciphering street terms used in the purchase and supply of drugs. He pointed out that Ms Delaney had conceded in her evidence before the Magistrate that she did not have field experience, in that she did not deal directly with addicts, victims or offenders; he further contended that she was biased as she was employed by the RCIPS.

39. Chapple J rejected the appellant's submissions. He held that the Magistrate applied the correct principles in determining whether Ms Delaney's evidence was admissible as expert evidence and that the Magistrate's conclusion that Ms Delaney had the necessary expertise could not be faulted. In reaching his conclusion, he took into account at [22] that Ms Delaney's experience was not in the field and that she was employed by the RCIPS.

40. The appellant now seeks to raise the same complaint before this Court. On his behalf, Mr Hughes refers to the guidance as to the practice which expert witnesses should follow in their reports given by Quin J in R v A. Powery [2009 CILR N7] and submits that Ms Delaney did not follow this guidance. In particular, she did not assert in her report, as Quin J recommended should be done, that she was giving independent assistance and she did not disclose the limitations of her expertise. It was only drawn out in cross-examination that she had no experience in the field. Mr Hughes submitted that, as merely a communications analyst, she was not qualified to offer an opinion on the context and meaning of the messages on the Galaxy phone.

41. In our judgment, this ground of appeal does not involve a point of law alone. The legal test for admitting expert opinion evidence is a point of law, but the Magistrate applied the correct legal test as described at para 36 above. There was therefore no error of law in that respect. What is said is that, on the facts, she should not have found that Ms Delaney was qualified to give expert opinion evidence in this case. That is not a point of law; it is simply the application of a legal principle to the particular facts of a case. As Lord Hoffmann pointed out at [23] of the judgment in Boyce (quoted at para 20 above), it is a question of mixed fact and law. This ground of appeal does not therefore fall within section 29(1) and is accordingly rejected. We would, however, add for the sake of completeness that, in our judgment, the Magistrate and Chapple J reached an entirely proper conclusion on the facts. In particular, while the guidance given by Quin J in *Powery* is undoubtedly very useful and should generally be followed, failure to do so does not mean that the evidence in question must necessarily be excluded. Often, any such failure will go simply to the weight to be attached to the evidence in question. In this case, the two failures to comply identified at para 40 above were wholly insufficient to lead to exclusion of Ms Delaney's evidence.

Ground 3 – Charge 3 is time barred

42. We think it is convenient to consider Ground 3 next. Section 78 of the Criminal Procedure Code (2013) provides:

> ***"Except where a longer time is specially allowed by law, no offence which is triable summarily shall be triable by a Summary Court unless the charge or complaint relating to it is laid within six months from the date on which evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant."***

43. In a passage relied on by the Magistrate, Sanderson J in *R v Eldermire* [2000] CILR 97 at 101 said:

> ***"I conclude that the words "sufficient to justify proceedings" do not require evidence beyond a reasonable doubt, but rather something less than that. In my opinion, if the evidence is sufficient in the mind of an unbiased right thinking person to show that the accused committed the offence, then proceedings would be justified. In other words: are there reasonable and probable grounds for believing that the accused committed the offence?"***

44. In relation to constructive knowledge, the Magistrate quoted and applied the test described by the Court of Appeal of England and Wales in *Platt v BRB (Residuary) Ltd* [2014] EWCA Civ 1401. Adapting the Court of Appeal's words at [28] to a criminal context, in order to determine if a prosecutor has constructive knowledge:

> ***"The court has to consider what knowledge [the prosecutor] might reasonably have been expected to acquire…"***

45. The appellant renews the submission made before the Magistrate and Chapple J to the effect that charge 3 was not laid within the required six month period.

46. The relevant timeline is as follows. The Galaxy phone was seized from the appellant on 15 June 2016. The phone was however locked and the police were unable to gain access to it. A software update subsequently enabled the police to download the SMS and MMS messages on the phone on 17 August 2016. However, the police were still unable to access the WhatsApp messages on the phone. Ms Delaney reviewed the SMS and MMS messages on 1 September, but gave evidence before the Magistrate that, although those messages caused her to suspect that the appellant was involved in the supply of drugs, they were not sufficient to found a charge of being concerned in the supply of cocaine as per charge 3. She needed to have access to the WhatsApp messages.

47. The Galaxy phone was subsequently sent away in late November to Cellebrite for a full download (including the WhatsApp messages) and this was received back from Cellebrite on 1 December 2016. Following consideration of the downloaded messages, the prosecution decided that there was sufficient evidence to lay charges 3 and 4, which were laid on 30 May 2017 i.e. just within the relevant six months from 1 December 2016.

48. Before the Magistrate, the appellant submitted first that, as the police were in possession of the Galaxy phone from 16 June 2016, they had constructive knowledge of its contents. The six-month period therefore started from that date. This submission was rejected by the Magistrate on the ground that, in order to have constructive knowledge of the messages on the Galaxy phone, the police had to be able to have access to the material in question, which they did not have at that stage.

49. Alternatively, the appellant submitted that the police had sufficient evidence to justify the charge following the downloading of the SMS and MMS messages on 17 August or, at the very latest on 1 September following the analysis by Ms Delaney. This too was rejected by the Magistrate, who accepted the evidence of Ms Delaney and concluded that there was not sufficient evidence to justify a charge until the full download on 1 December 2016 which included the WhatsApp messages.

50. On appeal to the Grand Court, Chapple J held that the Magistrate had applied the right test and had reached the correct decision on the facts. Indeed, he was of the opinion that the prosecution was entitled to a reasonable period after 1 December, in order to analyse the large volume of messages downloaded on that date, before the six-month period began to run.

51. Before this Court, Mr Hughes renewed the submission that the police had constructive knowledge sufficient charge on 15 June 2016 by reason of their possession the Galaxy phone and also had actual knowledge sufficient to charge from 1 September 2016 when Ms Delaney analysed those parts of the material which had been downloaded from the phone on 17 August.

52. In our judgment, the only point of law in this connection is the identification of the appropriate legal test for ascertaining when a prosecutor has constructive knowledge of evidence sufficient to charge. It is clear that the Magistrate and Chapple J applied the correct test as described above at para 44. What is said is that they both reached the wrong decision on the facts. It is said that they should found that the police had constructive knowledge sufficient to charge by reason of their possession of the Galaxy phone on 15 June and should also have found that the police had sufficient actual knowledge to charge on 1 September 2016. These are not submissions which involve a point of law alone; at best they are submissions of mixed law and fact. It follows that Ground 3 must also be rejected as not coming within section 29(1). Although it is not necessary, we would, for the sake of completeness, say that, if we had had jurisdiction to consider this ground of appeal, we would have upheld the decision of both the Magistrate and Chapple J on the facts.

Ground 2 – abuse of process

53. The appellant submits that the Magistrate should have struck out the prosecution as an abuse of process. Before the Magistrate and Chapple J there was also a submission that the Magistrate had no jurisdiction to try the charges on the basis of autrefois convict or autrefois acquit. This latter

submission is not renewed before this Court, but Mr Hughes relies on the background to that submission in support of his argument that there has been an abuse of process.

54. The factual background to the abuse of process submission is that, following the arrest of one Alex Ebanks and the seizure of Ebanks' phone, which had messages to the appellant on it, the appellant was charged with two specific counts of conspiracy (with Ebanks) to supply cocaine on two specific dates, namely 31 August 2015 and 22 September 2015. He was subsequently tried on those two charges before a jury in the Grand Court, which concluded in November 2017 that he was guilty of conspiracy to supply on 31 August 2015 but not guilty of the charge in relation to 22 September 2015.

55. The submission before the Magistrate and Chapple J was that, as the dates covered by charge 3 (being concerned in the supply of cocaine between 10 October 2014 and 15 June 2016) included 31 August 2015 and 22 September 2015, the appellant was being tried again for substantially the same offence as had been tried before the Grand Court. That submission was rejected by the Magistrate and by Chapple J on the basis that charge 3 alleged that the appellant was a persistent and regular supplier of cocaine throughout the period charged, whereas the trial before the Grand Court was in relation to specific supply on two specific dates; the appellant was never in jeopardy before the Grand Court of conviction for continuing drug supply over a substantial period.

56. As already mentioned Mr Hughes no longer maintains a submission of autrefois convict or autrefois acquit. However, he submits that the above background is relevant when considering whether there was an abuse of process. He contends that the police delayed unreasonably and unnecessarily some five months before sending the Galaxy phone off to Cellebrite to be downloaded and this was at a time when they were proceeding against the appellant in the Grand Court. Furthermore, the police were in possession of the full downloaded material from the Galaxy on 1 December 2016, which was some 10 months before the beginning of the trial in the Grand Court; yet they did not consider widening the scope of the charges against the appellant in the Grand Court to include a charges of being concerned in the supply of cocaine and ganja along the lines of charges 3 and 4. It was oppressive and an abuse of process to prosecute him subsequently and separately before the Summary Court when he could and should have been prosecuted for the *'being concerned'* charges before the Grand Court.

57. The Magistrate and Chapple J rejected the submission that there was an abuse of process. They held that there had been no unreasonable delay and it was perfectly possible for the appellant to have a fair trial before the Summary Court.

58. The Privy Council in *Smith* did not have to decide whether a decision on whether there has been an abuse of process is a point of law alone. In our judgment, it is plainly a question of mixed fact and law. The correct legal principles in relation to abuse of process must be applied in respect of the facts of the particular case. Mr Hughes did not submit that either the Magistrate or Chapple J had applied the wrong legal test concerning abuse of process. His submission was that they had reached the wrong conclusion on the facts. It follows that this ground of appeal does not concern a point of law alone and we therefore do not have jurisdiction to consider it.

59. If we had had jurisdiction, we would have had no hesitation in concluding that there was no abuse of process. The evidence from the Galaxy, which formed the basis of charges 3 and 4, was obtained within 6 months of the appellant's arrest and he was charged within 12 months of his arrest. There can be no suggestion that it was not possible for him to have a fair trial before the Summary Court after this period of time. The facts of this case come nowhere near the sort of lengthy delay which is necessary before there is likely to be an abuse of process on the ground of delay. Nor does the fact that, in theory, a charge equivalent to charges 3 and 4 could have been added to the Grand Court proceedings render the trial before the Summary Court unfair or mean that it is an abuse of process to have proceeded separately from the prosecution in the Grand Court. We therefore reject ground 2.

60. For the reasons stated above, we dismissed the appeal against conviction on 18 May.

Appeal against sentence

61. In her sentencing ruling, the Magistrate accepted the evidence of Ms Delaney to the effect that the messages on the Galaxy phone showed that the appellant had supplied some 14.5 ounces of cocaine over a two-year period to 49 customers. The Magistrate then had regard to the sentencing guidelines contained in the 2002 Statement on Tariffs and Guidelines for Sentencing Certain Offences which provide, so far as relevant:

> ***"The tariff for a first such offence, involving less than 2 ounces of cocaine or less than 4 grammes of cocaine base without mitigating circumstances, will be eight (8) years. For offences involving 2 ounces or more of cocaine without mitigating circumstances the tariff will be 10-12 years. Fifteen (15) years or more will be imposed where such an offence involves substantial importation or dealing in any way…. We would define 'substantial importation or dealing' as any transaction involving several ounces or kilo quantities."***

62. The Magistrate held that charge 3 fell within the 10 to 12 year bracket. Taking account of mitigation, she imposed a sentence of 11 years imprisonment on that charge, with concurrent sentences of 3 and 8 years on charges 1 and 4 respectively. She imposed a consecutive sentence of 2 years imprisonment on charge 2 on the basis it was an entirely separate offence committed after the period covered by charges 3 and 4 and at a time when the appellant was on bail. The total sentence was therefore 13 years imprisonment, which she ordered to run concurrently with the sentence of 3 years which had been imposed by the Grand Court on 11 May 2018 for the offence of conspiracy to supply cocaine on 31 August 2015 of which he had been convicted by a jury in November 2017.

63. The appellant appealed against sentence to the Grand Court. Chapple J noted that the period covered by charge 3 was 20 months rather than the two years referred to in the evidence of Ms Delaney, but he upheld the sentence imposed by the Magistrate. He concluded that the sentence was altogether appropriate. It was in accordance with the relevant guidelines and there were no reasons to depart from those guidelines. The sentence was not wrong in principle or manifestly excessive.

64. Before this Court, Mr Hughes raised only one point. He referred to the fact that the period covered by charge 3 was 20 months and that accordingly, to sentence the appellant on the basis of two years was to inflate the period of offending by 20%. The sentence should therefore be reduced accordingly to reflect the lesser period of offending. Although he did not specifically mention charge 4, his submission presumably also applied to that charge, but as the sentence on charge 4 was a lesser sentence and was imposed concurrently with the sentence on charge 3, any reduction in the sentence for charge 4 would not affect the overall sentence and that no doubt is why he did not refer to it.

65. Chapple J was fully aware that the period of offending on charge 3 was 20 months rather than two years, but he nevertheless upheld the sentence. In our judgment, he was right to do so. Sentencing for drug offences is not imposed on a linear basis, whether by reference to the period of offending or the quantity of drugs. The court has regard generally to the nature and extent of the offending and the overall involvement of the offender in the supply of controlled drugs. As the Magistrate said at [3] of her sentencing judgment, the appellant was a street level dealer with a significant number of customers. He was working on his own behalf as a sole trader for profit and conducted his operation over a period *'of almost 2 years'*. Even if one were, in accordance with Mr Hughes' submission, to reduce the quantity of cocaine by one-sixth to reflect the period of 20 months rather than two years, one would still be left with 11.7 ounces. A sentence of 11 years for the sale of 11.7 ounces of cocaine over a 20 month period by a street dealer carrying on his own business cannot possibly be said to be manifestly excessive having regard to the sentencing guidelines referred to above.

66. For these reasons, the appeal against sentence was therefore also dismissed.

Postscript

67. On 12 June, following preparation of this judgment but before it was issued to the parties, the appellant, acting in person rather than through Mr Hughes, filed a notice of motion requesting the Court *"..to hear a renewed application or alternatively an application to reopen the determination of an appeal.."* , together with written submissions in support, which we have read and considered.

68. The order reflecting the Court's decision to dismiss the appeals against conviction and sentence has been issued, dated 18 May 2022. It is not therefore open to the appellant to make further submissions within the present appeal or for the Court to alter its decision within that appeal.

69. However, as set out at para 67 above, the appellant has applied for the Court to reopen the appeal even if determined. Whilst this Court has a theoretical jurisdiction to reopen a concluded appeal, it has made it extremely clear on a number of occasions (eg, Anglin [2018] 2 CILR 409) that it will only do so in wholly exceptional circumstances. The appellant's submissions are made before the Court has delivered its reasons for dismissing the appeals and consist essentially of elaboration and expansion of points raised previously in written and oral submissions by Mr Hughes on his behalf.

They do not begin to come within the wholly exceptional circumstances necessary before the Court will reopen a concluded appeal.

70. That is sufficient to deal with the appellant's application and submissions in support. However, as the appellant has acted in person in filing these later submissions, we will address them briefly. They consist of 11 pages and refer to a number of matters but, as we understand them, the appellant is essentially raising two points.

71. First, in relation to ground 3, namely whether charge 3 was time-barred, by reference to section 14(8) of the Limitation Act (1996 Revision), which deals with limitation in civil claims for negligence, he argues that, when considering whether a prosecutor has constructive knowledge, it is a requirement that a prosecutor has taken all reasonable steps to obtain any expert advice. He submits that in this case, the police did not fulfil this requirement because they did not send the Galaxy phone to Cellebrite for a full download until late November 2016 despite having had it in their possession since June 2016.

72. This argument does not avail the appellant. In the first place, the Limitation Act has no application to prosecutions in criminal cases; it is concerned solely with certain civil cases. The correct test is as set out at para 44 above and was applied by the courts below.

73. Secondly, to the extent that, in applying that test, it is relevant to consider any delay by the police or prosecutor, that is a matter of fact or mixed law and fact and therefore, for the reasons set out above, does not fall within the jurisdiction of this Court on an appeal under section 29(1).

74. The second point raised by the appellant relates to ground 2, namely the abuse of process argument. The appellant elaborates on the point made on his behalf by Mr Hughes, namely that it was unfair and an abuse of process to prosecute him separately in the Grand Court and the Summary Court for offences which were part of a series of events. However, as stated at para 58 above, the courts below applied the correct legal test for determining whether there was an abuse of process. The appellant's real complaint is that they reached the wrong conclusion on the facts of this case. But, as also stated at para 58, that is not a ground of appeal which concerns a point of law alone, rather it concerns mixed law and fact. It is not therefore available on an appeal under section 29(1). Having said that, notwithstanding the additional submissions of the appellant in this latest material, we

remain of the view that, on the facts of the case, the courts below reached the correct conclusion. Accordingly we would have dismissed this ground of appeal even if we had jurisdiction to consider it.

75. In summary, the appellant's application to reopen this appeal is rejected.