

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 1 of 2010**

**BETWEEN:**

**SAMUEL AUGUSTUS DAVIS**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Hon. Sherman R. Moore, CHB, The Hon. Andrew D. Burgess  
and The Hon. Kaye C.A. Goodridge, Justices of Appeal.**

**2013: November 29**

**2014: May 12**

**Mr. Andrew Pilgrim, QC., in association with Mrs. Angella A. Mitchell-  
Gittens for the Appellant**

**Mr. Lancelot Applewhaite for the Respondent.**

## **DECISION**

### **Introduction**

[1] **MOORE JA:** On 10 June 2009 the appellant was convicted of the following offences:

- (i) Importation of a controlled drug, contrary to **section 4 (3)** of the **Drug Abuse (Prevention and Control) Act, Cap.131 (Cap.131);**

- (ii) Possession of a controlled drug, contrary to **section 6(2) of Cap. 131;**  
and
- (iii) Drug trafficking, contrary to **section 18(4) of Cap. 131.**

The controlled drug was 311.9 kilogrammes of cannabis. On 7 December 2009 he was sentenced to 9 years imprisonment on each count. It is from those convictions and sentences that he has appealed to this Court.

### **Facts**

- [2] On 22 January 2003 Sub-Lieutenant Carson Hackett and other members of the Coast Guard, in response to information received, departed Willoughby Fort on board the Coast Guard Vessel HMBS Trident (Trident) around 17:25 hours. At 7.5 nautical miles off Holetown, Hackett saw a vessel which he requested, orally by loudhailer, to stop. The vessel did not respond to the request. Warning shots were fired from Trident but the vessel also failed to respond to those shots. Finally the vessel was disabled by shots fired from Trident. A boarding party was deployed from Trident. The appellant sustained injury from the gunfire and was subsequently treated at hospital. Under police escort, the vessel was taken to Willoughby Fort where it was found to contain 21 packages of cannabis. There were two other men on board the vessel. They were also charged with the like offences to which they pleaded guilty.

[3] In response to questions put to him by the police, the appellant said that he had been advised by his lawyer to say nothing and to sign nothing. At the trial the appellant made an unsworn statement from the dock in which he said:

“I was rescued from the sea by Stanley Antoine and Haynes Harry. I was given a ride to Barbados and I was intercepted by the Coast Guard boat. When I get on the boat, all I saw was a couple containers and a blue tarpaulin covered the complete section of the front boat”.

He denied knowledge of the cannabis and said that his fingerprints were not found on the packages, which he saw for the first time after he left hospital and was taken to Oistins Police Station.

### **The Appeal**

[4] The appellant has appealed on five grounds.

#### **Ground 1**

[5] On this ground counsel contended that “The Learned Trial Judge erred in law when he failed to direct the jury as to the standard of proof vis-à-vis the onus on the appellant pursuant to the Drug Abuse (Prevention and Control) Act, Cap. 131”.

[6] Counsel submitted that:

“The Crown’s case was on the premise that drugs were imported into Barbados. Section 42 of the Drug Abuse

(Prevention and Control) Act is the applicable law where the issue of importation is raised. The learned trial judge erred in law when he failed to direct the jury on the presumption raised by Section 42 of the aforementioned legislation and the requisite standard of proof where the burden shifts to the accused. The jury ought to have been directed that once the appellant proved on a balance of probabilities that he had no knowledge of the drugs he was entitled to be acquitted”.

Counsel relied on **David Hooper v The Queen Criminal Appeal No. 18 of 2008 (Hooper)**.

- [7] Counsel for the respondent conceded that nowhere in the summation did the judge indicate to the jury that a burden had been placed on the appellant pursuant to **section 42 (1) of Cap. 131**, which effectively shifted the burden of proof to the appellant”. However, he submitted that the judge’s omission to make reference to **section 42 (1)** benefitted the defence since the jury was unaware of any shifting of the burden of proof and it was therefore wholly unnecessary for the judge to embark on a direction relating to the standard of proof when the onus had shifted.
- [8] In the joint appeals of **Biddy, Kelly and Richardson v The Queen Criminal Appeals Nos. 2, 4, & 3 of 2008**, this Court examined **Hooper**. In that case the Court determined that **section 42(1)** cannot be taken in isolation but must be read in conjunction with **sections 5(1), 6(3) 12 and 39 of Cap. 131** which create the offence of possession and provide defences thereto.

[9] These statutory provisions have their genesis in the English Misuse of Drugs Act, 1971. In **R v Lambert [2001] UKHL 37 (Lambert)**, Lord Slynn of Hadley explained these provisions thus:

“16. The first question asks whether it is an essential element of the offence of possession of a controlled drug under section 5 of the Misuse of Drugs Act 1971 that the accused knows that he has a controlled drug in his possession. Bearing fully in mind the importance of the principle that the onus is on the prosecution to prove the elements of an offence and that the provisions of an Act which transfer or limit that burden of proof should be carefully scrutinised, it seems to me that the Court of Appeal in **R v McNamara [1988] 87 Cr App R 246** rightly identified the elements of the offence which the prosecution must prove. I refer in particular to the judgment of Lord Lane CJ at page 252. This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in section 5(4) or section 28 of the 1971 Act”.

[10] In the instant case **Worrell J** set out the case for the appellant and gave the jury the following directions from page 351 line 7 to page 353 line 4:

“The Crown then closed its case, Mr. Foreman and your members, and you will recall that certain options were put to the accused man and he indicated to the Court that he would be giving a statement, an unsworn statement from the dock. I will read that unsworn statement to you, but before I do I must tell you or reiterate that the accused man was within his rights to give such a statement and you will pay due regard and due heed to what he said in that statement, because basically, Mr. Foreman and your members, that is his account. There were no other witnesses from him in this case but that is his account,

Mr. Foreman and your members, and you must pay due regard to it. As I told you, you must treat it in the same way in which you treated the other evidence in this case. This is what he said, Mr. Foreman and your members.

He said: “Good morning, members of the jury, and your Lordship. I am Samuel Davis. I am being accused in this matter. From the 22<sup>nd</sup> day of January 2003, I was rescued from the sea by Stanley Antoine and Haynes Harry. I was given a ride to Barbados and I was intercepted by the Coast Guard boat. When I get on the boat all I saw was a couple of containers and a blue tarpaulin covered the complete section of the front boat.”

So here, the accused man is saying, Mr. Foreman and your members, and this is the accused man’s case. The accused man is saying that, yes, he could recall 22<sup>nd</sup> January 2003, but he was rescued from the sea. That is what he is saying. In other words, basically he is telling you up front that he is not into any importing or possession or trafficking. He was rescued from the sea by two gentlemen, Stanley Antoine and Haynes Harry. He was given a ride to Barbados, that’s what he says. He was given a ride to Barbados and intercepted by the Coast Guard boat.

So from the outset, Mr. Foreman and your members, he is indicating that he basically has no knowledge because if you see what he says next. He says, “When I get on the boat all I saw was a couple of containers.” In other words, he has knowledge of a couple of containers, not bales or anything like that, not any marijuana, not any cannabis. He is saying – and a blue tarpaulin covered the complete section of the front boat. And you would remember that there was talk, Mr. Foreman and your members, and you have the photographs of containers, and when I say containers, containers as opposed to the bales. He is saying all he saw were containers, he didn’t see any bales. So he is immediately indicating that he has no knowledge of these things. He is just getting a lift up to Barbados, that is basically it, having been rescued from the sea.”

The judge had earlier stated from page 311 line 15 to page 312 line 4:

“Now, those are the counts, Mr. Foreman and your members, but I must tell you that in every criminal case, the onus or burden of proof that an accused person committed an offence with which he is charged, rests on the prosecution. In this case there are three offences, Mr. Foreman and your members, and again, the Crown has the burden in respect of all three offences; the accused man has nothing to prove. This onus or burden never shifts to an accused man in a criminal case since every person who is charged with a criminal offence is presumed innocent until that person’s guilt is proved by the prosecution. This, Mr. Foreman and your members, is a fundamental principle of law. Therefore, if the accused man is to be found guilty of these offences, the prosecution must prove his guilt; the accused man has nothing to prove”.

[11] The judge later reiterated at page 363 lines 15 and 16: “Remember, Mr. Foreman and your members, that the burden of proving guilt throughout is on the prosecution.” Further from page 368 line 10 to page 369 line 2, he stated:

“As I told you, Mr. Foreman and your members, Section 39 of our law clearly indicates that –

... in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

That relates to all of the offences charged. And I told you, Mr. Foreman and your members, that although there is a burden on the Crown to prove their case, you are not to say that this is a

burden on the defence. The defence doesn't have to prove, all the defence has to do is to raise the issue in evidence that he neither knew nor suspected nor had reason to suspect that it was cannabis inside there. Once that has been raised, Mr. Foreman and your members, it is not that the accused man has to prove beyond reasonable doubt that he didn't know. He is entitled to raise that issue. The Crown then has to meet that issue with evidence”.

- [12] The appellant was caught on board a small boat with two other men and 311.9 kilogrammes of cannabis. The trial judge gave a full direction on possession. The appellant never sought to establish any of the defences provided in **section 12 or 39 of Cap. 131**. His only statement was that he was rescued from the sea.
- [13] The judge put the appellant's defence to the jury and told them that all the appellant had to do was to raise the issue. He never placed any burden on the appellant. Throughout his summation, the judge was at pains to point out that the burden of proof was always on the prosecution.
- [14] Every accused is entitled to have his defence, no matter how laughable it might be, put fairly to the jury. But when it has been so put and rejected by the jury he is not entitled to assail a Court of Appeal with it especially where, in the words of Lord Steyn at paragraph 43 of **Lambert**: “The appellant's detailed story stretches judicial credibility beyond breaking point”. We also take succour from the following words of Lord Steyn also recorded at the said paragraph:

“Even if the judge had directed the jury in accordance with the law as I have held it to be the Appellant’s conviction would have been a foregone conclusion”.

[15] In our opinion when all the circumstances of the instant case are considered, the failure of the judge to give the appropriate direction did not prejudice the appellant. We hold that the appellant’s conviction was a foregone conclusion.

### **Ground 2**

[16] On this ground counsel contended that: “The Learned Trial Judge erred in law when he failed to uphold the no case submission and the submission that the case be stopped after the defence was put”. He made the following submission:

“The Crown failed to establish receipt, control and possession of the drugs. There is a mental element to the act of being in possession of drugs. No evidence was adduced by the Crown to satisfy that the appellant had the requisite knowledge. Mere presence at a premises (boat) does not equate to control or occupation of said premises. The Crown having failed to establish the above the appellant ought not to have been called upon to answer the charge”.

[17] Counsel referred this Court to pages 193-225 and 265-288 of the trial record where in their arguments both counsel relied on various cases, including **R v. Galbraith 73 Cr. App R 124, CA (Galbraith)** and where the trial judge gave his ruling on the submissions.

- [18] Counsel for the respondent submitted that there was nothing by way of the submissions made on behalf of the appellant which could satisfy the test laid down in **Galbraith** upon which a successful submission of no case to answer could be upheld. He said that a submission of no case should only be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict. He submitted that there was compelling circumstantial evidence where the appellant was found aboard a pirogue laden with cannabis and it was therefore necessary for him to be called upon to answer the charge. He further submitted, relying on **Lambert**, that at that stage of the trial the prosecution had discharged its burden.
- [19] The appellant's defence for having been on board the pirogue (a small boat) with two other men and 311.9 kilogrammes of cannabis was that he was rescued from the sea, he knew nothing about the drugs and when he got on board the boat he saw a couple of containers and a blue tarpaulin covering the complete section of the front of the boat.
- [20] In his summation the trial judge gave a comprehensive direction on possession, analysed the evidence and gave a direction on circumstantial evidence from page 299 to page 311 of the trial record. He was thorough. It is difficult to imagine what more he could have done.

[21] We hold that this ground must fail.

### **Ground 3**

[22] This ground alleged that the trial judge erred in law when he failed to analyse the defence of the appellant. In that regard counsel contended that the trial judge failed to identify the weaknesses in the Crown's case with respect to the issue of possession. He submitted that **section 39 of Cap. 131** was not analysed and evaluated within the context of the facts of the case. In support of his argument counsel referred to pages 299 to 306 of the trial record and also cited **Fuller v R (1995) 52 WIR 424** and **Dwight Alleyne v The Queen, Criminal Appeal No. 17 of 2003 (unreported)**.

[23] Conversely, counsel for the respondent submitted that:

“The Learned Trial Judge adequately put the appellant's defence to the jury. There was nothing technical or elaborate about the appellant's defence which would require a factual or legal explanation by the Learned Trial Judge. Simply put the appellant's defence was that he was rescued from the sea by two men and was given a ride to Barbados but was subsequently intercepted by the Coast Guard. He stressed that when he got onboard he saw no evidence of drugs because a blue tarpaulin covered the complete front section of the boat. An analysis of the appellant's defence was addressed between page 352 line 5 – page 357 line 14. Additionally the appellant in his unsworn statement posited this defence page 226 line 20 – page 228 line 14. In its exposition of the Defence's case the Court sought to marshal the facts relating the issues, hence the summation was fair and balanced”.

[24] In support of his submission counsel relied on the commentary in the 1997 Criminal Law Review citing a statement of Simon Browne LJ in **Nelson v.**

**R:**

“... although every defendant had the right to have his defence, whatever it might be, faithfully and accurately placed before the jury, he was not entitled to demand that the judge should conceal from the jury such difficulties and deficiencies as were apparent in his case. The judge was not required to top up the case for one side so as to correct any substantial imbalance; he had no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other; judges existed to see that justice was done and justice required that they assist the jury to reach a logical and reasoned conclusion on the evidence.”

[25] In examining ground 2 we made reference to the thorough direction the judge gave on possession. He also told the jury that if more than one inference can be drawn from the facts they should draw the inference that is most favourable to the appellant. From page 351 line 7 to page 358 line 16 the trial judge carefully set out the case for the appellant, recounting the evidence and directing the jury on it. Again the trial judge was thorough.

[26] We agree with the extract quoted by counsel for the respondent and we adopt it. This ground is without merit.

#### **Ground 4**

[27] This ground was abandoned. It had alleged that the sentence was excessive.

#### **Ground 5**

[28] This ground alleged that the verdict is unsafe or unsatisfactory.

[29] In view of our findings on the earlier grounds and the thoroughness of the trial judge's summation we hold that there is no merit in this ground.

**Disposal**

[30] This appeal is dismissed, the convictions and sentences are affirmed and the sentences will begin from six weeks after the day on which they were imposed.

Justice of Appeal

Justice of Appeal

Justice of Appeal