[2016] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO 8/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

AUDLEY COLEMAN v R

Zavia Mayne instructed by Zavia Mayne & Co for the appellant

Miss Paula Llewellyn QC and Mrs Melony Taylor-Domville for the Crown

26 January and 26 February 2016

P WILLIAMS JA (AG)

[1] On 4 April 2014, the appellant, Audley Coleman, was convicted in the Corporate Area Resident Magistrate's Court for breaches of sections 7B and 7C of the Dangerous Drugs Act. Under section 7B, he was charged with dealing in ganja and under section 7C, he was charged with possession of ganja. He was sentenced to a fine of $15,000.00 or three months imprisonment at hard labour for possession of ganja, and $44,000.00 or six months imprisonment at hard labour, plus six months imprisonment at hard labour, for dealing in ganja.

[2] At the hearing of his appeal, counsel for the appellant sought and was granted leave to argue the amended grounds of appeal filed, and further, to abandon two of those grounds. Thus the amended grounds of appeal are:

> "1. The Learned Resident Magistrate erred in law in rejecting the Appellant's no case submission, thus depriving the Appellant of a decision of acquittal in his favour.
>
> 2. The Learned Resident Magistrate erred in law and/or wrongly exercised her discretion in permitting the Prosecution to re-open its case to tender evidence which had not arisen ex improviso.
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> 3. The Learned Resident Magistrate erred in law in finding that the Appellant was under an obligation to react differently to statements made by Joshua Shirley, after the Appellant had already been arrested and cautioned, thereby casting an obligation on the Appellant to disclose a defence before Trial, which is invasive of the Appellant's constitutional right to silence and to be presumed innocent.
>
> 4. The verdict is unreasonable and cannot be supported by the evidence."

Case for the prosecution

[3] The appellant was arrested and charged arising out of the finding of ganja in the trunk of a motor vehicle that he was driving on 15 January 2011. He denied knowledge of the ganja and how it came to be in the motor vehicle.

[4] The evidence as to the finding of the ganja came from Deputy Superintendent Andrew Hill. On Saturday 15 January he led a team of Anti-Corruption Branch personnel to Lower Elletson Road for an operation. The aim of this operation was to intercept and search a grey Honda Fit motor vehicle with registration number 6623 FM, and to search its occupants for anything illegal.

[5] At about 2:59 pm the grey Honda Fit motor car was spotted, intercepted and stopped along Lower Elletson Road in the vicinity of the entrance to the Elletson Road Police Station. The driver of the motor vehicle was the appellant, who identified himself as Constable Audley Coleman of the Motorized Patrol Division. After the appellant was searched, the car was then searched in his presence.

[6] The appellant was requested to open the trunk of the motor car which he did. DSP Hill then conducted a search of the trunk and found what he described as "a hidden compartment in the floor". On opening this compartment, a lug tool, a jack and a spare tyre were seen. DSP Hill lifted up the spare tyre and saw a black plastic bag. This bag was opened in the presence and view of the appellant by DSP Hill, who found a zip lock transparent plastic bag inside. DSP Hill opened the transparent plastic bag and gave evidence that there was "the definite smell or stench of ganja" coming from it.

[7] The zip lock plastic bag was found to contain cylindrical pellets and DSP Hill saw vegetable matter resembling ganja in them. He also saw one large cylindrical parcel which he said felt and smelt like ganja.

[8] DSP Hill described the black plastic bag as "worn, well-used and heavily crushed". He observed that there was dust in the wheel well but that there "wasn't any dust per say on the bag" but he "couldn't say the bag was squeaky clean". He further explained that one "couldn't see it just by looking unless you were searching diligently". The bag was at the bottom of the wheel well with the tyre over it.

[9] The bag and its contents were shown to the appellant by DSP Hill and he was asked what he was doing with ganja in his possession. The appellant responded that he knew nothing about it and "his cousin Joshua Shirley would have to account for it".

[10] The appellant, the car, and the items found in it were then taken to the Kingston Central Police Station. There, a comprehensive search was made of the vehicle in the presence of the appellant. Two payslips from the police department in the name of the appellant for May and June 2010, a booklist for the Denbigh High School 2010/2011, as also an accompanying letter from Shirann Coleman were found in the glove compartment of the car. Shirann Coleman was the daughter of the appellant.

[11] The appellant was then taken to the Criminal Investigation Branch Office, Kingston Central Police Station and, in his presence, DSP Hill opened the black plastic bag and counted the items. There were what DSP Hill described as 65 cylindrical pellets and one large cylindrical parcel. These items were replaced in the black plastic bag, placed in an envelope which was labelled and sealed. This envelope was secured in a safe.

[12] DSP Hill said that during all this time, the appellant was adamant that Mr Shirley would have to account for the findings. As a result, DSP Hill sent for Mr Shirley. Upon Mr Shirley being brought to the station, an interview was done with him by DSP Hill, who then caused a statement to be recorded from him.

[13] All this had taken place in a room separate from where the appellant was and upon completing his interview of Mr Shirley, DSP Hill returned to where the appellant

was. The appellant was arrested on reasonable suspicion of possession, dealing in, and taking steps preparatory to the export ganja. DSP Hill again cautioned the appellant who said nothing.

[14] DSP Hill then offered the appellant his mandatory telephone call and then heard the appellant telling the party on the other end of the line that Joshua Shirley had put ganja in his car. When the appellant hung up from his call, DSP Hill took the appellant to the room where Mr Shirley was giving his statement. DSP Hill described how he "confronted both men" and asked the appellant, while pointing at Mr Shirley, if this was the said man whom he had just told the person on the other end of the line had put ganja in his car. The appellant replied that it was the same Joshua Shirley whom he had loaned the car the day before. DSP Hill told the appellant that that was not the question he had asked. At this point, the appellant replied that it is the same Joshua Shirley who had put ganja in his car.

[15] Immediately Mr Shirley accused the appellant that he was lying and said that he, Shirley, would never have done anything to jeopardize the appellant's job. The appellant said nothing in response. DSP Hill said he had expected the appellant to say "very strong words" to Mr Shirley.

[16] On Monday 17 January, DSP Hill retrieved the envelope he had labelled and sealed, containing the items he had recovered from the trunk of the motor vehicle from the safe and took them to the Government Forensic Laboratory. He was given a receipt

with Folio No 139/2001. Samples were taken from the envelope and retained by the lab technician and the envelope returned to DSP Hill.

[17] On Wednesday 19 January, DSP Hill conducted a question and answer session with the appellant who was then represented by attorney-at-law Mr Christopher Townsend. The appellant was asked and responded to some 191 questions. The record of the questions and answers was admitted into evidence with no objection from the defence.

[18] In giving evidence about the question and answer session, DSP Hill made reference to the appellant explaining the route he took to attend work that Saturday as being along Marcus Garvey Drive. He asked the appellant if there had been any stops made whilst en-route to work to which the answer had been "not to my knowledge". When asked specifically whether he had stopped at Tinson Pen Aerodrome, the appellant explained that he had stopped there to collect a bottle of rum from "a Chris who worked there", but who was not seen.

[19] DSP Hill eventually collected the samples and a certificate from the Forensic Laboratory. The black plastic bag and its contents were admitted into evidence. The samples that had been taken from the contents of the black plastic bag were also admitted into evidence. The items found in the glove compartment of the motor vehicle were also admitted as exhibits.

[20] Although speaking about collecting a forensic certificate relative to his matter, DSP Hill completed his evidence and the Crown eventually closed its case without the

certificate being tendered as an exhibit. This failure was relied on by Mr Townsend in making a no case submission that there was no proof that the items recovered were in fact ganja. The Resident Magistrate then permitted the Crown to re-open the case and the certificate was admitted as an exhibit. The certificate showed that examination and tests carried out on the vegetable matter revealed that it was ganja weighing 300.40g (10.60 oz).

[21] Mr Joshua Shirley gave evidence of his dealings with the Honda Fit motor car. He acknowledged that he did in fact drive it on occasions when he was visiting Jamaica. He had left Jamaica in 1990 and now resided in Canada. He said he and the appellant were related, as the appellant's granddad is a cousin of his granddad, thus he and the appellant were "fourth (4^{th}) generation cousins".

[22] When he visited Jamaica, Mr Shirley stayed at the residence that the appellant shared with one Tyrone Bryan. He had been doing this since 2007. He did so when he came in November 2010 and was there until the time of this incident in January 2011.

[23] Mr Shirley explained how during this time he did in fact drive the Honda Fit motor car with the permission of the appellant. On one occasion he was forced to take the car to a garage due to a problem with a tyre. The car was then taken to a tyre shop by one of the workers at that garage. The car was gone for an estimated 15 – 20 minutes. Upon getting it back, in good condition, the car was returned to the appellant.

[24] Mr Shirley had borrowed the Honda Fit from the appellant on 14 January, the day before the ganja was found. He had driven it in the morning to go to a cambio.

Then he went to a car wash across the road from the cambio, but after a conversation on the phone with the appellant, he took the car to someone to have checks done on an unusual banging heard coming from the front end of the car. The car was checked as to what could have caused this noise without success. Mr Shirley again spoke with the appellant. He then drove to a car wash.

[25] Mr Shirley explained that he did not lose sight of the vehicle while it was being washed. He may have not focussed on it for the entire time but it was never out of his sight. From the car wash, he had then driven back to the appellant's residence and handed the car back to the appellant who then left for work. Mr Shirley did not drive the car again for that day. He however left the home and went to Claremont, Old Harbour, for the night.

[26] On 15 January, Mr Shirley returned to the appellant's residence at about 6:45 am. Later that day, at about 1:00 pm, the appellant asked if he had seen the keys for the car. Upon being told that he had not used the car, Mr Shirley said the appellant went back inside the house, came back, got in the car and left for work. The Honda Fit had been parked in the drive way from 6:45 am to 1:00 pm as far as he was aware.

[27] It was about 3:00 pm that afternoon that police officers visited the home and Mr Shirley was invited to accompany them to Kingston Central Police Station. He spoke to a police officer he was introduced to as being Inspector Hill. Eventually, Mr Shirley saw the appellant and they spoke. His recollection of the conversation was that the appellant told him "dem seh dem find drugs in a mi car".

[28] Mr Shirley said Inspector Hill asked "if drugs were to be found in Audley's car and he said that it belong to you, would that be the truth or a lie?" He responded that it would be a lie and offered to do a polygraph test right there. When invited by Inspector Hill to tell Mr Shirley what he had told the person on the phone, the appellant had mumbled "just because you did use the car". The appellant was however pressed by the Inspector as to whether he had not told the person that the drugs found in the car belonged to Shirley. The appellant responded yes. Mr Shirley said to him "are you serious my youth? a dat you really tell you sister? Knowing fully well I wouldn't do anything to jeopardize your job". The appellant did not respond.

[29] Under cross-examination, Mr Shirley was questioned about his usage of the car and he agreed that the appellant had never hindered him from driving it and for the time he had been in Jamaica for this trip he had borrowed the car quite a number of times. He had never however kept it overnight. He agreed that the car keys were usually kept on a table and were accessible to the appellant, the other occupant of the house Tyrone Barnes and everybody else, as the appellant did not "hide up" his car keys.

[30] He was questioned about his relationship with the appellant and said they were close. He was questioned about the relationship between the appellant and Tyrone Barnes and was not in agreement with suggestions that the two were not close and that there was "tension" in the house between the two.

[31] Mr Shirley was insistent that he was surprised to hear that ganja had been found in the vehicle. He had no idea how it got there. He said he could not determine if it had been there while he had the vehicle, or when the garage persons had it.

[32] Mr Shirley maintained that he never placed any ganja in the vehicle and he did not know how ganja came to be in that vehicle.

[33] Mr Ralston Nelson was the person who had actually loaned the appellant the Honda Fit motor car. Mr Nelson described himself as an auto repairman and explained that it was in the course of his work that he had come to know the appellant. He explained that he was to have sold the appellant a car which was being repaired and had loaned the appellant the Honda Fit in the summer of 2010, until the repairs and paper work were completed on the car to be sold. He had been in possession of the Honda Fit from earlier in 2010 "like in February". He had been driving the car then. He explained how once while it was in his control, he had had occasion to go into the trunk. The car had a punctured tyre and he had gone into the trunk to get the tools necessary to change it. He did not recall seeing any parcel or bag in the trunk at that time.

[34] Mr Nelson explained that while he had control of the Honda Fit, it remained at his premises, which was a garage, where he had eight persons working with him. Only two of those persons had access to the keys for the motor vehicle. He agreed, under cross-examination, that it could have been one of his employees named "Blacks" who handed over the keys and the Honda Fit to the appellant.

[35] Mr Nelson also explained that the appellant had taken the car back after it had been loaned to him to have the disc pads changed. On that occasion the jack and lug tool had been removed from and then replaced into the trunk of the vehicle. He had seen nothing in the trunk at that time but he was unable to recall the exact date and estimated that it was later 2010 "like October there about". He did not remove the spare tyre then and would have had no reason to do so.

[36] The mechanic to whom Mr Shirley had taken the car to have it checked for the noise in the front was Corvel Welcome. He gave evidence supporting Mr Shirley as to the checks made. He said he had driven the car for a short distance but could find nothing wrong. He was alone in the car but Mr Shirley remained in his vision over the distance the car was being driven.

[37] Mr Welcome also spoke about the car being driven by one of his workers to the tyre shop when a tyre needed repairing. Mr Shirley had remained at his garage while the worker had taken the car away. He said the car was returned with the tyre repaired within 20 minutes.

Case for the defence

[38] The appellant, at the time of trial, was a constable of police and had been a police officer for 18 years and about three months. He said that when he was stopped on 15 January by Detective Inspector Hill, he was told that the Inspector had information that marijuana was in the car underneath the spare tyre. He said he was

also asked who was driving the car before and he advised that his cousin was in possession of it before and the name of the cousin is Joshua Shirley.

[39] He explained how he had come to be in possession of the Honda Fit, that it had been loaned to him by Mr Ralston Nelson whom he described as a good friend of his.

[40] The appellant said he did not put the ganja in the trunk of the vehicle and he had no clue how it got there. His cousin Tyrone Bryan who lived with him also had access to the car. He normally left the keys in the dining room on the table. He told the police that his cousin Joshua Shirley would have to account for the drugs because he had the strongest belief that it belonged to Shirley.

[41] Under cross-examination, the appellant explained how it normally took him 20 to 25 minutes to travel to work. On 15 January he had left home sometime after 12:00 pm and was scheduled to commence working at 2:30 pm. He stopped at Tinson Pen with the intention of picking up a bottle of rum from a guy named Chris to deliver to a lady. He did not get the rum and stopped for less than three minutes.

[42] The appellant was insistent that, when stopped, Detective Inspector Hill did tell him that the marijuana was under the spare tyre. He agreed that there was a police officer videotaping the search of the trunk of the motor car.

[43] He had been in possession of the Honda Fit from sometime in September 2010 and had taken it back to Mr Nelson for servicing twice during that time. Asked about his relationship with his cousin, the appellant said "before he migrated we were not too

close". He said Shirley had stayed at his house about two to three times since migrating in the 90's. His cousin Shirley was the only other person who drove the car and he did so with and without his permission. The appellant would however prevent Shirley from using the car on a Sunday when he would get it washed but he would not normally hide the keys from Shirley. The appellant was insistent that Shirley had in fact driven the car on the morning of 15 January and had returned it at about 12:00 mid-day.

[44] The appellant said that he did confront Shirley on 15 January and Shirley had replied that he never did it. Before 15 January 2011, the appellant never had any difficulty with Shirley "in any way at all".

[45] Inspector Colin Roberts gave evidence on behalf of the appellant. He had known the appellant for about 18 years, from 1995, and spoke of the appellant as being an honest individual who had never conducted himself outside the law in Inspector Robert's presence. The senior officer also said he had never conducted any disciplinary hearings involving the appellant.

Submissions

[46] Grounds one and two of the appeal can be taken together, as the thrust of the submissions was in relation to the learned Resident Magistrate erring in law in rejecting the no case submission made on behalf of the appellant, and then wrongly exercising her discretion in permitting the prosecution to re-open its case to tender evidence which had not arisen ex improviso.

[47] Mr Mayne reminded this court of the ingredients of an offence of possession of ganja, as restated by the Privy Council in **Bernal and Moore v R** (1997) 51 WIR 241 at page 167. He submitted that the notes of evidence disclosed that none of the witnesses called by the Crown testified that the appellant was seen with the bag or any bag containing the prohibited substance. No evidence was presented that the appellant was ever in the trunk of the motor car or that he had ever removed or handled the spare tyre. Accordingly, there was no evidence on the basis of which the appellant could be fixed with either actual or constructive knowledge of the presence and contents of the bag.

[48] Mr Mayne submitted further that there was no evidence of conduct from which an inference could be drawn that the appellant knew that the bag and its contents were in the car. There was no evidence that he tried to evade the police when stopped, or that he tried to prevent them opening and examining the trunk, or that he had any warning, which he did not heed, of the presence and contents of the bag.

[49] Mr Mayne concluded this part of his submissions by noting that in all the circumstances, at the close of the prosecution's case, it could not be said that there was evidence from which the tribunal of fact could reasonably draw an inference that the essential ingredient of knowledge (whether actual or inferential) on the part of the appellant, had been made out by the prosecution.

[50] In support of this submission Mr Mayne relied on the law as set out in the 1962 English Practice Note [1962] 1 All ER 448 and the pronouncement of Lord Lane CJ in **R**

v Galbraith [1981] 1 WLR 1039. He contended that the status of the Crown's evidence at its highest was such that a jury properly directed as to the legal requirements, would not properly have convicted on it. He submitted that the learned Resident Magistrate therefore committed a grave error in rejecting the appellant's no case submission.

[51] Mr Mayne then went on to submit that the prosecution at the close of its case had also failed to establish another essential element of the offence. They had failed to prove that the bag contained a prohibited substance, by failing to put evidence that would suggest that the substance was in fact ganja. He noted that it was in reply to the submission made on the basis of this failure, that the Crown applied to and was given permission to reopen its case and to tender into evidence the certificate of the government analyst to prove the vegetable matter submitted was indeed ganja.

[52] Mr Mayne submitted that the learned Resident Magistrate committed a very grave error in permitting the Crown to reopen its case in order to fill gaps in the Crown's evidence. His complaint was that, in proceeding to find the appellant had a case to answer only after allowing the prosecution to reopen its case to fill the evidential gap in the Crown's case, the appellant was denied a fair trial.

[53] Mr Mayne relied on the authority of **R v Rice** [1963] 1 All ER 832 at page 839 for the statement of the general principle of practice that the prosecution should adduce all the evidence available to it and on which it intends to rely before the close of

its case, unless it can be shown that a matter has arisen ex improviso which the prosecution could not have foreseen.

[54] He also noted the pronouncement of Watkins J in **R v Hutchinson** (1985) 82 Cr App R 51, at page 59, as follows:

> "The ex improviso principle has to be applied by the court with a recognition that the prosecution are expected to react reasonably to what may be suggested as pre-trial warnings of evidence likely to be given which calls for denial beforehand, and for that matter, to suggestions put in cross examination of their witnesses. They are not expected to take notice of fanciful and unreal statements no matter from what source they emanate."

[55] Mr Mayne referred us to **R v McKain** (1994) 47 WIR, a case in which this court had outlined the instances in which the prosecution may be allowed to call evidence at the discretion of the trial judge after it has closed its case. He noted them as being:

> "i. where the evidence arises ex improviso
>
> ii. to adduce evidence which is a mere formality
>
> iii. in very special circumstances, which must be decided in the context of the particular case, such circumstances naturally occurring on the rarest of occasions."

[56] Mr Mayne submitted that none of the exceptions is applicable to the instant case: the analyst's certificate was available to the prosecution at the commencement of the trial when the Crown's case was being advanced.

[57] For the Crown, Mrs Melony Taylor-Domville submitted that at the end of the prosecution's case, there was sufficient evidence on which the learned Resident Magistrate was correct in ruling the appellant had a case to answer. She noted that in **Director of Public Prosecutions v Brooks** (1974) 12 JLR 1374, possession is characterized as knowingly having the prohibited substance in one's physical custody or under one's physical control. Thus, the evidential burden would be on the Crown to prove the actus reus of physical custody or control and of knowledge. In this regard, she referred us to **R v Cyrus Livingston** (1952) 6 JLR 95.

[58] Mrs Taylor-Domville also relied on **Bernal and Moore v R** where it had been stated that guilty knowledge, unless expressed, must be proven circumstantially. Thus, she submitted, knowledge may be inferred from the fact of possession or from surrounding circumstances or from both: **R v Cyrus Livingston**.

[59] She submitted that at the close of the prosecution's case, there was sufficient evidence for the learned Resident Magistrate to draw the inference that the appellant had knowledge that:

a) the bag and its contents were in his possession or control, and

b) the content of the bag was a prohibited substance (ganja).

[60] Mrs Taylor-Domville noted that the evidence which demonstrates the prosecution had established a prima facie case against the appellant was as follows:-

"Actus Reus

(a) The appellant was the driver of the vehicle and only occupant in the car and was therefore in control of the vehicle having the prohibited substance (ganja) (p 39).

(b) The car belonged to the appellant as it was loaned to him before the incident since summer 2010.

Mens Rea

(c) The persons who had the motor vehicle at some point prior to the date of the incident were close friends of the appellant and their evidence that they had not seen anything in the vehicle at the time it was under their control neither had they been in the trunk ….

(d) Things found in the car that connected appellant with the motor car.

(e) The evidence of the nature of the relationship which existed between the parties, namely, Mr Shirley, Mr Nelson or even Tyrone with the appellant and the absence of any evidence suggestive of any prior conflict between them. This supports the view that there would be no reason for the named parties to have placed the ganja in the car. Further there was no evidence to suggest that "Suga", the car wash lady or Welcome had any prior conflict with the appellant as from the evidence they were unknown to the appellant.

(f) The condition and location of the bag containing the prohibited substance (p 40-41) …

(g) The response of the appellant when shown the bag containing the ganja (p 40) and the subsequent conduct of the appellant when given an opportunity to confront Joshua Shirley (p 42-44)"

[61] Mrs Taylor-Domville submitted, in conclusion on this point, that a prima facie case having been made out, the evidential burden therefore shifted to the appellant to displace the inference of knowledge in him with the legal burden remaining throughout

the case on the prosecution. She referred to **R v Nicholson** (1972) JLR 680 which was approved in **Bernal and Moore v R**.

[62] On the second ground Mrs Taylor-Domville relied on **R v Kenneth Codner** (1956) 6 JLR 229, a case in which the Clerk of Courts had closed the prosecution's case without proving the stalks were ganja as defined in law. It was then held by this court:

> "When the case for the prosecution is closed without proof of a fact which ought to have been proved, the Court in considering whether to allow the case for the prosecution to be re-opened has a discretion to exercise, and if that discretion is judicially exercised, the Court of Appeal will not interfere."

[63] Mrs Taylor-Domville submitted that in the instant case the learned Resident Magistrate had exercised her discretion judicially when she made a ruling allowing the prosecution to reopen its case. Further, she submitted, the appellant would not be prejudiced in any way as his defence was not that the prohibited matter was not ganja but that he had no knowledge.

Discussion and disposal

[64] The Privy Council in **Bernal and Moore v R** stated:

> "The actus reus required to constitute an offence under section 7C of the Dangerous Drugs Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The mens rea which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof of this knowledge will depend on the circumstances of the case

> and on the evidence and any inferences which can be drawn from the evidence."

[65] At the end of the Crown's case, the learned Resident Magistrate had undisputed evidence that the dangerous drugs had been found in a motor vehicle that was under the control of the appellant. The evidence was also unchallenged that circumstances had existed when the car had been out of the possession of the appellant. However, persons who had handled the vehicle had given evidence as to their dealings with it and had denied placing the drugs in the vehicle. The presumption then remained that the appellant who had control of the vehicle was responsible for what was found therein.

[66] Mr Mayne was correct that there was no evidence of the appellant being seen actually placing the drugs in the vehicle but the inferences that could be drawn from the evidence that had been presented were such that the learned Resident Magistrate was correct in rejecting the no case submission that was made.

[67] The case of **R v Richard Nicholson** (1971) 12 JLR 568 decided in this court remains a foremost authority in this area. Luckoo JA, at page 571, stated:

> "We are in agreement with the view taken by the Court of Appeal in **R v Cyrus Livingston** (2) that mens rea is a necessary ingredient in proof of a charge of possession of ganja. Once the prosecution adduces evidence in proof (i) of the "fact of possession," that is that the accused person had the thing in question in his charge and control and knew that he had it, and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent

> therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by reason of any fact or circumstance inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima facie case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution."

[68] In the instant case, the inference of possession that arose from the prosecution's case was such that the learned Resident Magistrate cannot be faulted for rejecting the no case submission on that basis.

[69] Turning to ground two, the complaint was that there was no proof of the fact that the item recovered was in fact ganja. This was so because of the failure of the prosecutor to have the forensic certificate tendered into evidence to verify this fact. While it is correct that this was not a matter that arose ex improviso, it is clear that the prosecutor had led sufficient evidence of its existence but had failed to complete the process by asking that it be exhibited.

[70] The guidance given by Forte JA (as he then was), in **R v McKain** is properly relied upon by Mr Mayne. However, the overriding consideration remains what was held by this court in **R v Kenneth Codner**. The learned Resident Magistrate had the discretion to exercise in considering whether to allow the case for the prosecution to be re-opened and this court will not interfere if that discretion was judicially exercised.

[71] As a general rule, evidence upon which the prosecution intend to rely on in proof of its case should be called before the close of that case. However, it is accepted that

the judge has a discretion to admit evidence of a formal or technical nature, or evidence which is not capable of being disputed, which should properly have been presented prior to the close of the prosecution's case. In the case of **R v Francis** (1990) 91 Cr App R 271, Lloyd LJ had this to say in analysing the extent of the judge's discretion:

> "There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding, and lest it be thought we are opening the door too wide, we would echo what was said by Edmund-Davis L.J. in the **Doran** case at page 437 that the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions."

[72] In the instant case, the prosecutor had adduced evidence from the investigating officer of his having taken the items recovered from the trunk of the car to the Government Forensic Laboratory for examination. Evidence was then adduced of the officer returning to the laboratory and collecting a forensic certificate along with the samples that had been taken from the items. There was ultimately no challenge to the fact that this had been done. The prosecutor had chosen to have the samples and the items tendered into evidence. The tendering of the certificate was omitted and this failure, in these circumstances, can be viewed as an oversight.

[73] The learned Resident Magistrate exercised her discretion in circumstances where the appellant could not have been taken by surprise and therefore could not have suffered any prejudice. The discretion was exercised judicially and therefore ought not

to be interfered with. It is clear that this ground must fail. The learned Resident Magistrate rightly rejected the submission of no case and ruled that the appellant had a case to answer.

Ground three

[74] Mr Mayne's complaint is understood to be concerned with the manner in which the learned Resident Magistrate treated the evidence that when the appellant was confronted, as it were, with Joshua Shirley, he remained silent. This arose from evidence that was undisputed.

[75] The appellant did not deny that he had sought to suggest that Shirley was the person who should be called on to account for the ganja found in the car. There was also no denial that he did not say anything to Shirley when they were brought together. The fact that the appellant had at that time been cautioned already meant that he had the right to remain silent.

[76] Mr Mayne quite properly reminded this court of the case of **R v Hall** [1971] 1 All ER 332. Lord Diplock, at page 324, had stated:

> "It is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot

> give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

[77] Mr Mayne also relied on the comments of Cave J in **R v Mitchell** (1892) 17 Cox 503 at page 508:

> "…when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

[78] It then became the submission of Mr Mayne that in the instant case, the appellant was not on even terms with DSP Hill or Joshua Shirley as he had been arrested and charged and did not have the benefit of legal representation at the time when the confrontation occurred. Mr Mayne further relied on **R v Christie** [1914] AC 545 at 554 and **R v Gilbert** (1978) 66 Cr App R 257.

[79] Mr Mayne submitted that in finding that a different reaction was expected from the appellant the learned Resident Magistrate embarked on a course which served to undermine the appellant's right to remain silent and to be presumed innocent, thereby casting an obligation on the appellant to disclose a defence before trial which is invasive of the appellant's constitutional right to silence and to be presumed innocent. He further submitted that while a distinction might properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent, the learned Resident Magistrate did not make this distinction

and the context of her findings suggest that she inferred guilt from the appellant's refusal to speak during the confrontation with Shirley.

[80] In response, Mrs Taylor-Domville submitted that in certain circumstances the silence or the reaction of an accused may be used to strengthen the inference of possession. She referred us to two decisions of this court in support of her submission **R v Connell** (1971) 12 JLR 578 and **R v Williams** (1970) 16 WIR 74.

[81] Mrs Taylor-Domville submitted that there was no substantial miscarriage of justice in the learned Resident Magistrate considering the appellant's silence. She noted that the context in which the learned Resident Magistrate made the finding could be viewed as a recounting of the evidence of DSP Hill rather than being the comment of the learned Resident Magistrate. As such, the comment was made without more, therefore it cannot be said what weight the Resident Magistrate actually attached to it.

Discussion and disposal

[82] The evidence of DSP Hill was that the appellant had been "adamant that Mr Shirley would have to account for the findings". The officer said it was as a result of this stance that he had sent for Mr Shirley without informing the appellant. Further, it was only after a statement had been recorded from Mr Shirley that the appellant was arrested and charged and at this time when cautioned he said nothing.

[83] It is clear that DSP Hill staged the confrontation in the hope of some reaction on the part of the appellant. He was asked if the appellant had said anything and responded:

> "He said nothing at all. As a matter of fact, thinking that he would I said nothing initially because I had expected Mr Coleman to say strong words to Mr Shirley, very strong words."

[84] In reviewing the evidence, the learned Resident Magistrate had this to say:

> "However, when confronted by Shirley, Coleman on the Crown's case as previously mentioned, did nothing or said anything until D.S.P. Hill prompted him. On the evidence, D.S.P. Hill gave him the opportunity to repeat his previous claims and asked him if this was the Joshua Shirley whom he said put the Ganja in his car. Coleman, instead of saying yes, said that it was the same Joshua Shirley whom he had loaned the car to the day before. Based on the evidence, it was only on DSP Hill's insistence that he said it was this Joshua Shirley that put Ganja in his car."

[85] In her statement as to her reasons and findings she stated:

> "The unchallenged evidence is that when confronted with Shirley, Coleman did not voice his assertions willingly and had to be pressed by D.S.P. Hill to acknowledge what he had said. Although under no obligation to say anything, in those circumstances, a different reaction was expected."

[86] She then subsequently concluded:

> "Nevertheless, in all the circumstances of this case I find that the Crown has satisfied me so that I feel sure that Mr Audley Coleman was in possession of the car on 15th January, 2011 and that he knew that the drugs were in the trunk of the car."

[87] It is therefore safe to assume that one of the circumstances the learned Resident Magistrate considered was the appellant's failure to say anything when confronting the

man who he had been adamant should account for the ganja in the car. This was not the usual situation where the accused was silent in the face of an accusation or upon charge. This can be viewed as an opportunity being given to him to confront the person he had maintained had to account for the ganja for which he was being arrested and charged. It was clear from the evidence given by DSP Hill that this confrontation had been orchestrated to see what the appellant would have done. DSP Hill expected a different reaction in the circumstances. This then became part of DSP Hill's evidence and was found by the learned Resident Magistrate as a finding which went to her eventually deciding that the appellant was guilty. The learned Resident Magistrate did not say what, if any, inference she drew from it.

[88] Mr Mayne's point of attack against the learned Resident Magistrate was that she erred in finding that the appellant was under an obligation to react differently. However, the learned Resident Magistrate expressly stated that the appellant was under no obligation to say anything. In the circumstances, the learned Resident Magistrate did not seem to draw any inference unfavourable to the appellant from the fact of his not confronting Mr Shirley. This ground must therefore fail.

Ground four

[89] Mr Mayne, in submitting that the verdict is unreasonable and cannot be supported by the evidence, noted that although the court found that the appellant was in possession of the motor car, there was no evidence that the appellant knew actually or inferentially that the bag and its contents were in the car. He further submitted that the learned Resident Magistrate had no basis for finding as a matter of fact that the

appellant was guilty of possession of ganja; the Crown had failed to establish that the appellant had the requisite mens rea (knowledge), there was no coincidence of actus reus and mens rea, in order to constitute a crime.

[90] Mr Mayne referred to the provisions of section 14(1) of the Judicature (Appellate Jurisdiction) Act; **Daley v R** [1993] 4 All ER 86; **Keith Pickersgill v R** RMCA No 28/2000 delivered on 7 June 2001, where Smith JA had cited **R v Joseph Lao** (1973) 12 JLR 1238.

[91] Mrs Taylor-Domville found the usual support in responding to the ground in **R v Lao**. She submitted that it was entirely a matter for the learned Resident Magistrate to assess the evidence and to decide who or what she believed and there was cogent evidence before her on which she could and clearly did rely. She concluded that the verdict is reasonable having regard to the evidence and that there has been no miscarriage of justice.

Discussion and disposal

[92] This was a case where the prosecution was inviting the court to draw the inference that the appellant in the circumstances knew that the ganja, found in the car that was in his possession and under his control, was his. The evidence led, which was carefully reviewed and considered by the learned Resident Magistrate, in effect ruled out all other persons who admittedly had had any dealings with the car from having placed the ganja in the car themselves. This process of elimination and the surrounding circumstances were such that it cannot be said that the learned Resident

Magistrate was plainly wrong in making her findings and arriving at her conclusion. This ground must therefore also fail.

Sentence

[93] In the original notice and grounds of appeal filed upon the appellant's conviction, there had been the following ground:

> "The sentence is excessive in the circumstances"

[94] At the hearing of the appeal, Mr Mayne did not ask to abandon it although he did not argue it before us. The sections of the Dangerous Drugs Act under which the appellant was convicted prescribe the penalty for the offence. It states inter alia:

> "7B Every person who –
>
> a) cultivates, gathers, produces, sells or otherwise deals in ganja; or
>
> …
>
> Shall be guilty of an offence and –
>
> …
>
> e) on summary conviction before a Resident Magistrate, notwithstanding section 44 of the Interpretation Act, shall be liable –
>
> (i) to a fine which shall not be less than one hundred dollars, nor more than two hundred dollars, for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so, however that any such fine shall not exceed five hundred thousand dollars; or

(iii) to imprisonment for a term not exceeding three years; or

(ii) to both such fine and imprisonment.

7C Every person who has in his possession any ganja shall be guilty of an offence and –

(b) on summary conviction before a Resident Magistrate, shall be liable –

(i) to a fine not exceeding one hundred dollars for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so, however that such fine shall not exceed fifteen thousand dollars; or

…"

[95] The forensic certificate stated that the vegetable matter was ganja with a weight of 300.40g (10.60 oz). The learned Resident Magistrate had clearly fallen into error when she sentenced the appellant to fines exceeding the mandatory fine provided by the statute for the actual amount the appellant was found to have had in his possession. The appellant had therefore received a sentence to pay fines in excess of the ones prescribed by law.

[96] In the circumstances, the appeal against the conviction is dismissed. However the appeal against the sentence is allowed. The sentence is set aside and the following sentence is imposed:

Possession of ganja - $1,000.00 or 6 months imprisonment at hard labour.

Dealing in ganja - $2,000.00 or 6 months imprisonment at hard labour.