[2015] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 5/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE WILLIAMS JA (AG)

HERON PLUNKETT v R

Garth McBean QC and Miss Dian Johnson for the appellant

Miss Kelly-Ann Boyne and Mrs Suzette Whittingham-Maxwell for the Crown

14, 15 October, 6 November and 4 December 2015

PHILLIPS JA

[1] On 10 July 2007, Mr Heron Plunkett (the appellant) was convicted by Her Honour Miss Marjorie Moyston, Resident Magistrate for the parish of Portland for the offences of possession of ganja and dealing in ganja. He was ordered to pay a fine of $15,000.00 or in the alternative to serve 30 days imprisonment at hard labour for possession of ganja, and for dealing in ganja, he was ordered to pay $76,800.00 or in the alternative to serve 30 days imprisonment and in addition six months imprisonment at hard labour. The appellant appealed against his conviction and sentence on the grounds that the chain of custody of the exhibits had been so severely compromised that the learned

Resident Magistrate ought to have had a doubt as to their integrity and also that there was no proof that the appellant possessed the requisite *mens rea* to ground the convictions. We heard this matter on 14 and 15 October 2015 and on 6 November 2015 delivered our decision which stated that:

> "The appeal is allowed. The appellant's convictions for the offences of possession and dealing in ganja are quashed and the sentences for those offences are set aside. Judgment and verdict of acquittal is entered."

The following are the reasons for our decision.

Background

[2] The appellant, a Constable of Police attached to the Manchioneal Police Station in the parish of Portland, pleaded not guilty to three informations that charged him with the offences of possession of ganja, dealing in ganja and taking steps preparatory to export ganja. In support of these charges the Crown called three witnesses: Detective Sergeant Calvin Brown, Constable Tessong Harley and Constable Fernando Jackson.

[3] Detective Sergeant Brown testified that at the time of the trial he had been a police officer for 30 years and had been attached to the Narcotics Division since 2003. He further stated that he specialized in and had prosecuted a number of ganja cases. On 30 September 2006 at about 3:00 pm while he was in Annotto Bay in the parish of Saint Mary, he received information and as a result contacted a number of police officers including Constable Harley and Constable Jackson. Based on the information received, at about 4:00 pm the same day, he drove to Portland in his private motor car. On reaching Norwich District in the parish of Portland, Detective Sergeant Brown further

testified that he saw a white Toyota motor car registered 9461 ED proceeding towards the Saint Mary direction and so he turned around his motor car and started to follow the vehicle. On reaching the Passley Gardens main road in the parish of Portland, he stopped for a short while and met a police service vehicle that was being driven by Constable Harley who was in the company of Constable Jackson and another police officer. He also said that he then gave them instructions and proceeded towards the direction of Saint Mary.

[4] On reaching Saint Margaret's Bay in the parish of Portland, the white Toyota motor car registered 9461 ED being driven by the appellant who was accompanied by Mr Kevin Taylor, had stopped along the Saint Margaret's Bay main road in the vicinity of the Ken Jones Aerodrome. Detective Sergeant Brown testified that he then went up to the appellant and told him that he had received information that he, the appellant, was using his car to transport ganja. The appellant said nothing in reply. Detective Sergeant Brown then said that he cautioned the appellant and asked him what was inside the car and he also did not reply. He opened the rear right door of the car being driven by the appellant, at which time he said that he could smell the strong scent of what he believed or thought to be ganja coming from the car. Nothing of significance was found inside the car, but while searching the front section of the car, Detective Sergeant Brown said he smelled the strong scent of what appeared to be ganja.

[5] In the presence of the appellant, his passenger Mr Taylor and other police officers, Detective Sergeant Brown opened the trunk of the car being driven by the

appellant and found six parcels wrapped in brown masking tape. Four of the six parcels were triangular shaped and two were shaped like a cylinder. Detective Sergeant Brown said he asked the appellant what was inside these parcels and he said that the appellant made the statement "[a] little out of yesterday one". Detective Sergeant Brown said he understood what the appellant meant but he did not ask him to explain it, and further stated that at the time the appellant appeared to know what was in the packages. Detective Sergeant Brown stated that he used a knife to cut each parcel in the presence of the appellant and Mr Taylor and saw what appeared to be ganja in each parcel. He further testified that the trunk of the car was then closed in the presence of both men and the men and the car were subsequently taken to Narcotics Headquarters in the parish of Kingston.

[6] On the journey to Narcotics Headquarters, the appellant's car was driven by Constable Jackson who was accompanied by Mr Taylor and another police officer. The appellant was placed in a service vehicle driven by Constable Harley in the company of another police officer. Constable Harley drove the service vehicle immediately behind the appellant's car. Detective Sergeant Brown said he drove his motor car immediately behind the service vehicle so that both the service vehicle and the appellant's car were in his view at all times.

[7] On reaching Narcotics Headquarters, Detective Sergeant Brown said that the six parcels of what appeared to be ganja were taken into the guard room from the appellant's car and he marked 'CB' on each parcel in the presence of the appellant and

Mr Taylor. Detective Sergeant Brown said he then placed four rectangular shaped parcels and one cylindrical shaped parcel in a large transparent plastic bag which he labelled 'A' and then he placed the other cylindrical shaped parcel in another plastic bag which he labelled 'B'. Both bags were labelled and sealed in the presence of both men. The parcels Detective Sergeant Brown told the court were then handed over to the exhibit storekeeper for safekeeping.

[8] Detective Sergeant Brown further testified that on 2 October 2006, a question and answer interview was conducted with the appellant. A written record of this interview was tendered and admitted into evidence as exhibit 1. The following responses were gleaned from the appellant's question and answer interview. The appellant stated that he was the owner of the said white Toyota motor car registered 9461 ED; he was the driver on the day in question, and he is a Constable of Police. He stated that on 30 September 2006 about 3:00 pm, he gave his car to Mr Taylor to wash. The appellant had stated that Mr Taylor was not really his friend, he just knew him for about three years and he would sometimes give his car to Mr Taylor to wash. The appellant did not remember the time Mr Taylor returned the car but said that upon its return he had not inspected it because he was in a hurry to get to Portmore and return to work, and he would not normally inspect his car after it had been washed. He said that when Mr Taylor returned the car he was on his way to Kingston. He then said that he was going to Portmore to deliver items to the mother of his child. The appellant said that he knew a drug called ganja but he was "not certain of the smell of ganja". When stopped by the police, the appellant said he saw parcels in his car but he was not

sure of the amount and he did not remember what was contained in the packages. The appellant said when the car trunk was opened he smelled "some form of bush" and denied placing ganja in his car or giving anyone permission to do the same.

[9] Detective Sergeant Brown further testified that on 5 October 2006, he charged the appellant and Mr Taylor, pursuant to a ruling by the Director of Public Prosecutions, for the offences of possession of ganja, dealing in ganja and taking steps preparatory to export ganja.

However, on the date of the trial only the appellant was before the court. No evidence was led before Her Honour Miss Moyston as to the reasons for the absence of Mr Taylor but Crown Counsel Miss Kelly-Ann Boyne in her submissions to this court stated that Mr Taylor died before the start of the trial.

[10] Detective Sergeant Brown testified that on 9 October 2006, he had retrieved the two plastic bags he had sealed and labelled in the appellant's presence and took them to the Government Forensic Laboratory (Forensic Lab) in the parish of Kingston. When the two plastic bags were retrieved from the storeroom at Narcotics Headquarters, Detective Sergeant Brown stated that he observed that "one of the bag [sic] was bitten up — small bites and a portion of one of the exhibits was eaten". At the Forensic Lab samples were taken from the six parcels for which he obtained a receipt with a number and they were handed back to him and he later returned them to the storeroom at Narcotics Headquarters. The forensic certificate was tendered and admitted into evidence as exhibit 2.

[11] When identifying the parcels in court, Detective Sergeant Brown stated that the bags left in the storeroom at Narcotics Headquarters were not in the same condition when he saw them last because "the transparent plastic bags was [sic] eaten up as also the brown masking tape that wrapped [the] Ganja" and "[m]ost of [the] Ganja was also eaten up". After having been shown the bag labelled 'A', Detective Sergeant Brown identified four rectangular shaped parcels, and a parcel that had been a "cylindrical shaped parcel before". There was also some vegetable matter in the large transparent plastic bag. He went on to state that when the parcel had been left with the exhibit storekeeper at Narcotics Headquarters there had been "no bites or cuts on any of the parcels", but when the parcels had been taken to the Forensic Lab, there was a hole on one of the rectangular shaped parcels and a portion of ganja was missing. He also stated that one half of the ganja was also missing from the cylindrical parcel when it was taken to the Forensic Lab. Bag 'A' and its contents were admitted into evidence as exhibit 3. When bag 'B' was shown to Detective Sergeant Brown, he identified it as the parcel that was originally cylindrically shaped and that was admitted as exhibit 4.

[12] When Detective Sergeant Brown was cross-examined by counsel Mr Carl McDonald on behalf of the appellant, as to the integrity of the exhibits, he said that he had cut each of the six parcels he had found in the trunk of the appellant's car, but he was unable to show where he had made the cuts due to the condition of the parcels at that time. He further stated under cross-examination that at the time he took the cylindrical parcel to the Forensic Lab, there were several holes in one area, and it was wet.

[13] Constable Harley testified that he had been attached to Area 2 Narcotics and on the day in question he was at Saint Margaret's Bay with Detective Sergeant Brown, Constable Jackson and other police officers. He drove an unmarked service vehicle carrying the appellant that was travelling behind a car being driven by Detective Sergeant Brown. Constable Jackson, he said, was driving the appellant's car that was travelling between the car being driven by Detective Sergeant Brown and the unmarked service vehicle. The vehicles travelled thus to Narcotic Headquarters. Under cross-examination he denied any suggestion that during the journey to Narcotics Headquarters the convoy had been broken and further said that he was attached to Narcotics since 2001 and that he could smell ganja even if it was placed in a tightly taped scandal bag. He testified that he saw four cylindrical shaped and two rectangular shaped parcels in the trunk of the appellant's car when it was searched in Saint Margaret's Bay.

[14] Constable Jackson testified that he was also attached to Area 2 Narcotics and on the day in question he was a member of a police party in St Margaret's Bay and that he drove the appellant's car accompanied by Mr Taylor and another police officer to Narcotics Headquarters. There had been six parcels of vegetable matter in the trunk of the vehicle and on the journey to Narcotics Headquarters he noticed the scent of ganja. Both Constable Harley and Detective Sergeant Brown were travelling, respectively, in vehicles behind the appellant's car being driven by him (Constable Jackson). His cross-examination was centered on the lighting in the area and who drove the unmarked police service vehicle.

[15] At the end of Constable Jackson's cross-examination, the Crown closed its case. Mr McDonald made an unsuccessful submission of no case to answer with regard to the chain of custody of the six parcels and the lack of proof that the appellant had knowledge of the possession of ganja.

[16] The appellant gave an unsworn statement from the dock that he is a Constable of Police stationed at Manchioneal Police Station, who was involved in the capture of a notorious wanted man and had never been before any board of enquiry. On 30 September 2006, he said that he gave Mr Taylor his car to wash while he went to Port Antonio to buy things for his new born baby. Mr Taylor returned the car some hours after and he did not inspect the vehicle because he was in a hurry to get to Kingston to deliver the items to his child's mother. Mr Taylor asked the appellant for a ride into Kingston and the appellant agreed. Whilst on his way to Kingston he was stopped by police who opened the trunk of his car and then closed it. Because of improper lighting he could not see what was in the trunk. He was later transported to Narcotics Headquarters in Kingston. He denied knowing that ganja was inside the vehicle, denied smelling ganja in the vehicle and denied telling Detective Sergeant Brown "[a] little out of yesterday".

Findings of the learned Resident Magistrate

[17] The learned Resident Magistrate reasoned that she had to consider a number of issues including: (i) whether the appellant had knowledge and control of the ganja; (ii) whether the parcels taken to the Forensic Lab were in fact those found in the trunk of

the appellant's car; (iii) whether that which was taken to the Forensic Lab was ganja; and (iv) issues as to the appellant's good character.

[18] In finding that the appellant had knowledge and control of the substance in his vehicle, Her Honour Miss Moyston examined certain aspects of the appellant's unsworn statement. At paragraph 13 of her reasons for judgment, she said that she rejected the appellant's indication as to how the substance may have found its way into his car for the following reasons:

> "a) If as he says, Kevin was not really his friend, it is most unlikely that Kevin would put a large amount of any substance in the vehicle of someone who was not his friend and indeed was a Police Officer.
>
> b) If it were indeed Kevin Taylor who put a large amount of substance into the [appellant's] vehicle without the [appellant's] knowledge, I find that it is a most uncertain way to transport it to Kingston as [the appellant] could easily have refused him passage to Kingston. Then what would have happened to the substance in the trunk. How would it have been removed?
>
> Indeed, how would Kevin Taylor have retrieved the packages if even in Kingston without the Constable being aware of the substance in the trunk?"

[19] The learned Resident Magistrate also found that the appellant had knowledge of the ganja in his car on the basis that the appellant indicated in his unsworn statement that he had not clearly seen the contents of the trunk due to improper lighting, but in his question and answer statement he said that he had seen some brown packages but that he was not sure of the amount. To the extent that there were discrepancies in the testimony of Detective Sergeant Brown, the learned Resident Magistrate found that

these "discrepancies…were mistakes and not lies". She went on to state, at paragraph 23 of her reasons for judgment, that:

> "I find that Detective Sergeant Brown was truthful when he said that [the appellant] said 'It is a little out of yesterday,' I reject the [appellant's] denial that he said that. Although the evidence does not disclose exactly what he meant by that, I find that this statement shows that he knows something was in the trunk of his vehicle and it also suggests he knows it was ganja."

[20] The learned Resident Magistrate also used the evidence of the smell of ganja to ground her finding that the appellant knew that ganja was in his car. This is because Detective Sergeant Brown said that he could smell the strong scent of ganja in the car and Constable Jackson said that he noticed the scent of ganja on his way from Portland to Narcotics Headquarters. The learned Resident Magistrate said that Detective Sergeant Brown would have been familiar with the scent of ganja and she found that the scent of ganja in the appellant's car was strong enough for the appellant to smell it on his journey from Port Antonio to Saint Margaret's Bay. She further reasoned, at paragraph 32, that:

> "Even if, as the [appellant] says, he does not know the smell of ganja, having smelled the strong scent in his car, any reasonable person would want to know what that smell was. I note that this was not a small quantity of the item in the trunk but at least 48lbs and possibly more at the time of the finding."

[21] Although she recognized and acknowledged the discrepancy in the evidence of the police officers in respect of the order in which the vehicles proceeded to Narcotic

Headquarters, the learned Resident Magistrate nonetheless found that the service vehicle travelled in a convoy and was always in the view of the appellant.

[22] Her Honour Miss Moyston's findings in relation to the integrity of the parcels was that, despite the changed conditions of some of the packages and Detective Sergeant Brown's mistakes as to the shapes of the parcels, the same parcels that were recovered from the trunk of the appellant's car were the same substances that were taken to the Forensic Lab and were the same ones presented in court.

[23] In support of this finding, the learned Resident Magistrate stated, at paragraph 18 of her reasons for judgment, that the appellant himself said that he saw brown packages in his car. She found that the convoy to Narcotics Headquarters had not been broken and so the ganja was in the appellant's view at all times. She found that there were six packages in the appellant's car, six packages taken to the Forensic Lab and six packages presented in court with 'CB' on them. She accepted that there were discrepancies in the shapes of the items but added that Detective Sergeant Brown was just mistaken as to shapes and she found him to be a witness of truth. She accepted that the transparent plastic bags were not in the same condition as when they were taken to the Forensic Lab and, although no explanation had been given as to these changes, she nonetheless found that since each package had 'CB' written on it and were identified by Detective Sergeant Brown, then they were the same packages that had left the storeroom at Narcotics Headquarters and which had been found in the trunk of the appellant's car.

[24] The learned Resident Magistrate further found, at paragraph 53 of the reasons for judgment, based on the forensic certificate, that the packages taken to the Forensic Lab contained ganja that weighed 48 pounds 0.93 ounces.

[25] The appellant was acquitted for the offence of taking preparatory steps to export ganja (as per section 7A(1) of the Dangerous Drugs Act) and, as previously stated, was convicted for the offences of possession and dealing in ganja and sentenced to a fine of $15,000.00 or 30 days imprisonment at hard labour and $76,800.00 or 30 days imprisonment and in addition six months imprisonment at hard labour, respectively.

The appeal

[26] The appellant appealed his conviction and sentence. Mr Garth McBean, Queen's Counsel, for the appellant, applied for and was granted leave to argue four supplemental grounds of appeal, filed 8 October 2015, which we have summarized as follows:

(i) The learned Resident Magistrate erred in finding that despite the change in condition of some of the parcels, the same parcels that were taken from the trunk of the appellant's car were the same parcels that had been taken to the Forensic Lab.

(ii) The learned Resident Magistrate erred when she found that the integrity of the chain of custody was not compromised enough to cast reasonable doubt as to

the packages that were examined at the Forensic Lab were the same as those recovered from the motor car that was being driven by the appellant.

(iii) The learned Resident Magistrate erred when she found that the appellant was in possession of ganja since he had no knowledge that ganja was in his car trunk.

(iv) Based on the evidence presented in court, the learned Resident Magistrate erred when she failed to acquit the appellant of possession of and dealing in ganja.

Queen's Counsel asked this court to allow the appeal and for the convictions to be quashed and the sentences set aside.

Appellant's submissions

[27] Mr McBean submitted that this appeal raises two main grounds: (i) that the integrity of the exhibits had been severely compromised; and (ii) that the requirement of knowledge had not been proved to ground a conviction for possession of ganja.

[28] In support of the first issue, Mr McBean in relying on **R v Hodge** (2010) 77 WIR 247, stated that the learned Resident Magistrate's finding, at paragraph 58 of her reasons for judgment, that despite the changed conditions of some of the parcels the same parcels reached the Forensic Lab, was inconsistent with her finding, at paragraph 44 of her reasons, that the conditions of the transparent plastic bags and some of the packages were not the same when they were taken to the Forensic Lab. The finding at

paragraph 58, counsel argued, also contradicted the inconsistent evidence of Detective Sergeant Brown, who at different points in his testimony, stated that there were four triangular and two cylindrical shaped parcels (seen in the trunk of the appellant's car) and at the Narcotics Headquarters he stated he removed four rectangular and two cylindrical shaped parcels, which he labelled and sealed, and also contradicted the evidence of Constable Harley that there were four cylindrical and two rectangular shaped parcels. Mr McBean also stated that the learned Resident Magistrate's finding that the substance was the same, also contradicted her finding that ganja was missing from some parcels and that less ganja had been submitted to the Forensic Lab than had been found in the trunk of the appellant's car.

[29] In relation to the Resident Magistrate's finding that the appellant had knowledge that he had ganja in his possession, Mr McBean relied on **Courtney Thompson v R** [2015] JMCA Crim 18, a decision from this court, and other cases referred to therein, namely, **Director of Public Prosecutions v Wishart Brooks** (1974) 21 WIR 411 and **Bernal (Brian) and Moore (Christopher) v R** (1997) 51 WIR 241, to submit that the learned Resident Magistrate had erred when she found that the appellant was in possession of ganja. Mr McBean submitted that the evidence of smell of ganja could not be used to infer knowledge because the appellant had stated that he did not know the smell of ganja, and no evidence had been led indicating that he knew the smell of ganja. Furthermore, the parcels were in the trunk of the car and not in the back seat, and no evidence was led that one could smell the scent of ganja in the appellant's presence while in Saint Margaret's Bay. Mr McBean also submitted that the statement,

which the learned Resident Magistrate accepted, at paragraph 23 of her reasons, as having been made by the appellant, "[i]t is a little out of yesterday", should not have been used to support a finding of knowledge since there was no explanation by Detective Sergeant Brown as to what he understood that statement to mean. Knowledge, counsel argued, could also not be gleaned from the circumstances, since the appellant had said that he gave his car to Mr Taylor to wash, and no evidence had been led that could have refuted this assertion.

[30] In total, Mr McBean submitted that the findings made by Her Honour Miss Moyston were based on mere speculation and conjecture, and did not support the conviction for the offences of possession and dealing in ganja and so urged the court to quash the convictions and set aside the sentences.

Respondent's submission

[31] Miss Boyne made submissions on the Crown's behalf. In relation to the chain of custody, Ms Boyne also relied on **R v Hodge**, but in this instance, to show that gaps in the chain of custody were not fatal to the case. She also cited **R v Grazette** [2009] CCJ 2 (AJ), **Richard Francis v R** [2010] JMCA Crim 68 and **Garland Marriott v R** [2012] JMCA Crim 9 in an effort to show that issues as to the identity of an exhibit are matters of fact to be determined by the fact finding tribunal. Crown Counsel accepted that there had been varying testimonies in relation to the shapes of the parcels, but submitted that Detective Sergeant Brown had given an explanation for this when he testified that the packages had been eaten and that one was wet. She argued that

despite the absence of any explanation being proffered as to the change in conditions of the packages and the varying testimonies as to the shapes of the parcels, the learned Resident Magistrate had sufficient evidence before her to conclude that the parcels were the same in all respects. Miss Boyne submitted further that in all respects the evidence pointed to the substance being ganja, because there was a strong smell of ganja, Detective Sergeant Brown had cut the parcels in the appellant's presence, revealing a substance resembling ganja and the appellant himself saw some brown parcels in the trunk of his car, though he was not sure of the amount. Crown Counsel also invited the court to consider **R v Joseph Lao** 12 JLR 1238 in support of her submission that the learned Resident Magistrate's findings, in this case, were not "palpably wrong" and did not go against the weight of the evidence.

[32] Miss Boyne relied on **R v Cyrus Livingston** (1952) 6 JLR 95, **Courtney Thompson v R**, **Director of Public Prosecutions v Wishart Brooks** and **Bernal (Brian) and Moore (Christopher) v R** to show that there was more than enough evidence available to the learned Resident Magistrate to ground her finding that the appellant knew he had ganja in his possession. Since the appellant was the driver, she submitted, he had been in physical custody and control and being in custody and control, he ought to have been able to smell the strong scent of ganja that the witnesses said had been in his car. Even if he did not know the smell of ganja, Crown Counsel argued, based on the evidence of the witnesses, the smell was strong and so any reasonable person would have wanted to discover the source of this unusual smell.

Crown Counsel submitted that this bit of evidence was sufficient for the learned Resident Magistrate to make a finding of knowledge on the part of the appellant.

[33] Miss Boyne urged the court to accept that there was sufficient evidence upon which Her Honour Miss Moyston could have made the findings she did and asked that the convictions and sentences not be disturbed.

Issues and analysis

[34] As was correctly recognised by both Mr McBean and Miss Boyne, this appeal raised two main issues: (i) whether the chain of custody had been so severely compromised that the learned Resident Magistrate erred in finding that the packages that were recovered from the trunk of the appellant's car were the same packages that went to the Forensic Lab and were tendered into evidence at the trial; and (ii) whether the appellant had the requisite knowledge to ground a conviction for possession of ganja.

Possession of ganja and dealing in ganja

[35] The appellant was convicted of possession of ganja and dealing in ganja contrary to sections 7C and 7B(a) of the Dangerous Drugs Act, respectively. Section 7C provides as follows:

> "Every person who has in his possession any ganja shall be guilty of an offence…"

Section 7B(a) states that:

> "Every person who—

> (a) cultivates, gathers, produces, sells or otherwise deals in ganja;…
>
> …
>
> shall be guilty of an offence…"

[36] The elements of the offence of possession of ganja under section 7C of the Dangerous Drugs Act were stated by the Judicial Committee of the Privy Council in **Bernal (Brian) and Moore (Christopher) v R** where Sir Brian Neill, in delivering the advice of the Board at page 249, said:

> "...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. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases. It will be for the tribunal of fact to investigate these circumstances to decide whether or not the accused had knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance."

[37] This statement has been endorsed in a number of cases before this court such as **Patricia Henry v R** [2011] JMCA Crim 16 where Morrison JA (as he then was) on behalf of the court, cited Sir Brian Neill's quotation, stated above, and correctly summarized it at paragraph [41] of the judgment as follows:

> "The key elements of the offence of possession of ganja are therefore (i) physical custody or control of the drug and (ii) knowledge that the substance which is in the defendant's custody or under his control is ganja…"

[38] McDonald-Bishop JA (Ag) (as she then was), with whom the other judges agreed, in **Courtney Thompson v R**, in examining the elements necessary to prove the offence of possession of ganja, at paragraph [40] of the judgment, said:

> "The authorities have made it clear that once there was physical custody or control of the ganja by the offender which was, in fact so in the case of the appellant, then, the court, in determining whether he had knowledge that he had the illicit substance in his possession, should have regard to all the surrounding circumstances of the case…"

[39] It seems therefore that physical custody or control and proof of knowledge that the appellant was in custody or control of ganja are essential requirements in proving the offence of possession of ganja. Knowledge can be gleaned from the particular circumstances of each case and is a fact that can be inferred by a fact finding tribunal.

[40] The evidence that is used in support of the charge of possession of ganja is used to prove dealing in ganja with the added requirement that the person in possession of ganja intended to sell or supply it. Section 22(7)(e) of the Dangerous Drugs Act gives rise to the rebuttable presumption that a person is dealing in ganja once the ganja weighs more than 8 ounces. Consequently, once a person is in possession of ganja with intent to sell or supply it or if the person is in possession of more than 8 ounces of ganja then the offence of dealing in ganja is proved.

Issue 1: Chain of custody

[41] The first element in proving possession of ganja is that the accused has physical control or custody of the drug and so, there should be no doubt as to the identity of the exhibits taken from the trunk of the appellant's car. In order to eliminate any questions surrounding the integrity of the exhibits there must be some evidence accounting for: (i) when, where and how the items were recovered; (ii) the condition they were recovered in; (iii) how they were stored; (iv) whether there were any changes to the condition of the items; (v) what, if anything, may explain those changes; and (vi) how particular exhibits can be differentiated from others, since there is nothing particularly unique about ganja. The leading authority on the issue is **R v Hodge** where an appellant who had been convicted for attempted robbery, aggravated burglary and assault occasioning actual bodily harm by the use of DNA evidence, questioned, *inter alia*, the integrity and accuracy of the DNA results obtained due to gaps in the chain of custody of buccal swabs taken from the appellant. This ground of appeal failed since it was held that the integrity of the chain of custody had not been disturbed. Baptiste JA in delivering the judgment of the court at paragraph [12] said:

> "The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. There is no specific requirement, neither is it necessary, that every person who may have possession

> during the chain of transfer be called to give evidence of the handling of the sample while it is in their possession..."

[42] The Singapore Court of Appeal also expressed the same views in **Nguyen Tuong Van v Public Prosecutor** [2005] 1SLR 103; [2005] 5 LRC 140 where an Australian national was convicted and sentenced to death for attempting to board a plane with 396.2 grams of diamorphine that had been strapped to his lower back with tape, contrary to section 7 of the Misuse of Drugs Act. The appellant appealed his conviction and sentence on the basis that, *inter alia*, the integrity of the drug exhibits had been compromised. It was held that the integrity and identity of the drug exhibits had not been compromised at any stage. Lai Kew Chai J in delivering the judgment of the court at paragraph 36 said:

> "The principles relating to the chain of custody of exhibits in evidence are settled. The Prosecution bears the burden of proving beyond reasonable doubt that the drug exhibits analysed by Dr Lee Tong Kooi of the HSA were the same as those seized from the appellant's back and haversack. Where there is a break in the chain of custody and a reasonable doubt arises as to the identity of the drug exhibits, then the Prosecution has not discharged its burden, and has failed to make out a *prima facie* case against the accused..."

[43] In the instant case, in order to ascertain whether or not there was reasonable doubt as to whether the integrity of the exhibits, had been compromised, we will analyse the parcels by making reference to the evidence of their shape and condition.

- **Shape of the parcels**

[44] With regard to the shape of the items, Detective Sergeant Brown stated that he retrieved **four triangular and two cylindrical shaped parcels** from the trunk of the appellant's car. By the time he drove to Narcotics Headquarters in Kingston the parcels morphed into **four rectangular shaped parcels and two cylindrical shaped parcels**. He placed the **four rectangular parcels and one cylindrical parcel** in a plastic bag marked 'A' and placed the remaining cylindrical parcel in a bag marked 'B'. Upon presentation of these parcels to the Forensic Lab, the description on the forensic certificate was one transparent plastic bag marked 'A' containing **four rectangular shaped parcels containing vegetable matter resembling ganja, one cylindrical parcel** with vegetable matter resembling ganja and loose vegetable matter resembling ganja. The transparent plastic bag marked 'B' **contained one irregular shaped parcel** made from black plastic material with loose vegetable matter resembling ganja. When identifying the parcels in the court below, Detective Sergeant Brown identified from bag 'A', **four rectangular shaped parcels** and **one parcel that was** "**cylindrical shaped before**" and from bag 'B', **one parcel that was "originally a cylindrical shaped parcel**", which would suggest that the parcel was no longer cylindrical but **irregular**. Constable Harley testified that he saw **four cylindrical shaped and two rectangular shaped parcels**, in the trunk of the appellant's car, which directly contradicted the descriptions given by Detective Sergeant Brown and the description stated on the forensic certificate.

[45] Her Honour Miss Moyston found that Detective Sergeant Brown was mistaken and not malicious as to the shapes he described and although there were changes in the condition of the packages, the items taken from the trunk of the appellant's car were the same as those taken to the Forensic Lab. Further, she found that despite the fact that the cylindrical shaped parcel in the bag marked 'B' was now irregularly shaped, the evidence as to its previous shape came from a credible witness, who was not seeking to mislead the court, and as such the parcels which were taken from the trunk of the appellant's car were the same packages taken to the Forensic Lab and presented in court.

[46] Despite these changes in the shapes of the parcels, no explanation was proffered by the Crown as to why it was that sometimes the items were described as triangular, and at other times rectangular or cylindrical. There was no evidence from Detective Sergeant Brown that he had limited knowledge of shapes and was mistaken or might have been mistaken as to the same. There was no explanation given as to why loose vegetable matter was found in the transparent plastic bag marked 'A' that was taken to the Forensic Lab when Detective Sergeant Brown had not mentioned the presence of loose vegetable matter resembling ganja at the time of the appellant's arrest or upon his arrival at the Forensic Lab in his evidence. Therefore the findings made by the learned Resident Magistrate in this regard were not supported by any evidence adduced at the trial and consequently, were erroneous.

- **Condition of the parcels**

[47] Detective Sergeant Brown testified that when he saw the six parcels in the trunk of the appellant's car he used a knife to cut each of the parcels in his presence and found vegetable matter resembling ganja. He also gave evidence that when he went to retrieve the parcels from the exhibit storekeeper to take to the Forensic Lab "one of the bag [sic] was bitten up—small bites and a portion of one of the exhibits was eaten". In fact, he said that the parcels were not in the same condition as when he received it last since he noticed that "the transparent plastic bags was [sic] eaten up" and "[m]ost of the ganja was eaten up". Later in his testimony he said that when the parcels went to the exhibit storekeeper there were no bites or cuts on any of the parcels, despite having testified to the contrary before. When he took the parcels to the Forensic Lab he stated that there was a hole on one of the rectangular shaped parcels and a portion of ganja missing, despite having testified earlier that there were bite marks on the parcel and some of the ganja was eaten up. He went on to state that about half of the vegetable matter resembling ganja was missing from the cylindrical parcel and so it would appear that the true weight of these parcels is a mystery. At the Forensic Lab there was no mention of bites, holes or cuts by the analyst and it certainly was not stated in the forensic certificate. During the trial, there was no indication that Detective Sergeant Brown identified the holes, cuts and bite marks that he had testified about earlier and no explanation had been given as to what could explain the drastic changes in the condition of the parcels, for example was there a rodent infestation in the storeroom or had an animal, human or otherwise, escaped and eaten the exhibits.

[48] Notwithstanding these grave discrepancies and the absence of explanations as to the radical changes in the condition of the parcels, the learned Resident Magistrate found that the transparent plastic bags had holes and what appeared to be bite marks on them. A portion of the ganja was missing not only from a cylindrically shaped parcel but in addition a portion of ganja was missing from the rectangular shaped parcel. Nonetheless the learned Resident Magistrate stated in paragraphs 50-53 of her reasons that:

> "50. Even though no explanation was given as to what caused holes or bites on the packages, I observed that each of the six packages had **CB** marked on them.
>
> 51. I accept the evidence of Detective Sergeant Brown that he had marked **CB** on these packages in front of the [appellant] before putting them in the transparent plastic bags.
>
> 52. I find that despite the bites these were the same packages left at the store room by Detective Sergeant Brown based on the marks and labels by Detective Sergeant Brown [sic] I find less ganja [sic] taken to laboratory than found in the trunk of the car and taken to Narcotics Headquarters.
>
> 53. I find based on the Forensic Certificate that what was taken to the laboratory was indeed 'ganja' and weighed 48lbs 0.93ozs." (Emphasis original)

[49] In the absence of clarifying evidence as to whether or not Detective Sergeant Brown had other parcels stored at Narcotics Headquarters for other cases with '**CB**' written thereon, the mere fact that the initials '**CB**' were written on the parcels that were admitted into evidence would not, by itself, lead to an inescapable inference that those were the same items alleged to have been seized from the trunk of the

appellant's car. Crown Counsel had cited **R v Grazzette**, **Francis v R** and **R v Hodge** to show that breaks in the chain of custody of the exhibits were held not to be fatal to the prosecution's case. However, in the instant case, the discrepancies in the evidence were so strong that the findings made by the learned Resident Magistrate with regard to the shape and condition of the parcels had not been supported by the evidence adduced. The evidence of Constable Harley directly contradicted the evidence of Detective Sergeant Brown as to the shape of the parcels, and this was not explained in the evidence. We are impelled to place on record our deep chagrin that a Detective Sergeant of Police, employed as a police officer for over 30 years, appeared to take no steps to preserve the integrity of the exhibits, and also we are deeply concerned with his inability to recognise and describe shapes. Detective Sergeant Brown's evidence in this respect was in our view incredulous. Consequently, the chain of custody on all fronts had been either "altered, compromised, contaminated, substituted or otherwise tampered with", to such an extent that "its integrity from collection to its production in court" created reasonable doubt as to the identity of the drug exhibits. Therefore, this ground of appeal must succeed.

Issue 2: Knowledge of possession of ganja

[50] As previously stated, the second issue in this appeal was whether or not there was sufficient evidence upon which the learned Resident Magistrate could have found that the appellant did in fact have knowledge that he was in possession of ganja. Knowledge that an accused had been in possession of ganja can be gleaned from the circumstances of each case and has been discussed in various cases.

[51] In **R v Cyrus Livingston** the appellant, a baggageman on a bus, placed a wooden box with ganja on a bus that was later found by police officers. The appellant was seen in the bus sitting on the opposite side facing the box. When told that there was ganja in the box the appellant said he got it from a woman named McLean. He was convicted for possession of ganja and he appealed his conviction on the basis that, *inter alia*, he had no knowledge that ganja was in the box on the bus. This court in dismissing the appeal, held that based on the circumstances, the appellant knew that he had ganja in his possession. He had placed four large parcels of ganja inside the bus, moved it around in the bus and travelled with it, and so must have noticed it. Moreover when the police asked what was on top of the box, the appellant said it was just a bed and mattress and omitted to tell the police about the ganja. O'Connor CJ in delivering the judgment of the court, at page 99, said:

> "…Merely to say 'we did not know that we had ganja' is not however, so easy a way out for persons found in possession of ganja as might at first sight appear. As was pointed out by Devlin J, in *Roper v Taylor's Central Garages (Exeter) Ltd* (1951) 2 TLR 284 at page 288, there are two degrees of knowledge which are sufficient to establish *mens rea* in cases of this kind. The first is actual knowledge, which the magistrate may find because he infers it from the fact of possession, or from the nature of the acts done, or from both. The magistrate may find this even if the defendant gives evidence to the contrary. The magistrate may say 'I do not believe him: I think that that was his state of mind'. Or if the magistrate feels that the evidence falls short of actual knowledge, he has then to consider the second degree of knowledge, whether the defendant was, as it has been called, deliberately shutting his eyes to an obvious means of knowledge, whether he deliberately refrained from making inquiries the results of which he might not care to have. Either of these two degrees of knowledge would be

> sufficient to support a conviction, though mere neglect to make such enquiries as a reasonable and prudent person would make, would not be sufficient."

[52] In **Director of Public Prosecutions v Wishart Brooks** the respondent was seen in a van around the driver's seat. When police officers approached the persons in the van, they including the respondent ran, and 19 sacks containing ganja were found in the body of the van. The respondent was caught and when asked why he ran from the van the respondent said he had been hired to drive it, and when asked if he knew what was in the sacks, the respondent made no reply. His conviction had been quashed by this court and was appealed by the Crown to the Judicial Committee of the Privy Council. The Board restored the conviction on the basis that, upon the evidence, including the respondent's statement to the police, the 19 sacks of ganja that were in his possession and the fact that he and the other occupants of the van attempted to run away on the approach of the police, the magistrate was, in their Lordships' view, "fully entitled to draw the inference that the defendant knew what he was carrying in the van".

[53] Indeed the Privy Council in **Bernal (Brian) and Moore (Christopher) v R** did not disturb the findings of the learned Resident Magistrate that the 96 tins of pineapple juice were substituted for ganja with the appellant's knowledge on the basis that the findings of fact on the issue of knowledge will depend on the circumstances of each case and inferences can be properly drawn from facts proved.

[54] In the recent decision from this court of **Courtney Thompson v R**, the appellant was driving a wrecker truck with a white Toyota motor car on top of it. Police pursued the wrecker because they received information that it was transporting ganja. Despite being pursued by police the appellant did not stop until he was overtaken by the police. Several packages of ganja were seen, on the front and back seats, through the front windscreen and window of the car and the officer also noticed the strong smell of ganja. He was convicted for the offences of possession of ganja and trafficking in ganja. The appellant appealed his conviction and sentence on the grounds that, *inter alia*, the finding of the learned Resident Magistrate that he had knowledge that he had ganja in his possession was wrong. This ground of appeal failed because the learned Resident Magistrate demonstrated that she had properly applied her mind to the circumstances that could give rise to knowledge by having regard to the appellant's failure to stop, and the fact that he remained silent, after caution, having been arrested and charged (although he has the legal right to do so). That could have been consideration for the learned Resident Magistrate in respect of knowledge, because of his failure to stop. However, in relation to the smell of ganja McDonald-Bishop JA (Ag) (as she then was) said, at paragraphs [59]-[60] of the judgment:

> "[59] It is, indeed, true that the fact that DSP Faulkner might have smelled the ganja does not necessarily mean that the appellant did so or could have done so, so that his knowledge that it was ganja could have been inferred on that basis. However, we must say that it would have really been difficult for the learned Resident Magistrate not to believe that a middle-aged man who has lived in Jamaica and who has worked with the police from time to time in a parish like Manchester would not have known the scent of ganja. As the tribunal of fact, she was expected not only to

> apply the law to the facts but also her common sense, which, evidently, she made an effort to do, albeit misplaced.
>
> [60] We found, however, that as tempting as the conclusion may have been, there was no direct evidence from which it could have been inferred that the appellant knew the scent of ganja or that he could have smelled it like DSP Faulkner did. The learned Resident Magistrate would have fallen into error in elevating that bit of evidence to being part of the circumstantial evidence from which knowledge on the part of the appellant could have been inferred. However, that error would not have been damaging or fatal to the conviction, as Mr Morris had submitted, because her finding was strongly supported by other cogent evidence from which knowledge could have been inferred."

[55] In the instant case, the learned Resident Magistrate found that the appellant knew that he had ganja in his possession based on the smell of the item in the trunk, when he uttered the words "[a] little out of yesterday one" and also from his attempt to explain how the ganja came to be in his possession.

- **Smell**

[56] The learned Resident Magistrate found, at paragraph 28 of her reasons for judgment, that there was a strong smell of ganja in the appellant's car. She also found, at paragraph 31, that the smell of ganja was strong enough for the appellant to have smelled it on his journey from Port Antonio to Saint Margaret's Bay. She grounded her findings on the basis of Detective Sergeant Brown's testimony that when he went up to the appellant's car and opened the rear right door of the car, he could "smell the strong scent of what appeared to be ganja coming from the car". Constable Harley stated that you could smell ganja from a tightly taped scandal bag and Constable Jackson testified

that he noticed the scent of ganja while driving the appellant's car from Saint Margaret's Bay to Narcotics Headquarters. She rejected the appellant's denial both in his question and answer statement to the police and in his unsworn statement in court that he did not know the smell of ganja, since this would be unlikely for a police officer not to be aware of the same.

[57] Interestingly, in this case, we do not know whether Detective Sergeant Brown smelled what appeared to be ganja before pulling the rear right door. There is no evidence with regard to that. However, from his expertise in narcotics, it was open to the learned Resident Magistrate to find that Detective Sergeant Brown knew the smell of ganja. Constable Harley said he could smell ganja through a tightly taped plastic bag, and Constable Jackson said he smelled ganja while driving the appellant's car on the journey from Saint Margaret's Bay, Portland to Narcotics Headquarters in Kingston, but there was no evidence that either witness had smelled ganja at the scene nor was there any evidence adduced as to their expertise in this regard. The appellant said he was not certain of the smell of ganja. No evidence was adduced as to the appellant's career as a police officer and whether or not he had prosecuted ganja related offences previously and so ought to have been, or was, familiar with the smell. It follows therefore that the findings made by the learned Resident Magistrate with regard to the smell as being proof of knowledge were not supported by the evidence.

- **The appellant’s statement**

[58] Detective Sergeant Brown further testified that when he asked the appellant what was inside the parcels found in his car he said “[a] little out of yesterday one”. He went on to state that he understood what the appellant meant but had not asked the appellant to explain the statement. The appellant in his unsworn statement has denied saying this and no other witness corroborated Detective Sergeant Brown in that regard. The learned Resident Magistrate found at paragraph 23 on this point as follows:

> “I find that Detective Sergeant Brown was truthful when he said that [the appellant] said ‘It is a little out of yesterday,’ I reject the [appellant’s] denial that he said that. Although the evidence does not disclose exactly what he meant by that, I find that this statement shows that he knows something was in the trunk of his vehicle and it also suggests he knows it was ganja.”

[59] In our view, such a finding cannot be supported by the evidence. It is rather curious that the learned Resident Magistrate or the clerk of the courts did not ask Detective Sergeant Brown what he understood that statement, that he said had been made by the appellant, to mean. So we are therefore not able to speculate or guess what the appellant may have meant when he uttered those words. The learned Resident Magistrate herself stated that she did not know what the words meant, but nonetheless found that by the use of the words, the appellant knew he had ganja in the car. The uncertainty of what the appellant could have meant by those words, and the fact that no evidence was adduced upon which an inference could be made as to the meaning of those words, in our view, the statement could not prove that the appellant had knowledge of the prohibited substance, and the Resident Magistrate’s finding in this

regard was therefore erroneous. Miss Boyne had submitted that the words used could be taken as proof that the appellant knew something was in the car. This submission must however raise another unanswered question, as to what would the appellant have known was in the car.

- **Circumstances proving knowledge**

[60] In his unsworn statement the appellant, said that he loaned the car to an associate of his named Kevin Taylor for him to wash the same. He stated that Mr Taylor had returned the car to him hours later and he had not inspected it as he was in a hurry to get to Kingston to deliver items to the mother of his child. He further stated that when he was stopped by the police he was unaware that ganja was in his vehicle. The learned Resident Magistrate rejected the appellant's attempt to distance himself from the parcels of ganja found in the trunk of his car, and found his explanation as to how they may have entered his car unlikely and unbelievable. This was because she felt that if Mr Taylor was not really the appellant's friend he would not have placed a large amount of any substance in his car. The learned Resident Magistrate stated that there was no explanation as to how the items would have been retrieved from the trunk of the car if the appellant had refused Mr Taylor a drive to Kingston. Although the appellant was jointly charged with Kevin Taylor, Mr Taylor died and so the appellant's assertions were not approved or disproved. Furthermore, because the appellant gave an unsworn statement there was no testing of the veracity of his claims in cross-examination. The questions raised by the learned Resident Magistrate, ought to have been put to the appellant by the police officers conducting the question and answer

interview but this had not been done. We agree with Mr McBean that the questions posed by the learned Resident Magistrate, and on which she based her finding, amounted to mere speculation and conjecture. Consequently, in our view, there was no evidence or assertion coming from the appellant, upon which an inference could be drawn that he knew about ganja being in the trunk of his car.

- **Silence**

[61] The learned Resident Magistrate made no inference as to knowledge from the fact that the appellant remained silent when Detective Sergeant Brown told him that he received information that he was using his car to transport ganja and when he remained silent after Detective Sergeant Brown asked him what was inside the car. However, this was an inference the learned Resident Magistrate could have properly drawn, because despite the appellant's legal right to remain silent, when the appellant, who was a police officer, was told that he had been suspected of having ganja in his possession, a reasonable prudent person who denied knowledge might have found it necessary to reject this assertion. The fact that an inference as to knowledge can be made from silence was accepted by this court in **Courtney Thompson v R** where at paragraph [52] of the judgement McDonald-Bishop JA (Ag) (as she then was) said:

> "Although, he did not bear the legal burden of proof, the appellant chose to remain silent (which of course, was his legal right to do) but by so doing he would have failed to adduce material to explain his action or non-action, as the case may be, for the consideration of the learned Resident Magistrate. It was, therefore, not open to his counsel to proffer an explanation, by way of submissions on appeal, for his failure to stop. That was not evidence or material placed before the learned Resident Magistrate for her consideration.

> It was open to her, therefore, to place an interpretation on the conduct of the appellant as she considered fit, having regard to all the circumstances of the case…"

However, in the instant case, it does not appear as if the learned Resident Magistrate considered the appellant's silence in the circumstances discussed or that she had used his silence, as indicated, to make an inference that he was aware of the presence of parcels of ganja in the trunk of his car. As a consequence, there remains no basis upon which the learned Resident Magistrate could have made her finding as to knowledge and the conviction on this basis cannot stand.

Conclusion

[62] The integrity of the parcels of ganja were so severely compromised that there was indeed a reasonable doubt as to whether the items that were retrieved from the trunk of the appellant's car were in fact those taken to the Forensic Lab, and whether in fact the same items were taken to court. It had not been proved that the appellant had knowledge that he had ganja in his possession, and the learned Resident Magistrate's finding that the appellant had such knowledge was erroneous. As a result no evidence had been adduced that supported the conviction for possession of ganja and it follows that there was no evidence to support the conviction for dealing in ganja. Consequently, shortly after the submissions on this appeal were heard, we made the orders set out in paragraph [1] herein.