

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIMCRAP2022/0002**

**BETWEEN:**

**DARRYL FRETT**

Appellant

**and**

**THE COMMISSIONER OF POLICE**

Respondent

**Before:**

The Hon. Margaret Price Findlay

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

**Appearances:**

Mr. Terrence Williams and Ms. Karlene Thomas-Lucien for the appellant

Ms. Khadija Beddeau for the respondent

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2024: January 31;  
June 6.

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*Criminal appeal – Appeal against conviction and sentence – Section 42 of the Eastern Caribbean Supreme Court (Virgin Islands) Act - Application to admit fresh evidence on appeal – Trial in the absence of an accused individual - Right of accused to attend trial – Whether the accused received a fair trial – Section 12 of the Firearms Act - Joint enterprise – Possession - Whether the elements of possession were made out against the appellant – Whether the appellant’s conviction is unsafe*

On 18<sup>th</sup> August 2016, the police observed the appellant, Mr. Edgar Carasco (“Carasco”) and Mr. Jose Almestica (“Almestica”) sitting in a parked vehicle outside of the Sports Complex at Pasea Estate, on the island of Tortola in the Territory of the Virgin Islands. Carasco was the driver of the vehicle and the appellant was seated in the front passenger seat while Almestica was seated in the rear seat. The police searched each person but nothing illegal was found on them. Thereafter, Police Constable Terry Humphrey (“PC Humphrey”) commenced a search of the vehicle. While nothing illegal

was found in the front seat of the vehicle, PC Humphrey discovered a firearm and ammunition in a black backpack that also contained Almestica's identification documents. Upon making this discovery, PC Humphrey shouted 'Gun' whereupon Almestica took off running. He was pursued and apprehended a short distance away. Cash totalling the sum of US\$49,000.00 was also found in the rear pouch of the front passenger seat.

The appellant was jointly charged with Carasco and Almestica for the offences of possession of the proceeds of criminal conduct contrary to section 29(11)(a) of the Proceeds of Criminal Conduct Act, keeping a firearm without a licence, contrary to section 11(2)(a) of the Firearms Act, and possession of explosives, contrary to sections 6 and 26 of the Explosives Ordinance. However, a no case submission was successfully made in relation to the proceeds of crime and possession of ammunition charges. The appellant, who did not give evidence at trial as he was absent from the jurisdiction for the greater part of it, was convicted for the offences of keeping a firearm without license and sentenced to 73 months imprisonment.

Dissatisfied with the decision of the learned senior magistrate, the appellant appealed against his conviction and sentence. The appellant then sought leave to amend his grounds of appeal to add the ground that a portion of the trial was improperly conducted in his absence. The appellant also filed an application to adduce additional evidence.

**Held:** dismissing ground 7 of the appellant's appeal, allowing grounds 3, 4 and 5 and quashing the appellant's conviction and sentence, that:

1. Pursuant to section 42 of Eastern Caribbean Supreme Court (Virgin Islands) Act, the Court of Appeal may receive fresh evidence on an appeal if the evidence is credible and there is a reasonable explanation for the failure to adduce it at trial. However, the Court has a discretionary power to receive fresh evidence when the Court thinks it necessary or expedient to do so in the interest of justice. Where the evidence to be adduced is not credible, that is the end of the matter. However, where the evidence is both credible and fresh it should be admitted unless the court is satisfied that it would not affect the safety of the conviction. Where the evidence is credible but not fresh, the court must make an assessment of its strength and the possible impact on the safety of the conviction. In this case, while the evidence of Detective Constable Ron Augustin is credible and would have been admissible at trial, the evidence cannot be considered as fresh. Evidence is fresh if it is evidence which could not have been obtained for the trial with reasonable diligence. The transcripts show that it was well-known to all parties, including the senior magistrate, that the appellant was incarcerated in St. Martin and that that was the reason for his absence from the trial. Furthermore, this information does not possess any strength such that would impact the safety of the appellant's conviction. The application to adduce fresh evidence is therefore dismissed.

Section 42 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, Cap 80, Revised Laws of the Virgin Islands, 2013 applied; **R v Benedetto** [2003] 1 WLR 1545 applied; **Lundy v The Queen** [2013] UKPC 28 applied.

2. An accused person has the right to be present at his trial, which is a component of the right to a fair trial. However, a judicial officer has a discretion whether to commence or continue a trial in the absence of the accused. In exercising this discretion, fairness to the defendant is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including the nature and the circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear. The critical question on appeals of this nature is whether the appellant received a fair trial. In this case, the appellant was represented by counsel from the outset. At some stage during the course of the trial the High Court granted him bail to travel to Puerto Rico for medical attention but on the resumption of the trial, it was discovered that the appellant was incarcerated in St. Martin. There was no evidence put before the magistrate explaining the circumstances under which the appellant came to be incarcerated in St. Martin despite her requests for, and the opportunities given to provide, same. Further, the magistrate enquired but was given no definitive answer from counsel as to when the appellant was likely to return to the jurisdiction. The appellant was in contact with and giving instructions to his counsel who continued to represent him, even in his absence. There was also full and effective cross-examination of the prosecution's witnesses by his counsel. In all the circumstances, although it could be said that the learned magistrate failed to demonstrate in her reasons that she had considered all the relevant matters before deciding to proceed in the absence of the appellant, there are compelling reasons for finding that the appellant waived his right to be present at the trial and in examining the trial proceedings as a whole, the appellant undoubtedly received a fair trial.

Section 16 of the **Virgin Islands Constitution Order** 2007 applied; **R v Hayward** [2001] 3 WLR 125 applied; **R v Jones (Anthony Williams)** [2002] UKHL 5 applied; **R v Lopez** [2013] EWCA Crim 1744 considered; **Czekala v District Court in Bydgoszcz (2010)** [2010] EWHC 1895 (Admin) distinguished; **Dula v Director of Public Prosecutions of Zwolle Lelystad Holland** [2010] EWHC 469 (Admin) considered.

3. Where there is an allegation that two or more persons are in joint possession of an article, the prosecution must prove to the criminal standard that each person had knowledge of the presence of the article and that each had the intention to assist or encourage its possession or control by one or more of them. The prosecution must adduce evidence from which such knowledge and intention can be reasonably inferred. In this case, section 12 of the Firearm Act does not apply to the appellant as there was no evidence that he was the owner or person in charge of the vehicle. Moreover, there was no evidence to support an inference that the appellant had knowledge that the firearm was in Almestica's bag nor behaviour from him from which guilty knowledge could be inferred. The prosecution did not lead evidence from which the inference could be drawn that

the appellant assisted or encouraged Almestica in the possession of the firearm. The appellant's mere presence in the vehicle as a passenger cannot without more lead to a conclusion that he is part of a joint enterprise and in possession of any illegal item found in the vehicle.

Section 19 of the **Criminal Code** Act No. 1 of 1997 of the Laws of the Virgin Islands considered; **DPP v Brooks** (1974) 21 WIR 411 applied; **Malcolm Maduro v The Queen** Territory of the Virgin Islands HCRAP2007/004 (delivered 19<sup>th</sup> December 2008, unreported); **Tenielle Percival et al v The Chief of Police** SKBMCRAP2017/0004 (delivered 10<sup>th</sup> November 2022, unreported) applied; **Levar Brown v The Chief of Police** SKBMCRAP2021/0003 (delivered 9<sup>th</sup> July 2023, unreported); **Dial Maharaj & Anor v The State** Cr. App. No.30 & 31/2007 applied; **Latchmi Bharath v Ferney Bohorquez** Cr. App No. 49 & 50/2008 applied.

## JUDGMENT

- [1] **WARD JA:** The appellant was convicted along with Mr. Edgar Carasco ("Carasco") and Mr. Jose Almestica ("Almestica") of the offence of keeping a firearm without license. He was sentenced to 73 months imprisonment.

### Background facts

- [2] The facts of this case are straightforward. On 18<sup>th</sup> August 2016, the police observed three persons sitting in a parked vehicle outside of the Sports Complex at Pasea Estate, on the island of Tortola in the Territory of the Virgin Islands. Carasco was the driver of the vehicle. The appellant was seated in the front passenger seat while Almestica was seated in the rear seat. The police approached the vehicle and indicated to the occupants their intention to search the vehicle. They smelled cannabis. They ordered the men to exit the vehicle and they complied. The police searched each person but nothing illegal was found on them. Thereafter, Police Constable Terry Humphrey ("PC Humphrey") commenced a search of the vehicle. Nothing illegal was found in the front seat of the vehicle. However, PC Humphrey discovered a firearm and ammunition in a black backpack that also contained Almestica's identification documents. Upon making this discovery, PC Humphrey shouted 'Gun' whereupon Almestica took off running. He was pursued and apprehended a short distance away, crouching among some patrons of a nearby bakery. A large amount of cash

totalling some US\$49,000.00 was also found in the rear pouch of the front passenger seat.

- [3] The appellant was jointly charged with the other two persons for the offences of possession of the proceeds of criminal conduct contrary to section 29(11)(a) of the **Proceeds of Criminal Conduct Act**,<sup>1</sup> keeping a firearm without a licence, contrary to section 11(2)(a) of the **Firearms Act**,<sup>2</sup> and possession of explosives, contrary to sections 6 and 26 of the **Explosives Ordinance**. However, a no case submission was successfully made in relation to the proceeds of crime and possession of ammunition charges thus, this appeal is against the appellant's conviction for keeping a firearm without a licence. The appellant did not give evidence at trial as he was absent from the jurisdiction for the greater part of it.

#### **Grounds of appeal**

- [4] The appellant challenges his conviction and sentence. Grounds 1 and 2 complain that the sentence imposed by the learned senior magistrate was unduly severe and based on a wrong principle.
- [5] Ground 3 complains that the learned senior magistrate erred in rejecting a submission of no case to answer at the close of the case for the prosecution because there was no evidence that the appellant had knowledge of the firearm that was in a closed backpack on the back seat of a car in which he was a front seat passenger.
- [6] Ground 4 avers that the decision to convict is unreasonable and cannot be supported by the evidence.
- [7] Ground 5 alleges that the learned senior magistrate erred in the application of points of law regarding the elements of possession.
- [8] On 29<sup>th</sup> December 2023, the appellant sought leave to amend his grounds of appeal to add a ground alleging that a portion of the trial was improperly

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<sup>1</sup> Act No. 5 of 1997 of the Laws of the Virgin Islands.

<sup>2</sup> Cap 126, Revised Laws of the Virgin Islands, 2013.

conducted in the appellant's absence. Additionally, the appellant filed an application seeking leave to adduce additional evidence which was heard on the morning of the appeal.

[9] I will deal first with the application to adduce additional evidence.

### **The fresh evidence application**

[10] At the hearing of the appeal, the appellant sought leave to adduce additional evidence in the form of an affidavit from the appellant exhibiting the affidavit of Detective Constable Ron Augustin ("DC Augustin") which had been sworn in opposition to an application for bail pending appeal made by the appellant on 29<sup>th</sup> August 2022. The appellant at the same time sought leave to amend his grounds of appeal to include a new ground, which complains that 'a portion of the trial was conducted in the appellant's absence'. The fresh evidence was intended to feed this new ground of appeal.

[11] In DC Augustin's affidavit, he furnishes some information in relation to the appellant's absence from his trial. The substance of the evidence sought to be adduced is contained at paragraphs 9, 10 & 11 of the said affidavit which I set out below:

"9. Following a successful bail application at the High Court, the Applicant was granted bail on 28<sup>th</sup> November 2018 to permit him to fly to Puerto Rico for eye surgery. A copy of the Court's Order is hereto exhibited as RA1.

10. When the matter returned to Court on 12<sup>th</sup> July 2019, I am aware that the Applicant was not present and his counsel could not account for his whereabouts. The matter was adjourned to 23<sup>rd</sup> July 2019 for report on the Applicant's whereabouts.

11. As an officer who works closely with the intelligence Unit, I learned that the Applicant had been arrested in St. Martin and was serving a sentence, thus his absence from the Territory."

[12] The nub of the evidence sought to be adduced is that the appellant was absent from his trial because he was incarcerated in St. Martin and was therefore not voluntarily absent from his trial. Counsel for the appellant, Mr. Terrence Williams referred the Court to sections 32 and 42 of the **Eastern Caribbean Supreme**

**Court (Virgin Islands) Act**<sup>3</sup> (“the Act”) and cited these as the basis of this Court’s jurisdiction to entertain the application. Mr. Williams further submitted that this evidence was both credible and relevant, but he submitted that the circumstances under which the appellant found himself in St. Martin were irrelevant.

- [13] Section 42 of the Act provides the statutory footing on which this Court may admit fresh evidence on a criminal appeal. It provides, so far as material:

“42. Duty to admit fresh evidence

Without prejudice to the generality of the preceding section (supplementary powers), where evidence is tendered to the Court of Appeal under that section, the Court of Appeal shall, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its powers under that section of receiving it if –

- (a) it appears to them that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and
- (b) they are satisfied that it was not adduced at the trial but that there is a reasonable explanation for the failure to adduce it.”

- [14] Section 42 imposes a mandatory duty on the Court of Appeal to receive fresh evidence if it satisfies both of the conditions in head (a) and head (b). But as the Privy Council explained in **R v Benedetto**<sup>4</sup> this duty is supplementary to a wider discretionary power conferred by section 41 which, so far as relevant, provides:

“For the purposes of an appeal in any criminal cause or matter, the Court of Appeal may, if they think it necessary or expedient in the interest of justice – (a) exercise any or all of the powers conferred by section 32 on the Court of Appeal ...”.

- [15] Relevantly, that power is found at section 32 (c) of the Act which empowers the Court of Appeal to ‘if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not a compellable witness’.

- [16] Summing up the power of the Court of Appeal to admit fresh evidence, the Board stated:

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<sup>3</sup> Cap 80, Revised Laws of the Virgin Islands, 2013.

<sup>4</sup> [2003] 1 WLR 1545.

“Thus, under these provisions, the court has a discretionary power to receive fresh evidence, to be exercised when the court thinks it necessary or expedient to do so in the interest of justice.”

[17] **Lundy v The Queen**<sup>5</sup> is one of the leading cases on the admission of fresh evidence on appeal in criminal matters. The overriding test is that the new evidence should be admitted if the interests of justice require it. This aligns with the conclusion reached in **Benedetto**. Lord Kerr, at paragraph 120 of the judgment, explained the necessary steps a court must take in deciding whether to admit fresh evidence in the following way:

“The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

[18] This approach is not inconsistent with that taken in **Benedetto** where the Board instructs:

“The court’s first duty is to read it [the evidence]. If, having done so and listened to any submissions made about it, the court considers the evidence on its face to be obviously unworthy of belief, or considers that the evidence would afford no ground for allowing the appeal even if accepted, the court would be very unlikely to admit it.”

[19] I summarise the propositions derived from the authorities in the following way. Where the evidence to be adduced is not credible, that is the end of the matter. However, where the evidence is both credible and fresh it should be admitted unless the court is satisfied that it would not affect the safety of the conviction. Where the evidence is credible but not fresh, the court must make an assessment of its strength and the possible impact on the safety of the conviction. If, on assessment, the court considers that there is a risk of a

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<sup>5</sup> [2013] UKPC 28.

miscarriage of justice if the evidence is excluded, it should be admitted even if it is not fresh. See **Lundy v The Queen**; **Lescene Edwards v The Queen**.<sup>6</sup>

[20] Applying this approach, the first issue is whether the evidence of DC Augustin sought to be adduced is credible. In my view, the evidence is plainly credible and would have been admissible at the trial in relation to whether the appellant was deliberately and voluntarily absent from his trial.

[21] The second inquiry is whether this evidence is fresh. It is trite that evidence is considered fresh if it is evidence which could not have been obtained for the trial with reasonable diligence. To my mind this evidence is not fresh. The transcripts, to which I will refer in greater detail below, show that it was well known to all parties that the appellant was incarcerated in St. Martin and that that was the reason for his absence from the trial. This is not information which came to the appellant's knowledge after the trial. Clearly, he had told this to his lawyer and, indeed, the senior magistrate had given his counsel the opportunity to put such evidence before her to assist in determining whether to proceed in the absence of the appellant. What was not known, and remains unexplained on this appeal, is why he was in St. Martin in the first place, when on the face of it his bail conditions only permitted him to travel to Puerto Rico for medical treatment. Neither the appellant's affidavit in support of this application nor the affidavit of DC Augustin sheds any light on this issue.

[22] For the reasons that follow when discussing the ground of appeal relating to proceeding with the trial in the absence of the appellant, I am unable to conclude that this information, which was already known to the senior magistrate at the time of the trial, possesses any strength such that it would impact on the safety of the conviction and would therefore dismiss the application to admit the fresh evidence.

[23] In my view however, the decision on this issue does not logically affect the application to amend the grounds of appeal to add a ground in relation to the

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<sup>6</sup> [2022] UKPC 11.

trial proceeding in the absence of the appellant, for which leave was granted. I turn now to consider this ground of appeal which was argued first and most strenuously by counsel for the appellant.

### **Trial in the absence of an accused person**

- [24] It is settled that a judicial officer has a discretion whether to commence or continue a trial in the absence of an accused person: **R v Hayward**;<sup>7</sup> **R v Jones (Anthony Williams)**.<sup>8</sup> The principles that come into play when a judicial officer is faced with deciding whether to commence or continue a trial in the absence of a defendant are well settled at common law. That determination must commence with a recognition that the general rule is that an accused person has a right to be present at his trial. In the Territory of the Virgin Islands this right is constitutionally guaranteed under section 16 of the Virgin Islands Constitution Order 2007 which provides so far as relevant:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence shall...(d) be permitted to defend himself or herself before the court in person, or at his or her own expense, by a legal practitioner of his or her own choice, or where he or she is unable to afford to retain a legal practitioner and the interests of justice so require, by a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law...

and except with that person’s own consent the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him to be removed and the trial to proceed in his or her absence.”

- [25] The general right to be present at one’s trial is a component of the right to a fair trial. It will be necessary later in this judgment to examine how an accused person’s consent to be tried in his absence may be manifested, or as it is sometimes put, how an accused may waive his right to be present.

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<sup>7</sup> [2001] 3 WLR 125.

<sup>8</sup> [2002] UKHL 5.

[26] Notwithstanding an accused's general right to be present at this trial, other principles are engaged when a judge is considering whether to conduct a trial in the absence of the accused. The starting point, as stated, must be a recognition of the accused's general right to be present at his trial. However, the judge must also consider the following principles as culled from **R v Hayward**:

- (i) An accused in general has a right to be present at his trial and to be legally represented.
- (ii) That the accused can waive his right to be present either in whole or in part. He will be treated as having waived his right wholly if knowing or having the means to know where and when his trial is to take place he deliberately and voluntarily absents himself and/or withdraws instructions from his lawyers. He may waive his right in part if being present and represented at the outset, during the course of the trial he behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws instruction from his lawyers;
- (iii) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or his legal representatives.
- (iv) That discretion should be exercised with great care, and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place, particularly where the accused defendant is unrepresented.
- (v) In exercising that discretion, fairness to the accused is of prime importance but fairness to the prosecution must also be taken into account. The judge has to have regard to all the circumstances of the case including: (a) the nature and circumstances of the accused's behaviour in absenting himself from the trial or disrupting it as the case may be and, in

particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (b) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings; (c) the likely length of such an adjournment; (d) whether the accused, though absent, is or wishes to be legally represented at the trial or has by his conduct waived his right to representation; (e) whether the absent accused's lawyers are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (f) the extent of the disadvantage to the accused in not being able to give his account of events, having regard to the nature of the evidence against him; (g) the risk of the jury reaching an improper conclusion about the absence of the accused; (h) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (i) the effect of delay on the memories of witnesses; (j) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the accused who are present.

- (vi) If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit.

[27] These principles were endorsed by the House of Lords in **Jones (Anthony Williams)**.<sup>9</sup> Importantly, and especially as it relates to section 16 (1) of the Constitution which mirrors Article 6 of the European Convention on Human Rights, it was held that the European cases interpreting Article 6 did not lay down a principle that a trial may only proceed in the absence of the accused only if there has been a waiver of the right to a fair trial. According to Lord Hoffmann:

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<sup>9</sup> Save that the House did not regard seriousness of the offence as a relevant factor.

“The question in my opinion is not whether the defendant waived the right to a fair trial but whether in all the circumstances they got one. It is whether on the particular facts of the case the proceedings taken as a whole...satisfied the requirements of the Convention. That, as I understand it, is the question which the European jurisprudence requires to be answered.”<sup>10</sup>

- [28] The appellant relies also on the case of **R v Lopez**.<sup>11</sup> Mr. Williams contended in written submissions that this case emphasises, and is authority for the propositions that: (a) the court must give a ruling that properly considers the issues relevant to continuing in the defendant’s absence; (b) the court must expressly consider whether the absence is deliberate and conscious before moving on to contemplate whether a trial, in the circumstances could be fair; (c) in this endeavour the trial judge must conduct an investigation and failure to do so would constitute a material irregularity resulting in the quashing of the conviction. Mr. Williams relies on **Czekala v District Court in Bydgoszcz (2010)**<sup>12</sup> in support of his argument that ‘absence occasioned by being in police custody for another offence or serving a sentence of imprisonment do not amount to voluntary absence’. As such, Mr. Williams submitted that it is abundantly clear that the appellant’s absence was not voluntary.
- [29] Mr. Williams criticised the senior magistrate for failing to observe the requirements articulated in **Lopez** and ascribes blame to the respondent for ‘not assisting the trial court as to the reasons for the appellant’s absence’.
- [30] With the relevant legal principles discussed above in mind, the particular facts of the case before us must be considered. As expressed earlier, stemming from their arrest on 18<sup>th</sup> August 2016, the appellant was jointly charged with two others for the offences of possession of the proceeds of criminal conduct contrary to section 29(11)(a) of **Proceeds of Criminal Conduct Act**, keeping a firearm without a licence, contrary to section 11(2)(a) of the **Firearms Act**, and possession of explosives, contrary to sections 6 and 26 of the **Explosives Ordinance**. The defendants were arraigned on 22<sup>nd</sup> August 2016 and each

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<sup>10</sup> At page 15, para 20.

<sup>11</sup> [2013] EWCA Crim 1744.

<sup>12</sup> [2010] EWHC 1895 (Admin).

pleaded not guilty to these charges. The prosecutor opened the facts of the case, and the question of bail was addressed. The transcript for this day appears to be incomplete as it ends abruptly during submissions by the prosecutor with no indication of the matter being adjourned and with no reply submissions by counsel for the defendants.

[31] The next hearing date for which there is a record is 7<sup>th</sup> February 2017. On that occasion the appellant was present and represented by counsel. Constables Kimani Roberts and Christopher Leuwin gave evidence for the prosecution. These were both material witnesses who spoke to the circumstances that led to the arrest of the three defendants and the finding of the money and firearm in the vehicle in which they were seated. The matter was adjourned to 5<sup>th</sup> and 6<sup>th</sup> April 2017 for continuation.

[32] We learn from the magistrate's written decision that the passing of Hurricanes Irma and Maria disrupted the trial process in September 2017 as it caused catastrophic damage across the island and to the court's premises. The trial resumed after the court's premises were reconstructed. A further disruption occurred when the appellant failed to attend his trial.

[33] The next date for which there is a transcript is 1<sup>st</sup> November 2019. Counsel for the appellant is there recorded as saying to the magistrate that on the previous occasion, he had indicated that he did not see how he could 'stand in the way of the matter continuing'. The reasonable inference is that the issue of continuing the trial in the absence of the appellant had been the subject of discussion between bench and bar on a previous occasion. It appears then, that having taken instructions and looked at the law more fully, counsel's position on 1<sup>st</sup> November was that he was obliged to apply to have the trial adjourned and hoped to persuade the magistrate by reference to **Blackstone's** that this was the proper course. However, when he started to give a reason why the appellant was in St. Martin, the magistrate stopped him.

[34] It is relevant to set out what the magistrate then said to counsel so far as is relevant:

“Mr. Thompson if you’re going to make an application as serious as this, I do not want any evidence from the Bar table as to why your client is not deliberately present (sic). That is not evidence. That is submissions...Your submissions must be supported by evidence...Now I am seeing where you are going and if you are going to make that application before me, you will provide me affidavit evidence...You are very much aware that your client was before me for this matter when it arose in November/December last year. He never received bail from me. His matter went to High Court for bail. The indications I have gotten from the Bar table is that his bail, there is an issue with his bail at the High Court. And in spite of that he is absent from this jurisdiction. Well, you will bring me evidence that supports (i) he’s on bail; (ii) there’s no condition of his bail that he was on that allowed him to be wherever he is; (iii) he is kidnapped wherever he is. Because if he had no right to be where he is, why is he not deliberately absent? Deliberately absent cannot just mean you are now in custody. How you get in custody in a foreign jurisdiction when you ought to have been here facing matters? ...And before I will consider delaying this matter until he comes back, because the last time you said you don’t even know when he is coming back. So I must delay this until the good Lord comes back? Bring your affidavit, sworn affidavit from him. ...Don’t bring me no cagey, watery water down affidavit, general affidavit. You bring me the meat of the matter starting with his bail proceedings in the High Court. What is the status of those proceedings? What were the conditions of his bail How did he get to St Maarten or wherever he his? Did he go through Customs to leave the British Virgin Islands? Did he check out to leave the British Virgin Islands? Bring it all, A – Z.”

- [35] The magistrate thereafter set deadlines for the filing of the appellant’s affidavit and written submissions from counsel for the appellant and the prosecution. The matter was then adjourned to Friday 6<sup>th</sup> December 2019 for her decision on the application to proceed in the absence of the appellant.
  
- [36] The transcript for 6<sup>th</sup> December 2019 is erroneously dated 2018. This must obviously be the case because the appellant’s non-appearance at his trial first occurred on or about 12<sup>th</sup> July 2019 so this could not be the subject of discussion in 2018. Secondly, the events recorded therein seem to follow naturally from what occurred on 1<sup>st</sup> November 2019. (An obvious example is the reference to the appellant’s affidavit being signed on 30<sup>th</sup> November 2019.)
  
- [37] On 6<sup>th</sup> December 2019, the magistrate’s orders had not been fully complied with. Counsel for the appellant indicated that he had in fact received a signed but non notarised affidavit from the appellant (dated 30<sup>th</sup> November 2019) but had

forwarded an unsigned copy of the affidavit to the prosecution. Mr. Thompson, the appellant's counsel at that time, informed the court that he was hoping to have the affidavit notarised so that it could be properly filed but in the interim, he offered to hand the court a copy of the signed affidavit. The magistrate refused to accept it, taking the view that an unsworn affidavit could not be relied upon and stating that she had specifically asked for evidence on oath from the appellant explaining his absence. After remonstrating with counsel for the appellant the matter was adjourned to 21<sup>st</sup> January 2020. The appellant's counsel was given until 13<sup>th</sup> December to either file a sworn affidavit from the appellant, or, if unsworn, to file submissions supporting reliance on an unsworn affidavit, and also to file submissions on the substantive application to stay or adjourn the trial. The prosecution was given until 6<sup>th</sup> January 2020 to reply. The matter was adjourned to 21<sup>st</sup> January 2020. The transcript of that hearing has not been produced. In fact, the next date for which a transcript was produced to this Court was 5<sup>th</sup> November 2020 when the trial continued in the absence of the appellant.

- [38] The only indication of the reason why the magistrate decided to proceed in the absence of the appellant is to be found at paragraph (iv) of page 2 of her decision.<sup>13</sup> The learned senior magistrate explains:

“The trial process was resumed after the court's premises at John's hole were rebuilt, but was, however, again interrupted by the absence of the Defendant, Darryl Frett who did not appear at trial. His then attorney, Mr. Patrick Thompson was very coy about his absence, but indicated that he was abroad and could not attend. Time was given to said counsel to file by way of affidavit before the court evidence on which the court could act that the Defendant Frett had not wilfully absented himself from the proceedings. Nothing was ever forthcoming. Hence, the court determined that it was right to proceed in the absence of the Defendant Frett.”

- [39] It seems fairly clear that the sole reason for the magistrate's decision to proceed in the absence of the appellant was that no affidavit evidence from him was forthcoming explaining his absence from the jurisdiction. Such evidence was a relevant consideration as it would allow the magistrate to assess whether his

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<sup>13</sup> Page 519 of the Record of Appeal.

absence was deliberate and voluntary. It is evident that this was the purpose for which the magistrate required an affidavit from the appellant. The criticism that the senior magistrate erred by insisting that such evidence come from the appellant and not from the prosecution is misguided. In all of the cases cited by the appellant, evidence of the reasons for the appellants' absence were furnished by the appellants themselves. Who better than the appellant to explain how he found himself in St. Martin?

[40] Mr. Williams has placed some focus on the argument that there was no evidence before the magistrate that the appellant had waived his right to be present at his trial. He submitted that in circumstances where the appellant was incarcerated in St. Martin he cannot be said to have been voluntarily absent, per **Czekala**.

[41] The relevant facts of that case were that the appellant was a Polish national in respect of whom a District Judge made an extradition order pursuant to a European Arrest Warrant. The background to this was that on 13<sup>th</sup> February 2003 the appellant allegedly committed the offence of theft in Poland. On 20<sup>th</sup> February 2003, he was interrogated as a suspect in relation to the offence and on that date instructed about his rights and obligations whilst on bail. These included an obligation to notify the Polish authorities of any change of address. He was granted bail. On 3<sup>rd</sup> March 2003, he allegedly committed the offence of robbery. On 3<sup>rd</sup> April 2003, the appellant was remanded in temporary police custody in relation to the robbery offence and remained in custody until his release some four months later on 2<sup>nd</sup> July 2003. In the interim, on 28<sup>th</sup> May 2003 he was tried and convicted in his absence on the theft charge in Poland. The appellant said in his proof of evidence, which he adopted at the hearing before the District Judge, that he had been unaware of the trial date for the theft offence until the trial had been concluded. It was common ground that he had not in fact received the summons which had been issued in relation to the hearing on that day. This was because the authorities had sent it to the address which, as far as they were concerned, was his address. He further said that he was being detained at the same police station where he was being separately proceeded against and that therefore the Polish authorities knew of his whereabouts. He testified that while his mother had received the summons in

relation to that theft case she was unable to visit him in custody as she was apparently a witness in the other case that was then ongoing, so it was not possible for her to pass it onto him.

[42] His appeal centred around the finding of the District Judge that the appellant had deliberately absented himself within the meaning of section 20 (3) of the Extradition Act. The basis on which the District Judge so held was that Mr. Czekala was well aware of his duty to notify the Polish authorities of his change of address - albeit he was in police custody at the time and there was no reason why he could not have written to the court or otherwise arranged to notify the court about this. The District Judge was of the view that notwithstanding the appellant was in temporary police custody at the relevant time, this did not absolve him of his said obligation to notify the authorities of his whereabouts at all times and was satisfied that he did nothing to comply with that duty. The District Judge therefore concluded that Mr. Czekala had deliberately absented himself from the theft trial. If that finding were to be upheld it would mean that the appellant would not be entitled to a retrial if he returned to Poland. The effect of section 20 of the Extradition Act is that had the judge not made that finding, he would have been obliged to have ordered the appellant's discharge in relation to the theft offence.

[43] On appeal it was held that the District Judge was wrong to hold that the appellant had deliberately absented himself. This was for two reasons. First, on a proper construction of the document outlining the appellant's rights and obligations while on bail, the obligation to notify a change of address did not arise in circumstances where he was temporarily in police custody. Secondly, even if the District Judge had been right to find that the appellant was in breach of his obligations to the Polish judicial authority, the court held it was wrong of the District Judge on the evidence before him to find that the failure of the appellant to notify the judicial authorities of his whereabouts in temporary police custody in breach of a known obligation to do so - demonstrated unequivocally an intention on his part not to attend his trial, so as to enable the inference to be drawn that he had deliberately absented himself from his trial. The judge was wrong to find that his failure to fulfil his obligation to notify the authorities should

be characterised as conduct deliberately absented himself from trial as such failure could not unequivocally indicate that he had made a conscious decision to not take part in the theft trial proceedings and, absent evidence unequivocally demonstrating such a conscious decision, a finding that he had deliberately absented himself from the trial could not be made.

[44] In my view, that case was clearly decided on its particular facts and is not authority for a broader general principle that one cannot be held to have voluntarily absented oneself if in custody at the time of trial. Indeed, the appellate Court in **Czekala**, cited the decision of the court in **Dula v Director of Public Prosecutions of Zwolle Lelystad Holland**<sup>14</sup> where Swift J held that, where the requested person had been personally served with the summons when he was held in custody in Poland and the summons informed him he was about to be tried in Holland, the appellant's subsequent failures to take any steps to obtain an adjournment in the light of his summons amounted to 'a voluntary and conscious decision not to participate in the Netherlands proceedings' and therefore 'deliberately absented himself from trial'. The appellate court recorded further that at paragraph 38, Swift J said that she could not accept the proposition that the mere fact a person has been held in custody means that he cannot be found to have deliberately absented himself from the trial of criminal proceedings in which he is involved. Each case will depend upon its own specific facts.

[45] The court in **Czekala** did not dissent from the views expressed by Swift J, seeking instead to distinguish **Dula**, by saying:

"There is a fundamental difference between the situation as existed in **Dula** where the individual knew by receipt of information that the trial was about to take place and where it was open to him to seek the adjournment of the trial and he could reasonably have foreseen that the consequence of inaction on his part would be a trial proceeding in his absence, and the situation in this case where at best all the appellant knew was that there was an ongoing criminal legal process in respect of the theft charge but did not know when his trial was to take place and did not know whether he might at any moment be taken by the authorities in whose control he was, to the theft trial."

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<sup>14</sup> [2010] EWHC 469 (Admin).

[46] The facts in the case at bar differ in at least one important material respect from those in **Czekala** and, if anything, has more in common with **Dula**: the appellant here was fully aware that this trial was on foot as he had attended part of it before absconding and he was obviously aware that it was ongoing. Despite attempts to have him explain the circumstances that led to his absence from the jurisdiction, that was not forthcoming.

[47] All that said, however, as the authorities make plain, deliberate and voluntary absence is not the only relevant consideration. Even if the senior magistrate had determined that the appellant had deliberately and voluntarily absented himself, which on the facts I daresay was a strong, if not irresistible inference, she was nonetheless required to also consider the **Hayward** principles set out at paragraph [26] of this judgment and to reflect in her decision that she had done so. Mr. Williams submitted that the absence of such considerations from her decision means that she did not take them into account and therefore erred in principle when she exercised her discretion. I agree that her decision does not reflect that she considered these principles and to that extent she erred.

[48] Despite the heavy focus on the question of waiver, I am mindful that on an appeal of this nature the critical question is not whether the appellant waived his right to be present at his trial but whether despite his absence, he received a fair trial. The words of Lord Hoffmann in **Jones** – a case of much greater and relevant persuasive authority than those cited by the appellant - are poignant:<sup>15</sup>

“The question in my opinion is not whether the defendants waived the right to a fair trial but whether in all the circumstances they got one. It is whether on the particular facts of the case the proceedings taken as a whole...satisfied the requirements of the Convention. That, as I understand it, is the question which the European jurisprudence requires to be answered.”

[49] That seems to me to shift the focus of enquiry on an appeal of this nature from whether, on an assessment of the facts known, a defendant can be said to have waived his right to be present at his trial, to one which focuses on the trial

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<sup>15</sup> At page 15, para 20.

process itself by asking: looking at all the trial proceedings as a whole, did the defendant receive a fair trial?

[50] It is the same question that must be answered in relation to an allegation of breach of section 16 of the Constitution and the common law right of a defendant to be present at his trial. For the reasons that follow, I would hold that the appellant did in fact receive a fair trial, notwithstanding his absence.

[51] The following facts seem to be clear and accepted by both sides, based on the record and the submissions presented to the Court. The appellant was always represented by counsel from the outset. At some stage, during the course of his trial, the High Court granted him bail to travel to Puerto Rico for medical attention. On resumption of the trial on or about 12<sup>th</sup> July 2019, the appellant failed to attend his trial. It was subsequently discovered that he had been arrested and was incarcerated in St. Martin. There was no evidence put before the magistrate explaining the circumstances under which the appellant came to be incarcerated in St. Martin despite her requests for, and opportunities given to provide, same. The magistrate enquired but was not given any definitive answer as to when the appellant was likely to return to the jurisdiction of the BVI. His trial counsel said he did not know. The appellant was nonetheless in contact with and giving instructions to his counsel who continued to represent him at the trial, even in his absence. There was full and effective cross-examination of the prosecution's witnesses by his counsel, which ultimately resulted in the magistrate upholding a no case submission made on the appellant's behalf in relation to the proceeds of crime charge and the possession of ammunition charge.

[52] Let it not be forgotten also that the appellant was being tried alongside others whose counsel, as the record shows, was anxious for the trial to continue. Clearly, they were being prejudiced by this extensive delay of almost two years, reckoning the period from after the courtroom was reconstructed following the hurricanes.

[53] All of the foregoing matters were known to the magistrate as they were revealed during the course of her enquiries and are relevant considerations under the **Hayward** principles. In my view, had the magistrate considered them, they would have weighed heavily in favour of proceeding in the appellant's absence because (a) the appellant left the jurisdiction in breach of his bail conditions, which strongly suggests it was deliberate and voluntary and thereby waived his right to be present; (b) the trial had already been adjourned for almost two years and still there was no indication as to when the appellant would return to the jurisdiction; (c) the appellant was being tried alongside other defendants, not all of whom had absconded. This was prejudicial to the defendant who was present; (d) given that the case against all three defendants was founded on a joint enterprise, separate trials were undesirable; (e) though absent, the appellant was legally represented throughout the trial and his lawyers were able to receive instructions from him during the trial and very ably presented his defence, even securing his acquittal on the proceeds of crime and possession of ammunition charges. Even when the appellant returned to the jurisdiction, which was before the magistrate gave her verdict in October 2021, those acting for him made no application to re-open the trial from him to give evidence; (f) the general public interest and the particular interest of witnesses required that the trial should take place within a reasonable time of the events to which it related.

[54] No complaint has been made in any of the grounds of appeal or submissions on behalf of the appellant that his trial was otherwise unfairly conducted. The appeal on this ground hinges on the arguments that the appellant had not waived his right to be present, and the magistrate's failure in her reasons to advert to the **Hayward** principles.

[55] In all the circumstances, I would hold that even though it could be said with justification that the magistrate failed to demonstrate in her reasons that she had considered these relevant matters before deciding to proceed in the absence of the appellant, this provides no basis for this Court to set aside the conviction on this ground. This is for two reasons: first, on the face of the record, there are compelling reasons for finding that the appellant waived his right to be present

at the trial; secondly, looking at the trial proceedings as a whole, the appellant undoubtedly received a fair trial. I would accordingly dismiss ground of appeal 7.

### **Grounds 3, 4 & 5**

[56] These three grounds are all related and, in substance, challenge the magistrate's finding that the appellant had committed the offence of keeping a firearm on the basis that he was part of a joint enterprise with his co-defendants to do so.

[57] It is often the case that a crime is committed by more than one person acting together in various ways. Section 19 of the **Criminal Code**<sup>16</sup> of the BVI identifies the various ways in which an offence may be committed by persons acting together and ascribes liability accordingly. The relevant parts of section 19 provide:

#### **"Principal offenders**

19. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding any other person to commit the offence;
- (c) every person who aids or abets another person in committing the offence; and
- (d) any person who counsels or procures another person to commit the offence.

(2) In a case arising out of subsection (1)(d), the accused may be charged with committing the offence or with counselling or procuring its commission."

[58] Thus, a person may be guilty if he joins with one or more persons to commit the act constituting the offence; or complicity may also be established where a person intentionally aids or abets (assists or encourages) or procures another to do so.

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<sup>16</sup> Act No. 1 of 1997 of the Laws of the Virgin Islands.

- [59] Here the appellant was charged with keeping a firearm. In ordinary terms, to keep something connotes the exercise of dominion or control over that thing. It is accepted that in substance, a charge of keeping a firearm is not conceptually different from possession. Possession entails that the article must be in the physical custody or under the control of the accused (in legal terms, the *actus reus*) and the accused must know that the article or thing is in his physical custody or under his control (the *mens rea*): **DPP v Brooks**.<sup>17</sup> One may be in possession of an article even though he does not have actual or physical control of it: **Malcolm Maduro v The Queen**;<sup>18</sup> **Tenielle Percival et al v The Chief of Police**<sup>19</sup> and **Levar Brown v The Chief of Police**.<sup>20</sup> This is the concept of constructive possession. Where, the allegation is that two or more persons are in joint possession of the article, the prosecution must prove to the criminal standard that each person had knowledge of the presence of the firearm and that each had the intention to assist or encourage its possession or control by one or more of them. Put another way, each must have intended that possession of the article would be exercised through one or more of them. The prosecution must adduce evidence from which such knowledge and intention can be reasonably inferred.
- [60] In the context of this appeal, the prosecution was required to prove either that the appellant had knowledge coupled with custody or control of the firearm, or that he had knowledge of the presence of the firearm and that he intended to assist or encourage whoever could be said to have had physical custody or control of it to do so on behalf of himself.
- [61] The prosecution's case against the appellant as articulated in its written submissions is that he was part of a joint enterprise and was in joint possession of the firearm with his co-defendants notwithstanding that it had not been found in his actual physical custody but in a bag containing Almestica's property. Ms. Beddeau, in written submissions on this appeal, described the case as a 'plain vanilla' joint enterprise.

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<sup>17</sup> (1974) 21 WIR 411.

<sup>18</sup> Territory of the Virgin Islands HCRAP2007/004 (delivered 19<sup>th</sup> December 2008, unreported).

<sup>19</sup> SKBMCRAP2017/0004 (delivered 10<sup>th</sup> November 2022, unreported).

<sup>20</sup> SKBMCRAP2021/0003 (delivered 9<sup>th</sup> July 2023, unreported).

[62] The magistrate set out the basis of the prosecution's case against the defendants at paragraphs 1 to 9 of her decision.<sup>21</sup>

[63] Later, in addressing the prosecution's case theory, the magistrate stated:

"It was their case that the firearm was found in a bag in a vehicle in which all three defendants were occupants. Their case theory is joint enterprise and all defendants are culpable for the firearm."

[64] At paragraph 16 of her decision the magistrate rehearses the reasons for the prosecution's contention that all three defendants were jointly liable for the firearm:

"a. The defendants were all sitting stationary in a vehicle in which a large amount of cash was found on the floor in full view;  
b. One defendant took off running when the firearm was found;  
c. Although two defendants did not take off running, the circumstantial evidence showed that they knew each other and were more than likely aware of the firearm;  
d. Defendant Almestica's behaviour is indicative of guilt and items in the bag in which the firearm was found bore his name."

[65] It is trite, that even where persons are jointly charged with committing an offence, the court must look at the evidence against each defendant separately in order to determine whether they are guilty. The learned magistrate was evidently aware of this requirement as she proceeded first to examine the case of Almestica separately.

[66] With respect to Almestica, the learned magistrate merely remarked at paragraph 6 of her decision that 'Mr. Almestica failed to attend the matter and therefore no positive case is put on his behalf'. She then moved on to consider the case against Carrasco.

[67] In the case of Carrasco, the driver, the magistrate invoked section 12 of the **Firearms Act**, which provides:

"The occupier of any house or premises or the owner or person in charge of any vehicle, vessel, boat or other conveyance, in which any firearm or ammunition is found shall, for the purposes of this Ordinance,

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<sup>21</sup> Pages 520 – 522 of the Record of Appeal.

be deemed to be the owner or keeper of such firearm or ammunition as the case may be until the contrary is proved.”

[68] Based on that provision she held that ‘the defendant Carrasco as the driver of the vehicle in (sic) deemed to be the keeper of the firearm found therefore (sic). He has a duty to rebut the presumption. He has offered his evidence and it is for the court to consider it’.<sup>22</sup> She rejected his evidence as ‘woefully inadequate and unbelievable’. She determined, correctly, that before convicting him she had to examine the Crown’s case to determine whether they had ‘met their burden of proof beyond a reasonable doubt’.

[69] After considering the Crown’s case, the magistrate declared at paragraph 76:  
“The Court accepts the Crown’s theory of the case as being one of joint enterprise and is satisfied beyond reasonable doubt on the evidence before it of a joint enterprise between the Defendants.”

[70] It is apparent that the magistrate did not specifically identify the evidence from which she drew the inference that the appellant was part of the joint enterprise and why she concluded that he was in joint possession of the firearm. Therefore, it must be concluded that her declared acceptance of the prosecution’s theory which she had set out at paragraph 16 of the decision, amounts to saying that she found the appellant guilty because:

“the defendants were all sitting stationary in a vehicle in which a large amount of cash was found on the floor in full view; one defendant took off running when the firearm was found; although two defendants did not take off running, the circumstantial evidence showed that they knew each other and were more than likely aware of the firearm; defendant Almestica’s behaviour is indicative of guilt and items in the bag in which the firearm was found bore his name.”

[71] In its written submissions, the respondent contends that the following circumstances establish knowledge and possession in the appellant: (a) all 3 men were found in a stationary vehicle after being together for almost 3 hours; (b) a large sum of money totalling US\$49,000.00 was found ‘underneath the seat where the appellant sat though it was closer to the back than the front and was sufficiently exposed to have been visible to occupants in the vehicle; (c) a

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<sup>22</sup> Page 531 of the Record of Appeal.

money counter was subsequently found at the home of the appellant; (d) the firearm was found in a backpack on the back seat of the car in which the appellant was seated; (e) when the appellant was instructed to exit the vehicle, one officer described him as being anxious; (f) one of the persons ran away when the firearm was found.

[72] There are some inaccuracies in relation to some of these contentions. As it relates to the finding of the cash, I agree with Mr. Williams that the evidence of PC Humphrey as it stood after cross-examination was that the cash was under a mat under the front passenger seat but to the rear and was not visible from the front. As it relates to the appellant's reaction, the full response of PC Leuwin when asked about the appellant's demeanour when he exited the vehicle was: 'Your Honour, the demeanour of Mr. Frett at the time was anxious, but composed, Your Honour'.<sup>23</sup> PC Roberts also testified as follows: 'Mr Frett's composure at the time? He was calm'.<sup>24</sup>

[73] That apart, even cumulatively none of the matters seemingly relied on by the senior magistrate or Crown Counsel could establish that the appellant was in joint possession of the firearm. Properly analysed, the evidence before the magistrate was that the firearm could be regarded as having been found in the actual custody or control of Almestica who was seated in the back seat. The bag was found next to him. It was closed and contained his identification documents. He fled when the firearm was discovered. These facts could lead to the clear inference that he was the person who had physical control of the firearm.

[74] On the other hand, there was no evidence to support an inference that the appellant had knowledge that the firearm was in Almestica's bag. The deeming provision in section 12 does not apply to him as there was no evidence that he was the owner or person in charge of the vehicle. There was no evidence of behaviour or reaction from him from which guilty knowledge could be inferred or any incriminating statements made by him, far less that he had custody or control of the firearm or was in constructive possession of it. The prosecution

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<sup>23</sup> Page 73, line 1 of the Record of Appeal.

<sup>24</sup> Page 58 of the Record of Appeal.

did not lead any evidence from which the inference could be drawn that the appellant assisted or encouraged Almestica in the possession of the firearm. There was no forensic evidence linking him to the firearm. The appellant's presence in the vehicle in proximity to the bag in which the firearm was discovered cannot without more ground an inference that he was part of a joint enterprise and was in possession of the firearm.

[75] It seems reasonable to conclude that this was the basis on which the senior magistrate determined that the appellant was guilty because there was nothing else connecting him with the firearm. My conclusion in this regard is supported by the fact that when dismissing the no case submission made on behalf of the appellant, her reasoning was as follows:

“It is not so simple a case regarding Darryl Frett because he is a passenger. However, he being in the vehicle with Carrasco may be good evidence that they are acting jointly with each other. So that's your joint enterprise.”<sup>25</sup>

[76] Mere presence in the vehicle as a passenger cannot without more lead to a conclusion that a person is part of a joint enterprise and in possession of any illegal item found in the vehicle. The folly of the temptation to leap to such a conclusion is exposed in two cases considered by the Court of Appeal in Trinidad and Tobago.

[77] In **Dial Maharaj & Anor v The State**,<sup>26</sup> police officers attended Asaraff Road, Caroni where they saw the appellants seated in a vehicle. Appellant No. 1 was driving, and appellant No. 2 was in the front passenger seat. They ordered the appellants out of the vehicle and searched it. They found a bag containing cocaine on the floor of the vehicle in front of the driver's seat. Both appellants were charged with possession of cocaine for the purpose of trafficking. The prosecution had relied on the deeming provisions contained in section 21 (1) of the Dangerous Drug Act 1991, which provide, so far as relevant, that any person who occupies, controls, or is in possession of any vehicle in which a dangerous drug is found shall be deemed to be in possession thereof unless he proves that

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<sup>25</sup> Pages 437, lines 12 -16 and 439, lines 14 -23 of the Record of Appeal.

<sup>26</sup> Cr. App. No.30 & 31/2007.

the dangerous drug was there without his knowledge and consent. I pause here to note that unlike section 12 of the BVI **Firearms Act**, the section 21(1) deeming provision extends to an occupier of a vehicle.

[78] The appellants contended that the trial judge had erred in failing to direct the jury that they were first to be satisfied to the extent that they felt sure that the appellant was a person who occupies, controls or was in possession of the vehicle before the presumption of possession arose and further erred when he failed adequately or at all to direct the jury that mere presence in the vehicle was not sufficient to make one an occupier within the meaning of section 21(1). The Court of Appeal engaged in an extensive discussion of the meaning of the term occupier as used in section 21(1). For present purposes, that discussion is not relevant save to say that it was held that it bore a restricted meaning, connoting some element of control of the vehicle.

[79] Relevantly, the Court of Appeal offered the following guidance which I gratefully adopt, mutatis mutandis:

“50. When faced with a party’s mere presence in a vehicle, in circumstances in which the drugs are in the actual possession of someone else in that vehicle, something more is required to clothe the former with constructive possession. In the United States case of *Nicholas Lyons v The State of Indiana* No. 49A02-0802-CR-185, the court considered the issue of the appellant’s constructive possession of drugs found in a vehicle in which the appellant was a passenger. The court surmised:

*When a defendant does not have exclusive possession of the place where the drugs are found, the inference of the defendant’s intent to maintain dominion and control over the drugs must be supported by some additional circumstances. Id. Our supreme court has previously cited the following as examples of additional circumstances supporting constructive possession: “(1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant’s plain view, and (6) the mingling of the contraband with other items owned by the defendant.”* *Gee v. State*, 810 N.E.2d 338, 341 (Ind. 2004) (citing *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999))...” (original emphasis)

[80] Applying that approach, the Court of Appeal held that the appeal of appellant No. 1 had no merit but that the appeal of appellant No.2, the passenger, succeeded because the prosecution had not proven him to be anything other than a 'serendipitous passenger'.

[81] The second case is **Latchmi Bharath v Ferney Bohoroquez**.<sup>27</sup> I largely adopt the summary of the facts contained therein. On 6<sup>th</sup> December 2004, two police officers observed a Mazda 323 motor vehicle turn into the parking lot at Gulf City Mall. The vehicle parked in the mall and the officers kept it under surveillance from a short distance away. Nothing of significance occurred. They eventually approached the vehicle and asked its occupants to disembark. Appellant No.1 Bharath was seated in the front passenger seat, appellant No.2 Bohoroquez was the driver of the vehicle and a third person, Olivares, sat in the back seat. An officer conducted a search of the vehicle and found a large opaque white feed type bag in the middle of the rear seat. He opened the bag and observed that it contained packets. The officer pierced one of them in the presence of the appellants and found that it contained a white powdery substance. He then told the appellants that he was of the opinion that the substance was cocaine and cautioned them collectively. Appellant No. 2, Borohoquez said, 'an East Indian guy told me to bring that bag here for him'. Appellant No. 1 denied any knowledge of the bag and its contents. The police were unable to say when or where she had entered the vehicle. The officer continued the search and found a large quantity of bolivares (1.747M) and three one dollar U.S. currency notes on Olivares. When the contents of the feed bag were weighed and tested at the Forensic Science Centre, it was certified to be 21.3kg of the dangerous drug cocaine. Neither appellant gave evidence at trial. The appellants were convicted, along with Olivares, of possession of a dangerous drug for the purpose of trafficking.

[82] The issue on appeal in relation to appellant No.1 was whether she was an occupier of the vehicle within the meaning of section 21(1) of the Dangerous Drug Act. The Court held that "the sum total of the evidence for the State was

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<sup>27</sup> Cr. App No. 49 & 50/2008.

that when the police officers approached the vehicle in which she was the front seat passenger, she denied all knowledge of the bag found on the back seat and its contents. The evidence disclosed nothing further in respect of her association with the vehicle. She could not therefore be proven to be an “occupier” within the meaning of the Act and consequently could not be deemed to be in possession and no burden cast on her. We find that this ground has merit and the appeal in respect of the appellant Bharat is allowed.”

[83] In both cases cited above, the deeming provision did not apply to the appellants because they were not found to be occupiers within the meaning of the Dangerous Drug Act. The result is that their status was similar to that of the appellant in this case, namely mere passengers in the vehicle. Here, the firearm having been found in the physical custody of Almestica, much more was required to fix the appellant with constructive possession of it. For the reasons discussed at paragraph [74] above, there simply was nothing more. The magistrate therefore erred and misdirected herself when she held that the appellant was part of a joint enterprise and therefore in possession of the firearm.

[84] It follows from what I have said in relation to the elements of the offence, the principles of joint enterprise and the evidence necessary to establish joint possession, that the magistrate was also wrong to overrule the no case submission made on the appellant’s behalf. The test to be applied at that stage is well known. Succinctly stated, a no case submission may be upheld (a) when there has been no evidence to prove an essential element of the alleged offence, or (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. In this case, the first limb is engaged and ought to have succeeded for the reasons given above.

**Disposition**

[85] I would dismiss ground 7 of the appellant's appeal. I would allow the appeal on grounds 3, 4 and 5 and quash the appellant's conviction and sentence.

I concur.

**Margaret Price Findlay**  
Justice of Appeal

I concur.

**Eddy D. Ventose**  
Justice of Appeal

**By the Court**

**Chief Registrar**