[2015] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 22/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

COURTNEY THOMPSON v R

Ernest Smith instructed by Ernest A Smith & Company for the appellant

Leighton Morris for the Crown

25 March and 31 July 2015

MCDONALD–BISHOP JA (AG)

[1] Mr Courtney Thompson, the appellant, had brought this appeal against his conviction and sentence after a trial conducted in the Resident Magistrate's Court for the parish of Manchester before Her Honour Mrs Desiree Alleyne, between 24 May 2012 and 2 April 2013. He was charged with the offences of possession of ganja, dealing in ganja and trafficking ganja. He was found guilty for the offences of possession of ganja and trafficking in ganja but the record was endorsed "no verdict" for the offence of dealing in ganja.

[2] He was sentenced as follows:

Possession of Ganja -	fined $15,000.00 or 12 months imprisonment at hard labour.
Trafficking Ganja -	fined $500,000.00 or 18 months imprisonment at hard labour plus two years imprisonment.

The sentences of imprisonment were ordered to run concurrently but consecutively to mandatory sentence if the fines were not paid.

[3] On 25 March, 2015, we heard this appeal and ordered as follows:

> "(1) The appeal against conviction is dismissed.
>
> (2) The appeal against sentence is allowed in part. The alternative sentences of 12 months imprisonment and 18 months imprisonment are set aside and six months imprisonment substituted on each conviction. The sentence is affirmed in all other respects.
>
> (3) The sentence is to commence on 25 March 2015."

[4] We promised then to reduce our reasons for our decision into writing. This is a fulfillment of that promise.

The background: the case at trial

The prosecution's case

[5] The case brought by the prosecution against the appellant and on which he was convicted may be summarized as follows: On 9 July 2008 Sergeant Leroy

Hanson (now retired), who was then attached to the Mandeville Police Station, received certain information which led him to the Winston Jones Highway in the parish of Manchester at around 2:00 pm. There he saw the appellant whom he had known before driving a wrecker truck that was conveying a white Toyota motorcar on top of it. Sergeant Hanson pursued the wrecker in his police service vehicle with flashing vehicle lights and blaring horn. Despite the police pursuing him in this manner, the appellant continued driving for about a mile and a half before the police managed to overtake the wrecker and stopped him. When the appellant eventually stopped, Sergeant Hanson informed him that he had received information that the motorcar he was transporting on the wrecker had ganja in it. The appellant told Sergeant Hanson that he had no knowledge of that.

[6] Sergeant Hanson then informed the appellant that he wanted to see what was inside the motorcar and asked him for the key. The appellant told him that he did not have the key. Sergeant Hanson then climbed on top of the wrecker and looked inside the motorcar through the front windscreen. He saw several packages on the front and back seats. He informed the appellant that he suspected that the packages in the motorcar contained ganja and instructed the appellant to drive to the Mandeville Police Station.

[7] When Sergeant Hanson arrived at the Mandeville Police Station, he sought the assistance of then Detective Inspector Kaydian Faulkner (who had become a

Deputy Superintendent of Police ("DSP") by the time of trial), who took over the investigation of the case. At the police station, while the motorcar was still on the wrecker, DSP Faulkner was able to see the packages that were inside the car through the windscreen and the window of the motorcar. In the presence of the appellant and Sergeant Hanson, DSP Faulkner used a wire to gain forced entry to the motorcar in which he found 12 knitted plastic bags on the driver's seat, the rear passengers' seat and in the trunk. These bags were opened in the presence of the appellant and they were found to contain 100 smaller packages, wrapped in beige and brown masking tape, and contained vegetable matter resembling ganja. The police had to use a sharp instrument to cut the bags open in order to see the contents which were sealed inside. DSP Faulkner, however, said that before the motorcar was opened, he could smell the contents of the bag to have been ganja.

[8] DSP Faulkner told the appellant that the parcels contained ganja and then cautioned him. On caution, the appellant said that he did not know that ganja was in the vehicle as he had only got a job to transport the motorcar to Old Harbour and that he did not know anything about the packages. According to him: "[i]s someone I see at Spur Tree Hill and them asked me to go and do this work for them" and that, "[i]t is white house mi a go mi see de man dem breakdown at Spur Tree and they asked me to carry the car for them to Old Harbour".

[9] The appellant was subsequently arrested and charged for the offences for which he was eventually tried. Upon being cautioned after he was advised of the charges, he made no statement.

[10] Later, samples were taken from the packages removed from the motorcar and tested by the government forensic analyst who certified that the packages contained ganja that weighed 542 pounds and 3.15 ounces.

No case submission

[11] At the end of the prosecution's case, Mr Ernest Smith, counsel for the appellant (both here and below), made a no case submission. He submitted, *inter alia*, that it was the duty of the prosecution to prove all the ingredients of the offences, and, in particular, the offence of possession of ganja. He argued that while the appellant had custody of the motorcar he did not have control of what was inside it, as he did not have a key for the vehicle and did not have access to its interior. The inaccessibility of the interior of the motorcar to the appellant, he said, was a fact that was not refuted by the prosecution. He submitted that the appellant was at all material times acting in the capacity of a bailee and in the circumstances where the ganja was not detectable or identifiable to the naked eye, knowledge is negated and, so, cannot be inferred. He further contended that the fact that the prosecution's evidence had disclosed that the owner of the motorcar could not be found was further evidence that buttressed the appellant's account of the circumstances under which he came to

be in possession of the vehicle. In the circumstances, the appellant ought not to be called upon to answer to the charges.

[12] The learned Resident Magistrate did not accede to the no case submission having found that a *prima facie* case had been made out by the prosecution. She called upon the appellant to answer to the charges on all three informations.

The defence

[13] The appellant chose to remain silent and to call no witnesses following the court's ruling on the no case submission. He, therefore, rested his case on the no case submission. Based on Mr Smith's submissions in the court below, which were, more or less, repeated before this court, it became evident that the appellant was content to rely on facts that had emerged on the Crown's case on the examination-in-chief and cross-examination of Sergeant Hanson and DSP Faulkner. This evidence was, particularly, in relation to what he had told Sergeant Hanson when he was stopped and what he had said on caution at the Mandeville Police Station.

[14] Sergeant Hanson had testified that the appellant had told him that he was on his way to Westmoreland when some men stopped him and asked him to take the motorcar to Old Harbour and that they did not give him a key for the car. He told Sergeant Hanson that he did not know the persons who gave him the job to transport the motorcar and he did not know where to find them. He did not give the police a particular location in Old Harbour to which he was

going. Sergeant Hanson also stated that when the appellant was searched at the police station no key for the motorcar was found on him.

[15] In addition, during the cross-examination of DSP Faulkner it was disclosed that the registered owner of the motorcar lived in St Elizabeth but that the police was not able to locate this person. DSP Faulkner also stated that the appellant had told him that he had charged the men $15,000.00 to transport the vehicle to Old Harbour.

The learned Resident Magistrate's finding

[16] The learned Resident Magistrate, in concluding that the appellant was guilty of two of the offences for which he was charged, found, in a nutshell, that in the light of all the circumstances of the case as presented by the prosecution, the appellant had exclusive custody and complete control of the motorcar that was in his possession and that there was enough evidence adduced by the prosecution from which knowledge on his part that he had ganja in the motorcar could be inferred. She found that the prosecution had proved its case beyond a reasonable doubt.

The appeal

[17] The appellant, being aggrieved by the findings and verdict of the learned Resident Magistrate, filed three grounds of appeal as follows:

> "1. That the Learned Resident Magistrate erred in law in concluding that mere custody as a

Bailee was sufficient to constitute knowledge of that which he was carrying/transporting.

2. That the reasoning of the Learned Resident Magistrate in concluding that the Defendant/Appellant ought to have known and seen that ganja was in the car because: -

   a. The ganja was concealed in bags and the packages wrapped in masking tape.

   b. No evidence that the smell of ganja was detected before the car was forced opened and no evidence that the ganja scent is known by every Jamaican. Such knowledge cannot be inferred.

3. That the Learned Resident Magistrate erred in law by arriving at conclusions adverse to the Defendant/Appellant by speculation and not from proved facts."

[18] There was no ground of appeal filed in relation to sentence. Mr Smith, however, was invited by the court to address the propriety of the alternative sentences that were imposed in default of payment of the fines in the light of the provisions of section 195(1) of the Judicature (Resident Magistrates) Act. The appellant was, therefore, granted the leave of the court to argue an additional ground and that was that the alternative sentences of imprisonment were manifestly excessive.

Submissions in relation to the appeal against conviction

The appellant's

[19] Mr Smith submitted that the only issue was whether or not the appellant, in his capacity as bailee, had knowledge that the locked vehicle with parcels in

bags which were sealed with masking tape, "air tight", contained ganja. He pointed out that the appellant was at the time operating a wrecker service and was merely chartered to carry a locked vehicle from St Elizabeth to St Catherine. He was never shown the contents of the sealed parcels that were inside the motorcar.

[20] He argued further that the signals made by the police for the appellant to stop are used, ordinarily, for other purposes and there was no evidence that the wrecker that was being driven by the appellant was the only vehicle on the road at the time. In addition, he said, the fact that the bags were visible from outside the vehicle is not evidence of knowledge of their contents and the evidence by DSP Faulkner that he could also smell ganja before the car was opened is incredible and was not supported by any other witness. He also submitted that enough effort was not made to locate the owner of the car in which the ganja was found.

[21] Mr Smith's ultimate contention was that the finding of the learned Resident Magistrate that the appellant had knowledge of the contents of the sealed packages was flawed and based on speculation. He drew from several aspects of the learned Resident Magistrate's findings of fact to support this argument. Furthermore, he complained, the inferences that were drawn by the learned Resident Magistrate from her findings of fact were not "inescapable". Accordingly, the conviction should be quashed and the sentence set aside. He

relied on the case of **Oscar Serratos v R** RMCA No 26/2004, delivered on 28 July 2006.

The Crown

[22] Mr Morris, in a most comprehensive and well-prepared submission, responded on behalf of the Crown. He submitted, *inter alia*, that the learned Resident Magistrate took into consideration all the relevant evidence in coming to a conclusion of guilt. Nowhere in her findings did the learned Resident Magistrate make the statement that the appellant was a bailee, he argued. He noted that the contention that the appellant was a mere bailee came from the defence when it was advanced that the appellant was merely carrying out his usual wrecking service with no knowledge as to the cargo. The learned Resident Magistrate, he said, did not accept that the appellant was a mere bailee and her basis for so concluding was well founded, in the light of the Privy Council's decisions in **Director of Public Prosecutions ("DPP") v Wishart Brooks** (1974) 12 JLR 1374 and **Bernal and Moore v R** (1997) 51 WIR 241.

[23] Mr Morris argued further that while the instant case is not identical to **DPP v Brooks** or **Bernal and Moore**, it is, nonetheless, equally, if not more, compelling based on its facts. He pointed out that the defence was asserting that the transporting of the motorcar was a part of a business transaction, yet the appellant was unable to provide the basic information required to fulfill the transaction that he said he had entered into with the men who chartered him to

convey the motorcar. He noted that that at the time the appellant was apprehended, he was unable to tell who was the owner of the vehicle, where exactly he was to take the vehicle, who he had received it from and to whom he was to deliver it. Furthermore, he had not received payment for the service and he had, essentially, deviated from a legitimate assignment to facilitate persons unknown, to go to places unknown.

[24] Mr Morris submitted that "as the evidence unfolded, this alleged transaction between the appellant and men unknown, was visibly out of the ordinary and the appellant's status as an ignorant bailee or mere transporter was visibly dubious and the Learned Resident Magistrate firmly dealt with it accordingly". In the circumstances of this case, the notion of mere bailee would fall squarely within the category of a "fanciful" defence as referred to in the authorities.

[25] He further contended that the conclusion arrived at by the learned Resident Magistrate that the appellant ought to have known and seen that ganja was in the motorcar, was not an isolated one and was only one part of her reasoning. So, she was justified in concluding, based on the evidence, that the appellant had knowledge of the presence of the parcels containing ganja in the motorcar.

[26] He argued that the learned Resident Magistrate drew inferences from proven facts as she was entitled to do, as was approved in **DPP v Brooks**. She

did not speculate, "but applied well thought out reasoning and logic to the case and by so doing she prevented the objectives of the legislation from being undermined by a cleverly conceived defence". According to learned counsel for the Crown, by virtue of the standard set in **DPP v Brooks**, as well as in **Bernal and Moore v R**, the evidence of the surrounding circumstances in the instant case was enough for the learned Resident Magistrate to have inferred guilty knowledge on the part of the appellant in the circumstances. In his words: "the appeal has not unearthed any material defect in law or in fact such as to raise concern about the safety of the verdict". The appeal against conviction is, therefore, without merit and the conviction should be upheld, he submitted.

Analysis and findings

[27] We are grateful to both counsel for their intellectually stimulating arguments and their assistance in distilling the critical points of the learned Resident Magistrate's decision that formed the focal point of our examination of the grounds of appeal against conviction. It may be said, from the very outset, that the core question for the determination of this court was whether or not the learned Resident Magistrate was correct in concluding, as she did, based on the evidence that was before her, that the appellant knew that the motorcar he was transporting had ganja in it so as to constitute the requisite *mens rea* for the offences for which he was convicted.

[28] After a careful consideration of the arguments advanced by both sides, within the context of the law distilled from the relevant authorities, we found favour with the position of the Crown, as was clearly articulated by Mr Morris, that there was enough evidence before the learned Resident Magistrate that would stand to justify her finding that the appellant had the necessary guilty knowledge that was required for proof of the charges brought against him. We now undertake to provide our reasons for arriving at that conclusion by an examination of the grounds of appeal that were filed and argued.

Ground one

The learned Resident Magistrate erred in law in concluding that mere custody as a bailee was sufficient to constitute knowledge of that which the appellant was carrying/transporting.

[29] The contention of Mr Smith that the learned Resident Magistrate erred in concluding that the appellant's mere custody of the motorcar as a bailee was sufficient to constitute knowledge of that which he was carrying or transporting is, indeed, reminiscent of the earlier cases of **R v Cyrus Livingston** (1952) 6 JLR 95 and **DPP v Brooks** in which the prohibited substance (ganja) being carried by the defendants, purportedly, on behalf of other persons, was concealed in sacks that were being carried in a way that would not have been visible or immediately obvious to the naked eyes.

[30] In **R v Livingston**, the appellant, Livingston, was a baggageman on a bus that was a common carrier. He took a sack that contained ganja from a

consignor for carriage on the bus. The bus was stopped and searched by the police and the sack with the ganja was discovered by the police. Livingston was charged for possession of ganja. His defence was that he was given the bag by a woman and he did not know that it contained ganja. He was convicted in the Resident Magistrate's Court and he appealed his conviction.

[31] On appeal, four questions were formulated for the determination of the court. The first question, and the one that is immediately relevant to the instant ground of appeal under consideration, was this:

> "(1) Could the temporary dominion or control which the appellant had over the ganja as baggageman on the bus amount to possession within the meaning of section 7 (c) or was it merely custody or charge?"

The court answered that question in the affirmative and stated its reason for saying so in the following terms:

> "As regards question (1) above, we think that the appellant's position was that of a common carrier or the agent of a common carrier and that, as such, he had possession, and not merely custody or charge, of the ganja. (*Pollock & Wright: Possession In The Common Law*, pp.130, 131, 166)."

[32] Questions (2) and (3), that the court also answered in the affirmative, were these:

> "(2) Does 'possession' in section 7 (c) of the Dangerous Drugs Law require that a defendant before he can be convicted, must be shown to have had knowledge that he had the thing in question?

> (3) If so, must a defendant, before he can be convicted, be further shown to have had knowledge that the thing which he had was ganja?"

The court having answered the first three questions in the affirmative, also answered the fourth question that was formulated for their consideration in the affirmative and that was whether there was evidence of knowledge by Livingston upon which the learned Resident Magistrate could have properly found him guilty.

[33] The court in **DPP v Brooks** was again confronted with the same questions on facts similar to those of the instant case. In that case, the police saw a van parked with its engine running on an air-strip with Brooks occupying the driver's seat. On the approach of the police, Brooks and other men who were in the cab of the van ran. Brooks was caught. The police found some 19 sacks or so containing ganja in the body of the van, which was not visible or accessible from the cab of the van. Upon enquires by the police for the reason he ran, Brooks stated that he was employed by a man named Reid to drive the van to Brown's Town. At the trial before the learned Resident Magistrate, he was convicted despite arguments on his behalf that there was no evidence he was in possession of the ganja.

[34] On his appeal to this court, the conviction was quashed and verdict and judgment of acquittal entered on the basis that he was not shown to have had anything more than mere custody or charge of both the van and its contents and

this was not enough to constitute possession within the meaning attributed to that word in **R v Livingston**.

[35] On appeal by the DPP to the Privy Council the Board allowed the appeal and restored the conviction. In doing so, their Lordships, speaking through Lord Diplock, stated (at page 1376) that the first question answered in the affirmative in **R v Livingston** was "clearly right upon the particular facts of *Livingston's* case", but that "the way in which the question [in *Livingston*] was framed and the brief reason given for the answer are liable to mislead and have led the Court of Appeal in to [sic] error" in **DPP v Brooks**. The Board opined that on the facts of **DPP v Brooks**, the learned Resident Magistrate in that case was correct to infer that Brooks knew that his load consisted of ganja even though it was concealed in sacks in a place where the sacks were not visible to him from where he was seated in the van.

[36] The Board, in arriving at this opinion, noted again what is meant by the word "possession" within the meaning of the Dangerous Drugs Act in the following terms:

> "In the ordinary use of the word 'possession' one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs."

Their Lordships then went on to state that which has been found to be rather instructive in treating with ground one of this appeal:

> "Question (i) and the reason given for the answer however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (ii) and (iii), the word 'possession' imported into this criminal statute as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which brings about the separation of proprietary and possessory rights in chattels. If this is the implication to be drawn from the part of the judgment in *R. v. Livingston* (1) it is, in their Lordships' view, wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only *actus reus* required to constitute an offence under s. 7 (c) is that the dangerous drug should be physically in the custody or under the control of the accused. The *mens rea* by which the *actus reus* must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (ii) and (iii) [being knowledge that he had the thing in question and knowledge that the thing he had was ganja]."

[37] In the light of their Lordship's reasoning and pronouncements in **DPP v Brooks**, the contention of Mr Smith that the appellant's custody of the locked car with sealed packages as a mere bailee could not render him liable as having been in possession of the drug for the purposes of the law, regrettably, has nothing to commend it as a matter of law. The appellant's position as a mere bailee is totally irrelevant to the pivotal question whether he was in possession of the dangerous drug for the purposes of the law. The questions as to ownership and whether steps were taken to find the owner of the car were also totally

irrelevant to the learned Resident Magistrate's determination of the key issue she had before her for resolution, which was the appellant's state of mind as to his knowledge, or lack of it, concerning the presence of ganja in the motorcar.

[38] Furthermore, and in directly treating with this ground of appeal, it must be stated that nowhere in the learned Resident Magistrate's finding is there any indication that she had found that the appellant's mere custody of the motorcar as bailee was sufficient, without more, to constitute knowledge of what he was carrying or transporting. The learned Resident Magistrate did consider other circumstances of the case from which she, ultimately, inferred that he had the requisite knowledge that would constitute the *mens rea* of the offence of possession of ganja for which he was charged. This was well in keeping with the guidance afforded her by the relevant authorities.

[39] In **Bernal and Moore v R** at page 251, the Privy Council, again, in addressing the issue as to the proof required in cases where the prohibited substance is concealed (as it was in that case in tins of pineapple juice), endorsed and reiterated, through his Lordship, Sir Brian Neill, the principles enunicated in **DPP v Brooks**. His Lordship 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. 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." (Emphasis added)

[40] 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. The learned Resident Magistrate did adopt that approach and so could not be faulted in going beyond the mere fact that the appellant had the motorcar as a bailee to examine all the circumstances of the case.

[41] For all the foregoing reasons, we found that ground one of the appeal was without merit and, it therefore failed.

[42] The burning issue for determination on the appeal was whether the learned Resident Magistrate was correct in her finding that the appellant knew he was transporting the motorcar loaded with ganja. This takes us now to a

consideration of grounds two and three that basically consist of the appellant's complaints concerning the learned Resident Magistrate's treatment of the facts and the inferences she drew from them as to the appellant's guilty knowledge.

Grounds two and three

The reasoning of the learned Resident Magistrate in concluding that the appellant ought to have known and seen that ganja was in the motorcar was wrong because - (a) the ganja was concealed in bags and the packages wrapped in masking tape; and (b) there was no evidence that the smell of ganja was detected before the car was forced open and no evidence that the ganja scent is known by every Jamaican. Such knowledge cannot be inferred. (ground two)

The learned Resident Magistrate erred in law by arriving at conclusions adverse to the appellant by speculation and not from proved facts. (ground three)

[43] The appellant had taken issue with the learned Resident Magistrate's finding that he ought to have known and seen that the ganja was in the motorcar on the basis that the drug was concealed. Having pointed to the law as expounded in the relevant authorities as it relates to possession of ganja in circumstances where the drug may have been concealed, it becomes evident that this argument of the appellant is unsustainable. Proof of knowledge in such circumstances must depend on inferences to be drawn from all the circumstances of the case, starting with the fact of the appellant's custody and control of the illicit drug. As Mr Morris, so rightly pointed out, the learned Resident Magistrate's conclusion that the appellant knew that ganja was in the

motorcar was not an "isolated conclusion arrived at" without regard to other circumstances of the case.

[44] The learned Resident Magistrate had demonstrably shown that in treating with the facts, she had the applicable law in mind, including the burden and standard of proof. This is how she commenced her reasoning process in what she called her "Reasons for Judgment" (page 28 of the transcript):

> "…The Court therefore now had to consider whether the prosecution had proved its case beyond a reasonable doubt that the accused had knowledge that the car he was in custody and control of, had ganja in it. The prosecution presented evidence that the car was in the custody and control of the accused. He had it on his wrecker. Although he did not present a key for the car, at all times he alone had custody, possession and control of the car. In accordance with his right, the accused chose not to explain to the court the circumstances under which he came to be transporting a car loaded with ganja on his wrecker. The Court therefore has to now consider whether knowledge that ganja was in the vehicle is to be inferred…"

[45] The learned Resident Magistrate then proceeded to identify the circumstances of the case to see whether knowledge could be inferred and in so doing she highlighted the following facts (pages 28 – 29 of the transcript):

> "1. The accused's refusal to stop when the officer blew his horn and constantly flashed his lights.
>
> 2. Both prosecution witnesses said that they easily saw the knitted bags in the car, through the windshield. The Court is of the view that the accused

> ought to have also seen those knitted bags in the car when placing the car on the wrecker.
>
> 3. The accused told the police that he was on his way to Westmoreland to pick up a vehicle for Mack D's (a car company) which is in Porus, and when he saw this car disabled at Spur Tree in St. Elizabeth, he did not proceed with his plans, he instead decided to take this car to Old Harbour. He was not paid on the spot for doing so, he was to take it to someone he did not know; further he did not know exactly where to meet the person."

[46] The learned Resident Magistrate, then, embarked on a clear reasoning process of the evidence that was before her evidently applying logic and common sense that she was entitled to do as the tribunal of fact. She reasoned, in substance (page 29 of the transcript):

> "The Court asks itself, why would the accused not proceed to Westmoreland? Why did he take a vehicle filled with knitted bags, which the court finds could easily be seen through the car windshield, to someone all the way to [sic] Old Harbour whom he did not know, nor did he have an exact address where to meet that person. The accused's Attorney-at-Law did not challenge DSP Faulkner's evidence under cross-examination that he could smell the ganja through the knitted bags.
>
> Further, the accused, an elderly man who worked constantly with the police, ought to have been put on notice as the knitted bags were easily seen through the window. The Court is of the view that the transporting of a car filled with ganja on a wrecker was not by accident. The evidence revealed that the accused also did a lot of 'wrecking' work for the police, and the police knew him well, so he certainly would not be easily stopped on the road. As Sgt. Hanson said, he received a report, and that was why he pursued and stopped the accused.

> Also, because the car would then be higher when it is on the wrecker, the knitted bags in the car will not be easily seen, as they would be if the car is ordinarily driving and was stopped on the road. The Court finds that is why the car was filled to the brim with the packaged ganja, and there was no attempt to conceal the bags with the packages in the car because it was well known that the car was going on a wrecker, where the knitted bags will not be easily seen…"

[47] She then went on to note that the fact that no key was found on the appellant's person or on the wrecker did not mean he did not have custody, possession and control of the car and, therefore, the ganja in the car (page 29 of the transcript). She then addressed the following questions that she saw emerging on the facts before her and which Mr Morris had, aptly in our view, classified as "oddities" (pages 29-30 of the transcript):

> "Why didn't he get the key to the car if he had seen the persons with the car on Spur Tree Hill as if it had just broken down? If this undisputed explanation to the police were true, those persons must have had the key. The Court also asked itself: Why none of these persons who were apparently on the way to Old Harbour with the vehicle when it broke down, go with the accused in the wrecker? Did he not question these men about this?"

She then commented (page 30):

> "But of course he did not testify or give an unsworn statement and that is his right. Fortuitously, he was not called to pick up the car, he happened to be driving by on his own contracted mission to Westmoreland, which, strangely, he immediately aborted."

[48] Following on that thorough reasoning the learned Resident Magistrate then concluded on the crucial question of the appellant's knowledge (page 30):

> "When one considers the circumstances of this case, knowledge that ganja was in the car must be inferred. The Court does not believe the accused did not know that he was transporting a car filled with packages of ganja. He also had custody, possession and complete control over the car and its contents. The Court is of the view that the prosecution [sic] proved its case beyond a reasonable doubt."

[49] Mr Smith in taking issue with the learned Resident Magistrate's reasoning had asserted as part of his complaint in grounds two and three that her finding that the appellant had knowledge of the contents of the sealed packages was flawed and based on speculation in several instances identified by him, each of which will be examined in turn.

[50] Learned counsel's first contention was that insufficient effort was made to locate the owner of the car in which the ganja was found. This, we found to have been without merit. The question of ownership was of no materiality to the question to be resolved by the learned Resident Magistrate. That was therefore not a legitimate consideration for her in dealing with the question of knowledge. Ownership has nothing to do with possession in the context of dangerous drugs cases as Lord Diplock had made it clear in **DPP v Brooks** (see paragraph 35 above). Any omission on the part of the learned Resident Magistrate to take into account the ownership of the car and matters relating to that question did not amount to any error on her part to avail the appellant.

[51] Secondly, Mr Smith argued that the interpretation given by the learned Resident Magistrate to the appellant's failure to stop when the police was pursuing him with flashing lights and blaring horn was flawed and based on speculation as those signals are customarily used by the police to overtake. Again, we found no favour with this contention of Mr Smith because, whatever other interpretation could have been put on the signal or action of the police, and what was in fact put on it, would have had to have come from the appellant himself who was the driver of the vehicle being pursued. His explanation would have had to be at the trial either in the form of a sworn testimony or by an unsworn statement from the dock. It would have been his state of mind that would have had to be explained and, unfortunately, nothing came from him by way of explanation to the court for his failure to stop before the police had overtaken him.

[52] 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. Her

interpretation of the appellant's conduct in failing to stop, in the light of all the circumstances of the case, is not at all unreasonable and her finding based on it cannot be said to be plainly or palpably wrong. That argument of Mr Smith was, therefore, rejected as being one without merit.

[53] Mr Smith also complained, thirdly, that the evidence that the bags were visible from outside the vehicle and that the appellant had decided to take an impromptu job are not, without more, evidence of knowledge of the contents of the motorcar and the packages. This, also, we found to have been an untenable argument. As already indicated (but which deserves to be repeated) the learned Resident Magistrate did not base her findings on isolated facts and arrive at an isolated conclusion based on those facts. The facts to which she had regard did arise on the evidence of the case presented by the prosecution and were primary facts, so that, if she accepted them, it would have been open to her to draw such inferences from them that were reasonable and inescapable in the light of all the surrouding circumstances.

[54] Indeed, some of the primary facts relied on by the learned Resdient Magistrate to arrive at her findings that the appellant had the requisite knowledge were just some of the peculiarities of the circumstances of the case that she noted. She was not in error in any way in paying regard to those matters that arose on the evidence. They did not stand alone from other facts during the course of her analysis which ultimately led her to infer guilty knowledge on the part of the appellant.

[55] Mr Smith also argued, as the appellant's fourth grouse with the findings of the learned Resident Magistrate, that DSP Faulkner's evidence that he could smell the ganja before the packages were opened is incredible. This is so, he said, because the packages were sealed "air tight" with masking tape and there was no other evidence supporting DSP Faulkner's evidence. Also, he argued, there was no evidence that the ganja scent is known by every Jamaican. As such knowledge on the part of the appellant could not be inferred based on that evidence.

[56] We found that this argument that DSP Faulkner's evidence was incredible is, with all due respect, unacceptable. As a matter of law the witness could properly speak to what he perceived with his senses, including his sense of smell; that is what direct evidence entails. It was, therefore, simply a matter for the learned Resident Magistrate, as a question of fact, to say whether she accepted DSP Faulkner as a credible and reliable witness when he said that he smelled the ganja.

[57] The learned Resident Magistrate had evidence before her that at the time of the commission of the offence and at the time of the trial, DSP Faulkner was a senior police officer attached to the Trans National Crime and Narcotics Division in Mandeville. His assistance was sought by a junior officer (Sergeant Hanson) and he took control of the investigations immediately. There was no challenge by way of cross-examination to the fact that he would have known and would have been able to identify the scent of ganja. He was not cross-examined on his ability

to recognize the scent of ganja. The learned Resident Magistrate was, therefore, entitled to act on his evidence once she accepted him as a witness of truth and that she could rely on him when he said he smelled ganja. There need not have been any supporting evidence. This is not a matter on which corroboration was required as a matter of law or practice.

[58] One cannot overlook the fact that there were 100 packages of ganja that weighed over 500 pounds in the motorcar. It could not be seen as far-fetched that in such circumstances, a senior police officer, attached to the Narcotics Division of the Jamaican police force, would have been able to detect the scent of ganja. There was no basis for the learned Resident Magistrate to reject that evidence if she accepted it as true. The only question would have been what use could she have properly made of it. All it could really go to establish was that ganja was in the motorcar, particularly, in light of the forensic report. In relation to the question whether it could establish knowledge on the part of the appellant that ganja was in the motorcar, that would have been a totally different matter and we found that Mr Smith's concerns about the use of that bit of evidence by the learned Resident Magistrate was, not at all, unjustifiable. Mr Morris had conceded that fact.

[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.

[61] Her finding that the appellant should have seen the knitted bags in the motorcar as it was in evidence that the bags were easily seen through the windscreen and windows cannot be faulted. So too, is her reasoning that having seen them, he should have made the necessary enquiries in the light of the circumstances, including the fact that he is elderly and has done work for the police before that day. She cannot be faulted to say in such circumstances, he would have been put on notice to take precaution in ascertaining what his cargo was. Their Lordships in **R v Livingston** had made it abundantly clear that

merely to say "we did no know that we had ganja" is not so easy a way out for persons found in possession of ganja because falling short of actual knowledge, knowledge, sufficient to support a conviction may, nevertheless, be imputed to a person who, according to O'Connor CJ, deliberately shut his eyes to an obvious means of knowledge or who deliberately refrained from making enquiries the results of which he might not care to have. In all the circumstances of this case, the learned Resident Magistrate could have legitimately found that the appellant had the requisite *mens rea* falling short of actual knowledge on the basis of willful blindness or constructive knowledge.

[62] In any event, the learned Resident Magistrate did not use willful blindness or constructive knowledge to fix the appellant with possession. She looked at other circumstances, including his refusal to stop upon being pursued by the police and the oddities of the transaction he said he had entered into with unknown persons to transport the motorcar to an unknown destination and to hand over the car to unknown persons. After a thorough analysis she found that he knew he was carrying ganja. In other words, she found that he had actual knowledge. She cannot be faulted for arriving at that finding.

[63] In our view, there was an abundance of cogent and compelling evidence that the learned Resident Magistrate could have relied on, and did rely on, in coming to her decision that the appellant had the requisite knowledge. Barring her erroneous reliance on the evidence of DSP Faulkner concerning his smelling the ganja, all the inferences drawn by her as to the appellant's knowledge would

have been based on the evidence and proven facts that she accepted as true. Therefore, she had the evidential foundation from which the knowledge required to establish the *mens rea* for possession of ganja and by extension, trafficking in ganja, could have been reasonably and inescapably inferred. She was entitled to make her findings based on such inferences, which she properly did.

[64] We concluded that the learned Resident Magistrate was correct in her ultimate finding that the appellant, based on all the circumstances, was in possession of the ganja that was in the motorcar he was transporting and that he was trafficking the drug in contravention of the Dangerous Drugs Act. Her treatment of the evidence was in keeping with the principles enunciated by their Lordships in **DPP v Brooks** and **Bernal and Moore v R**, two binding authorities from our jurisdiction that treat with proof of knowledge in situations where ganja was, similarly, being transported in a tightly concealed manner.

[65] Therefore, the complaints of the appellant in grounds two and three that the findings of the learned Resident Magistrate were wrong and were based on speculation and not proven facts were, with all due respect, baseless.

Conclusion

[66] We found that despite Mr Smith's valiant effort and his intellectually provocative submissions on behalf of the appellant, there was nothing in the grounds of appeal that could persuade us to the view that the ultimate finding of the learned Resident Magistrate that the appellant knew that the motorcar he

was transporting was loaded with sealed packages containing ganja was erroneous, unreasonable and unsupported by the evidence. Therefore, there was no proper basis on which this court could disturb the appellant's conviction. Accordingly, the appeal against conviction was dismissed.

Appeal against sentence

[67] As indicated previously, the appellant had not specifically appealed against sentence, however, counsel was invited by the court to make submissions on this issue in the light of section 195(1) of the Judicature (Resident Magistrates) Act, which provides:

> "Where jurisdiction is given to any Court to impose a fine, and no express provision is made as to the mode of enforcing payment of the same, payment may be enforced by the Magistrate ordering that in default of payment forthwith of such fine the person on whom such fine is imposed shall suffer imprisonment, with or without hard labour, for a period not exceeding six months."

[68] It is noted that both sections that have created the offences for which the appellant was charged have stipulated that the offender may be fined or sentenced to a term of imprisonment or sentenced to both fine and imprisonment. They have made no express provision as to the mode of enforcing the payment of a fine, where that is the sentence imposed. As such, the provisions of section 195(1) would be engaged whenever a fine is imposed as a sentence under these provisions.

[69] It is for that reason that the learned Resident Magistrate's imposition of a sentence of 12 months imprisonment on the charge of possession of ganja and 18 months imprisonment on the charge of trafficking in ganja in default of payment of the fines was found to be inconsistent with the provision of section 195(1) and as such was *ultra vires*. Consequently, the alternative sentences of imprisonment that were imposed to take effect, in the event of the appellant's default in payment of the fines, were found to be manifestly excessive, as they exceeded the prescribed maximum penalty of six months imprisonment. Mr Morris had, appropriately, conceded this point on behalf of the Crown.

[70] It was in the light of the breach of section 195(1) that the appeal against sentence was allowed, in part, and the alternative sentences reduced to six months imprisonment as recorded in the orders made at paragraph [3] above.