

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

SAINT CHRISTOPHER AND NEVIS

SKBMCRAP2021/0003

BETWEEN:

LEVAR DEVERE BROWNE

Appellant

and

THE CHIEF OF POLICE

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Perry Joseph and Mr. Chesley Hamilton for the Appellant
Mr. Bervis Burke, Crown Counsel, for the Respondent

2023: February 23;
July 5.

Magisterial criminal appeal – Appeal against conviction - Possession – Drug trafficking – Section 29(2) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act - Whether, on a charge of possession of controlled drugs with intent to supply, where the drugs are secreted in a container box or other receptacle, the prosecution must prove that the accused knew that the box contained controlled drugs – Constructive possession - Whether a consignee of a parcel which has not been released into his physical custody by Customs officials can be said to be in possession of that parcel and its contents – No-case submission – Whether the learned magistrate erred in overruling the appellant’s no-case submission – Statutory interpretation – Strict liability - Whether the mens rea of importation requires knowledge on the part of the accused that the parcel or thing being imported contains dangerous drugs - Whether the offences of importation under sections 4(1)(a) of the Drugs Act and sections 103(1)(b) and 108 (1)(a) of the Customs Act are strict liability offences

A box purportedly containing personal effects was shipped from Miami to Saint Kitts by sea. The box was consigned to the appellant and the bill of lading listed his address and his telephone number. On arrival in Saint Kitts, the box was stored in the Customs Department's transit shed. On 4th September 2019, the appellant went to the Customs and Excise Department to clear the box. He presented the bill of lading to the Customs Examination Officer, Ms. Adonis Gumbs, who retrieved, opened, and examined the box in the appellant's presence. Ms. Gumbs removed a container purportedly containing Kool-Aid mix, a large can purportedly containing mixed vegetables and a container purportedly containing iced tea mix. She shook the containers but noticed that they felt compact and that they did not appear to contain any powdery or liquid content.

Ms. Gumbs asked the appellant to accompany her to the scanner where Customs Officer Gregory Davis scanned the items. Ms. Gumbs took them back to the examination room where she and Mr. Davis further examined the contents of the box in the presence of the appellant. They discovered other cans of Tang iced tea mix, two large cans of ketchup and two bottles of protein powder. Mr. Davis opened the Tang container and emptied its contents into a plastic bag. He observed that there was a plastic container inside of the Tang container. He removed the plastic container and discovered a package wrapped with rubber bands and 'caution paper'. Inside of that was a transparent Ziplock plastic bag containing vegetable-like matter, which he suspected to be cannabis. A total of fifteen such packages containing 1,627 grams of cannabis were found concealed in seven containers. The appellant was cautioned. He denied knowledge of the packages and claimed that somebody was trying to set him up.

The appellant was arrested and charged with several offences under the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act ("the Drugs Act") and the Customs Act. He was tried by the learned Senior Magistrate for District A. At the close of the prosecution's case, the appellant made a no-case submission, which was overruled. The appellant was convicted and sentenced to two years imprisonment on the charges of possession with intent to supply and importation of controlled drugs contrary to the Drugs Act, to run concurrently. He was convicted but reprimanded and discharged on the Customs offences.

Being dissatisfied with the ruling of the learned Senior Magistrate, the appellant appealed to this Court on four grounds of appeal. However, three main issues fell for determination by this Court: (i) whether, on a charge of possession of controlled drugs with intent to supply, where the drugs are secreted in a container box or other receptacle, the prosecution must prove that the accused knew that the box contained controlled drugs; (ii) whether a consignee of a parcel which has not been released into his physical custody by Customs officials can be said to be in possession of that parcel and its contents; and (iii) whether the mens rea of importation requires knowledge on the part of the accused that the parcel or thing being imported contains dangerous drugs.

Held: dismissing the appeal and affirming the appellant's conviction, that:

1. On a charge of possession of controlled drugs with intent to supply, it suffices for the prosecution to prove that an accused knew that he had the container or box in his physical custody or under his control and that there was something in it. That is

the degree of knowledge and control that the prosecution is initially required to prove, which vests the accused with the necessary possession of the container and its contents. The burden then shifts to the accused to bring himself within the scope of section 29(2) of the Drugs Act to prove on a balance of probabilities that he neither knew nor suspected nor had reason to suspect that the box contained cannabis.

Section 29(2) of the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act** Cap. 9:08 of the Laws of Saint Christopher and Nevis applied; **R v McNamara** (1988) 152 JP 390 applied; **R v Lambert** [2002] 2 AC 545 applied; **Salmon v HM Advocate** 1998 SCCR 740 applied; **DPP v Brooks** (1974) 21 WIR 411 distinguished; **Bernal and Moore v R** (1997) 51 WIR 241 distinguished.

2. It is settled that it is perfectly possible for possession to exist without physical custody. 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). The evidence before the magistrate was that a box containing cannabis was brought into Saint Kitts from Miami. There is no dispute that the appellant was the consignee of that box: the bill of lading bore his name, address and his telephone number. As consignee, the appellant was, in law, the importer of that box. As importer, the appellant was the one who caused the box to be imported into Saint Kitts. To cause something to be brought into Saint Kitts is to exercise control over that thing. Though the appellant did not have physical custody of the box, he exercised control over it and was in constructive possession of it. The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading, fully intending to take physical custody of the box subject, obviously, to the payment of any applicable customs duties.

Section 2 of the **Customs Act** Cap. 20:04 of the Laws of Saint Christopher and Nevis applied; **DPP v Brooks** (1974) 21 WIR 411 applied.

3. The circumstances under which a trial judge may uphold a no-case submission are settled: (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. The criticism that the learned Senior Magistrate misdirected himself in relation to the elements of the offence of possession is unsustainable. The Senior Magistrate clearly appreciated that he was dealing with a 'box possession case' and that the interplay between section 6(3) and sections 29(2) and (3) of the Drugs Act had to be considered. The appellant not having given evidence, and the magistrate by his verdict obviously not having accepted the truth of his statement to the police that he was expecting school

supplies, the appellant did not discharge the evidential burden placed on him by section 29(2) to show that he neither knew nor suspected nor had reason to suspect that the box contained cannabis. Accordingly, the no-case submission was bound to fail, and the learned Senior Magistrate was right to overrule it.

Section 29(2) of the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act** Cap. 9.08 of the Laws of Saint Christopher and Nevis applied; **R v Galbraith** (1981) 1 WLR 1039 applied; **R v Lambert** [2002] 2 AC 545 applied.

4. The law presumes that mens rea is required before a person can be convicted of a criminal offence. However, based on the wording of the sections, the penalties prescribed and the issues of social concern, that presumption is rebutted and the offences under sections 103(1)(b) and 108(1)(a) of the Customs Act and section 4(1) of the Drugs Act are strict liability offences. It was therefore sufficient for the prosecution to prove that the appellant imported a box into Saint Kitts and that the box contained cannabis. As importer, the appellant was the one who caused the box to be imported into Saint Kitts. The importation was complete the moment the box entered the territorial seas of Saint Christopher and Nevis. The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading fully intending to take physical custody of the box. This being a strict liability offence, the prosecution was not required to prove that the appellant knew that the box contained cannabis.

Section 2 of the **Customs Act** Cap. 20.04 of the Laws of Saint Christopher and Nevis applied; Sections 103(1)(b) and 108(1)(a) of the **Customs Act** considered; Section 4(1) of the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act** Cap. 9.08 of the Laws of Saint Christopher and Nevis considered; **Nurse v Republic of Trinidad and Tobago** [2019] UKPC 43 applied; **Darren Bhola v Canserve Caribbean Limited**, in **Darren Bhola [Customs and Excise Officer II] v Canserve Caribbean Limited and others** TT 2017 CA 34 applied; **Sweet v Parsley** [1970] AC 132 considered; **He Kaw Teh v The Queen** (1985) 157 CLR 523 distinguished; **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese** TT 2011 CA 11 disappplied.

JUDGMENT

- [1] **WARD JA:** The experience of law enforcement in its fight against drug trafficking is that in many cases involving possession and importation of drugs, the drugs are often secreted in some container, box or other receptacle. When these matters proceed to trial, the debate usually centres on the degree of knowledge that the prosecution is required to prove. Do they have to prove not only that the accused

knew that he had the box or container but also that it contained controlled drugs? This appeal raises the following issues: (i) whether, on a charge of possession of controlled drugs with intent to supply, where the drugs are secreted in a container box or other receptacle, the prosecution must prove that the accused knew that the box contained controlled drugs; (ii) whether a consignee of a parcel which has not been released into his physical custody by Customs officials can be said to be in possession of that parcel and its contents; and (iii) whether the mens rea of importation requires knowledge on the part of the accused that the parcel or thing being imported contains dangerous drugs.

The facts

- [2] A box purportedly containing personal effects was shipped by sea from Miami to Saint Kitts. The box was consigned to the appellant. The bill of lading recorded his address as Upper Fiennes Avenue, Basseterre, St. Kitts and listed his telephone number as 869 669 6360. It was not suggested that the address and telephone number were not the appellant's. On arrival in Saint Kitts, the box was stored in the Customs Department's transit shed. On 4th September 2019, the appellant went to the Customs and Excise Department to clear the box. He presented the bill of lading to the Customs Examination Officer, Ms. Adonis Gumbs, who, having retrieved the box from the transit shed, opened, and examined it in the appellant's presence. Ms. Gumbs removed a container purportedly containing Kool-Aid mix, a large can purportedly containing mixed vegetables and a container purportedly containing iced tea mix. She shook the containers but noticed that they felt compact, in that they did not appear to contain any powdery or liquid content. Ms. Gumbs decided to have the items scanned and asked the appellant to accompany her to the scanner.
- [3] Customs Officer Gregory Davis scanned the items, after which Ms. Gumbs took them back to the examination room where she and Mr. Davis further examined the contents of the box in the presence of the appellant. They discovered other cans of Tang iced tea mix, two large cans of ketchup and two bottles of protein powder.

Mr. Davis opened the Tang container and emptied its contents into a plastic bag. He observed that there was a plastic container inside of the Tang container. He removed the plastic container and discovered a package wrapped with rubber bands and 'caution paper'. Inside of that was a transparent Ziplock plastic bag containing vegetable-like matter, which he suspected to be cannabis. A total of fifteen such packages containing 1,627 grams of cannabis were found concealed in seven containers. The appellant was cautioned. He denied knowledge of the packages and claimed that somebody was trying to set him up.

[4] The appellant was subsequently arrested and charged with the following offences under the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act**¹ ("the Drugs Act") and the **Customs Act**:²

- (a) Importing certain controlled drugs, to wit cannabis into the Federation contrary to section 4(1)(a) of the **Drugs Act**.
- (b) Having in his possession certain controlled drugs, to wit cannabis for the purpose of supplying it to another contrary to section 6(3) of the **Drugs Act**.
- (c) Knowingly attempting to evade customs with respect to the importation of restricted goods, to wit, cannabis contrary to section 185(2)(b) of the **Customs Act**.
- (d) Importing goods, to wit cannabis which is restricted and not in accordance with the restrictions imposed contrary to section 103(1)(b) of the **Customs Act**.
- (e) Importing cannabis concealed in containers holding goods of a different description, contrary to section 45(3)(9)(1)(a) of the **Customs Act**;

¹ Cap. 9.08 of the Laws of Saint Christopher and Nevis.

² Cap. 20.04 of the Laws of Saint Christopher and Nevis.

- (f) Submitting a false declaration to a Customs Officer which is false in material contrary to section 182(1)(a) of the **Customs Act**.

[5] The appellant was tried by the learned Senior Magistrate for District A. At the close of the prosecution's case, the appellant made a no-case submission, which was overruled. The appellant was convicted and sentenced to two years imprisonment on the charges of possession with intent to supply and importation of controlled drugs contrary to the **Drugs Act**, to run concurrently. He was convicted but reprimanded and discharged on the Customs offences.

The appeal

[6] By amended notice of appeal, the appellant lodged four grounds of appeal:

- (i) The learned magistrate erred in fact and law by finding that the appellant was in possession of a controlled drug to wit cannabis in circumstances where the appellant did not have exclusive physical control and custody of said substance.
- (ii) The learned magistrate erred in failing to uphold a No-Case Submission when the court was obliged to stop the case where the necessary evidence to establish possession and importation was not called by the Prosecution.
- (iii) The learned magistrate erred in finding that the Prosecution need not establish that the appellant knew, suspected or had reason to suspect the substance in question was a controlled drug.
- (iv) The learned magistrate erred in law by finding that the appellant imported a controlled drug, to wit cannabis into the Federation in circumstances where intention to do so was not proved.

The legal submissions

The appellant's submissions – Grounds 1 and 3

- [7] The submissions in relation to these grounds are dealt with together because they challenge the magistrate's findings in relation to the *actus reus* and *mens rea* of the offence of possession with intent to supply. On behalf of the appellant, learned counsel, Mr. Perry Joseph, submitted that there was no, or no sufficient evidence that the appellant had physical custody or control of the box containing the drugs. At no time was the package cleared and released to the appellant but remained at all material times under the control of Customs. Up to the point of examination and scanning of the box, Customs retained control of the box; the appellant was a mere bystander, who was neither in physical possession nor control of the box. It was submitted that the Bill of Lading gave the appellant no implied custody or control over the box and thus the appellant had neither actual nor constructive possession of it. That could only occur when Customs released the box to him.
- [8] Mr. Joseph therefore submitted that the appellant could not in law be said to have been in possession of the drugs found in the box since the prosecution failed to prove that the appellant had 'exclusive physical control or custody' of the box. Mr. Joseph submitted that it followed that no burden shifted to the appellant to show that he was not in possession of drugs for the purpose of supplying it to another because the prosecution had failed to establish possession. In this regard, it was submitted that the magistrate did not properly apply **R v McNamara**³ because that case held that the burden only shifted to the appellant when the prosecution 'proved all they need to prove'. Here the prosecution had failed to prove possession, so no burden shifted to the appellant.
- [9] In relation to ground 3, Mr. Joseph submitted that there was no evidence to establish that the appellant had knowledge that the box contained drugs. Mr. Joseph relied on the evidence of Police Officer Maurice Sergeant, who testified under cross-examination that when cautioned, the appellant said he was expecting a shipment

³ (1988) 152 JP 390.

of school supplies. In the face of this, the prosecution failed to adduce any evidence to prove that the appellant knew that the box contained drugs. It was further submitted that the learned magistrate was completely misguided as to the mens rea of the offence of possession. The appellant submitted that the following passage from the magistrate's reasons illustrates this:

"The fact that the accused knew (sic) nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute."⁴

- [10] The appellant contends that this is erroneous in law as knowledge is an essential element of possession. Had the learned magistrate properly addressed his mind to the law and the evidence, the only reasonable finding open to him was that the appellant was never in possession of the cannabis and had no knowledge of its presence.

The respondent's submissions - Grounds 1 and 3

- [11] On behalf of the respondent, learned counsel, Mr. Bervis Burke, sought to meet the contention that at no time was the appellant in physical custody or control of the box containing the drugs by submitting that the word 'possession' in the **Drugs Act** means actual or constructive, and although the drugs in this case were not found in the physical custody of the appellant, in law possession may yet be established. Mr. Burke cited the case of **Malcolm Maduro v The Queen**⁵ in support of this proposition and posited that the appellant was in constructive possession of the box.
- [12] The respondent further submitted that in the context of constructive possession, the prosecution must prove that the accused had the ability to exercise some power or some measure of control over the item in question, and it is not necessary to prove that such power was in fact exercised or that the accused had actual possession of

⁴ See page 52 of record of appeal.

⁵ BVIHCRA2007/004 (delivered 19th December 2008, unreported).

the drugs. It was submitted that it was sufficient to establish constructive possession if the magistrate found that the appellant had some control over the cannabis or that he had the intent to possess it.

[13] The respondent further argued that there was sufficient evidence to warrant the drawing of an inference that the accused was in possession of the drugs. That evidence is said to be that the appellant was the consignee of a box containing drugs and that he presented himself with the bill of lading to claim it. The respondent submitted that being in possession of a bill of lading is equivalent to actually being in possession of the same goods. The respondent relies on **Cole and another v North Western Bank**⁶ which it contends held that the holder of the bill of lading is entitled, as against the shipper, to have the goods delivered to him to the exclusion of other persons, thus placing him in the same commercial position as if the goods were in his physical possession.

[14] The respondent seeks to buttress this proposition by reference to section 4 of the **Factors Act**⁷ which provides:

“Any person entrusted with and in possession of any document of title to goods shall be deemed and taken to be the true owner of the goods, wares, and merchandise described and mentioned in such document so far as to give validity to any contract or agreement made or entered into by such person with any person for the sale or disposition of the said goods, wares, and merchandise, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument advanced or given by such person upon the faith of such document...”

[15] The respondent therefore submitted that the bill of lading created and gave the appellant both ownership and entitlement to the goods which it described. Mr. Burke challenged the contention that the appellant was a mere bystander. He submitted that this was plainly not the case since the appellant, in presenting the bill of lading, was in effect demanding the goods.

⁶ (1875) LR 10 CP 354.

⁷ Cap. 18.13 of the Laws of Saint Christopher and Nevis.

[16] It is further said that had the customs officers' suspicion not been aroused, the appellant would have cleared the package. The respondent contends that these matters were sufficient to ground an inference that the appellant was in possession of the box.

[17] As it relates to ground 3 concerning the appellant's knowledge, the respondent submitted that this could be inferred from a combination of suspicious circumstances. It was submitted that on the prosecution's case, the magistrate was entitled to find that the appellant's possession of and presentation of the bill of lading to claim the box was enough to satisfy the magistrate that the appellant was exercising some control over the drugs and was in constructive possession of it. It was argued that these same facts and inferences also support the finding of guilt on the importation charge.

Appellant's submissions in reply

[18] In relation to the respondent's submissions on the effect of the appellant's possession of the bill of lading, the appellant submitted that according to **Cole v North Western Bank**, a bill of lading or other documents of title did not at common law, confer on the holder any greater power than the possession of the goods themselves. Mr. Joseph submitted that the bill of lading only serves as physical possession from a commercial standpoint (the enforcement of rights against various parties) and not in the present case, where goods are shipped through Customs. Customs has sole and unfettered custody and control over the package at the expense of the shipper and the consignee. It is only when Customs releases it to the consignee that ownership is transferred. The appellant relies on the case of **George W. Bennett Bryson's & Co. Ltd. trading as Bryson's Shipping v George Purcell trading as Hortico Landscaping and Nursery**⁸ for this proposition.

[19] I say straight away, that notwithstanding the industry of counsel in producing these cases in response to an invitation by the Court to address it on whether the bill of

⁸ ANUHCVP2011/0023 (delivered 28th February 2018, unreported).

lading bore any significance on the issue of possession, I do not find them particularly helpful and will make no further reference to them.

Appellant's submissions - Ground 4

- [20] In relation to ground 4, the appellant submitted that the offence of importation is not a strict liability offence, and that the onus was on the prosecution to prove that the appellant imported the cannabis in question into Saint Kitts and that he had knowledge or awareness that what was being imported was cannabis. The appellant relies heavily on the decisions of the Trinidad and Tobago Court of Appeal in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**,⁹ and the decision of the Australian High Court in **He Kaw Teh v The Queen**,¹⁰ which the Trinidad and Tobago Court of Appeal purported to follow.

Respondent's submissions - Ground 4

- [21] In reply to this ground, Mr. Burke submitted that where a defendant denies knowledge of how drugs came to be in his possession, the magistrate is entitled to consider such a coincidence. It was submitted that the magistrate was correct to consider the fact that the appellant had the bill of lading that matched the package which he went to collect at Customs. In those circumstances, the magistrate was correct to find the appellant guilty on the importation charges.

Discussion

- [22] Notwithstanding the order in which the grounds of appeal were arranged and argued, I think it more convenient to address the ground of appeal in relation to the no-case submission as the starting point and to treat grounds 1, 3 and 4 as really providing the particulars of the arguments as to why it is said that the elements of the respective offences were not established and, therefore, why the no-case submission should have been upheld. If the appellant is correct in his submissions relating to the no-case submission, the appeal must be allowed.

⁹ TT 2011 CA 11.

¹⁰ [1985] 157 CLR 523.

The law

[23] The circumstances under which a trial judge may uphold a no-case submission are settled: (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.¹¹ The no-case submission in the case at bar was grounded on the first limb only.

[24] The magistrate was required to satisfy himself that the elements of each offence were established. I turn now to discuss the elements of each offence in turn and to consider whether the evidence deployed by the prosecution was sufficient to raise a prima facie case. Before doing so, it is necessary to set out the statutory framework governing the offences of possession with intent to supply and importation. I will then deal first with the submissions in relation to the offence of possession with intent to supply, followed by a discussion of the importation offences.

The statutory framework - possession with intent to supply

[25] Section 6 of the **Drugs Act** is in the following terms:

“Restriction of possession of controlled drug.

6. (1) Subject to any regulations made under section 8 for the time being in force, it shall not be lawful for a person to have a controlled drug in his or her possession.

(2) Subject to subsection (5) and to section 29, it is an offence for a person to have a controlled drug in his or her possession in contravention of subsection (1).

(3) Subject to section 29, it is an offence for a person to have a controlled drug in his or her possession, whether lawfully or not, with intent to supply it to another in contravention of section 5(1).

(4) Subject to subsection (1), a person found in possession of the following controlled drugs in quantities of more than

¹¹ R v Galbraith (1981) 1 WLR 1039.

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) fifteen grammes of cannabis or cannabis resin;

is deemed to have the controlled drug for the purpose of trafficking unless the contrary is proved, the burden of proof being on the accused.”

[26] Section 2(1) of the **Drugs Act** includes the offence of possession with intent to supply contrary to section 6(3) in its definition of ‘drug trafficking offences’.

[27] Section 6(3) is to be read in conjunction with and subject to section 29, which provides a defence of lack of knowledge to persons charged with an offence under sections 5(2) and (3), sections 6(2) and (3), section 7(2) and section 10.

[28] Section 29 of the **Drugs Act** provides:

“Proof of lack of knowledge, etc., to be a defence in proceedings for certain offences.

29. (1) This section applies to offences under any of the following provisions of this Act, that is to say, section 5(2) and (3), section 6(2) and (3), section 7(2) and section 10.

(2) Subject to subsection (3), in any proceedings for an offence to which this section applies it shall be a defence for the person charged to prove that he or she 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 or she is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused

(a) shall not be acquitted of the offence charged by reason only of proving that he or she neither knew, nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof

(i) if he or she proves that he or she neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he or she proves that he or she believed the substance or product in question to be controlled drug or a controlled drug of a description, such that if it had in fact been that controlled drug or a controlled drug of that description, he or she would not at the material time have been committing any offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which is open to a person charged with an offence to which this section applies to raise apart from this section.”

[29] I will return to a discussion of the relationship between section 6(3) and section 29, but before doing so it is necessary to say a word about the elements of the offence of possession.

[30] Possession is not defined in the **Drugs Act**, save that section 2(3) states that ‘for the purposes of this Act, the things which a person has in his or her possession shall be taken to include anything subject to his or her control which is in the custody of another’. This seems to extend the concept of possession to the situation where the article is subject to the control of the possessor though in the custody of another; in effect constructive possession.

[31] The case of **Director of Public Prosecutions v Wishart Brooks**¹² is often cited for its elucidation of the concept of possession, which it held should be given its ordinary meaning. There Lord Diplock stated:

“In the ordinary use of the word “possession” one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under

¹² (1974) 21 WIR 411.

one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs... The only actus reus required to constitute an offence under s 7 (c) is that the dangerous drug should be physically in the custody or under the control of the accused. The mens rea by which the actus reus must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3)."

- [32] Questions 2 and 3 postulated that before an accused could be convicted it had to be shown that he had knowledge that he had the thing in question and that it had to be further shown that he had knowledge that the thing he had was ganja.
- [33] In short therefore, 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*). In the case of a charge of possession with intent to supply, the prosecution must prove this intention, but are aided by the deeming provision of section 6(4) which deems possession of drugs above a specified quantity (15 grammes in the case of cannabis) possession for the purpose of trafficking unless the contrary is proved, the burden of proof being on the accused. This leads me to a consideration of the relationship between section 6(3) and the defences provided in section 29.

The relationship between section 6(3) and section 29(2) and (3)

- [34] As mentioned earlier, section 29 introduced the statutory defence of lack of knowledge. Focusing specifically on section 29(2) for the moment, it is concerned with whether a defendant had knowledge of some fact that the prosecution is required to prove to secure a conviction. So, for example, in the context of the case at bar, the prosecution must prove that the box consigned to the appellant was in his physical custody or under his control and that the box contained a substance and that substance was cannabis. Section 29(2) affords the appellant a defence if he proves that he thought the box contained school supplies and that he neither knew nor suspected nor had reason to suspect that the box contained cannabis. This is essentially the appellant's defence in this case: he thought the box contained

school supplies and did not know it contained cannabis; but he goes further and says, in any event, the prosecution did not even establish that he had physical custody or control of the box.

[35] The defence provided in section 29(3) caters to a different and more limited scenario. It is concerned with the situation where it is necessary for the prosecution to prove that the substance or product, which is the subject of the offence, is the particular drug which the prosecution says it is, and they succeed in proving such. A typical example of the intended ambit of the subsection is provided in **Donald Salmon v Her Majesty's Advocate**.¹³ In a case where the prosecution have proven that the accused was in possession of tablets which they have also proven to be ecstasy tablets, but the accused person says he was mistaken about the nature or quality of the tablets and thought they were heroin tablets, he would not be acquitted if he proves that he did not know that the substance or product he had (heroin) was the particular controlled drug (ecstasy) that the prosecution alleged and proved he had in his possession. In other words, he is not to be acquitted because he confused one controlled drug for another. However, if he proves that he thought that the tablets were aspirin and that he neither knew nor suspected nor had reason to suspect that they were ecstasy tablets then he would be entitled to be acquitted under section 29(3). For present purposes, it is not necessary to dwell on this defence any further since, on the facts, only the defence under section 29(2) is engaged on this appeal.

[36] It is right to say, however, that the defences under section 29(2) and (3) are only engaged where the prosecution proves that the accused was in possession of the box and that it contained cannabis. It is only at that stage that a burden shifts to the accused to bring himself within the scope of the section 29(2) defence of lack of knowledge. To this extent, Mr. Joseph is correct to submit that failure by the prosecution to prove possession will mean that the accused has no case to answer.

¹³ 1998 SCCR 740.

- [37] The question here is exactly what must the prosecution prove? The appellant relies on **DPP v Brooks** to say that it is for the prosecution to prove that the accused had physical custody or control of the box and that he knew that the box contained cannabis before he could be convicted. While no issue can be taken with the definition of possession articulated in **DPP v Brooks**, it must be noted that this case was concerned with construing the Jamaican Dangerous Drugs legislation, which did not contain provisions mirroring section 29(2) and (3). The same may be said of **Bernal (Brian) and Moore (Christopher) v R**,¹⁴ which was also a case construing the Jamaican drugs legislation and which followed **DPP v Brooks**. While **Bernal and Moore** was a case where the drugs were sealed in containers, the occasion did not arise for a discussion and analysis of any provision analogous to sections 29(2) and (3) of the **Drugs Act**.
- [38] Similarly, the appellant's reliance on **Fitzroy Farrell v The Queen**¹⁵ is of limited value since that case was not a box possession case; the drugs were found in a kitchen cupboard in the appellant's house, and his defence was that the police had planted the drugs there. Secondly, although the case mentioned section 30(2) of the Montserrat Drugs (Prevention of Misuse) Act, which is in identical terms as section 29(2) of the **Drugs Act**, the case did not engage in any discussion of the provision.
- [39] The issue of the degree of knowledge that the prosecution is required to prove, and specifically whether they have to prove not only that the accused knew that he had the box or container in his physical custody or under his control but also that it contained controlled drugs has to be considered in the light of the provisions of sections 29(2) and (3) of the **Drugs Act**, which I have discussed above, and the authorities that have examined similar provisions in other jurisdictions.

¹⁴ (1997) 51 WIR 241.

¹⁵ MNIHCRAP2015/0005 (delivered 3rd October 2017, unreported).

[40] In this regard, as a starting point, I find more helpful and relevant to the issues engaged on this appeal, the case of **R v McNamara**,¹⁶ where the Court of Appeal in England was called upon to construe section 28 of the UK's Misuse of Drugs Act 1971, which is materially in the same terms as section 29 of the **Drugs Act**. This is the statutory provision, which first introduced in England the defence of lack of knowledge. Prior to its introduction, its predecessor was the Drugs (Prevention of Misuse) Act 1964, under which the degree of knowledge and control the prosecution needed to prove was as articulated in **Warner v Metropolitan Police Commissioner**¹⁷ and **DPP v Brooks**.

[41] With the advent of section 28 of the Misuse of Drugs Act 1971, new arguments emerged. To quote Lord Justice General in **Salmon v HM Advocate**:

“Under the 1964 Act, on the other hand, there was never any doubt that the burden of proving the necessary knowledge and control rested on the Crown. With the advent of section 28 of the 1971 Act, however, the Crown began to argue that the effect of section 28(2) had been to shift the onus in regard to proving the necessary knowledge from the Crown to the defence. In other words, it was contended that all that the Crown required to do was to prove that, as a matter of fact, the drugs were in the custody or control of the accused and he would then be convicted, unless he proved that he had not known that the drugs were there. Not surprisingly, this kind of argument provoked a strong reaction from the courts, both in Scotland and in England. They rejected the argument for the Crown and affirmed that section 28(2) did not shift the onus of proving knowledge on to the defence (*McKenzie v Skeen*, per the Lord Justice-General at p.121 in Scotland and *Ashton-Rickardt*, per Roskill L.J. (at pp.47H–48H) in England). The courts were plainly right to reject the Crown's argument: as Roskill L.J. pointed out, the manifest purpose of section 28 was not to place a new onus on an accused person but 'to afford a defence to an accused person where no defence had previously existed' (*Ashton-Rickardt* at p.43F).”

[42] In **R v McNamara**, much light was shed on the degree of knowledge and control that the prosecution was required to prove in circumstances such as the present. In that case, the appellant arrived on a motorcycle at the home of a co-defendant where police were executing a search warrant. Police found a box containing

¹⁶ (1988) 152 JP 390.

¹⁷ (1968) 132 JP 378.

cannabis on the back of the appellant's motorcycle. He was arrested and cautioned. He claimed that he had been instructed by someone to deliver the box, which he thought contained pirated video films. He claimed that it was only by chance that he had stopped at the co-defendant's house to pick up his boots.

- [43] In addressing the so-called "box-possession" cases in the context of section 28, Lord Lane first extrapolated four propositions from the speeches in **Warner**:

"First of all a man does not have possession of something which has been put into his pocket or into his house without his knowledge: in other words something which is "planted" on him, to use the current vulgarism. Secondly, mere mistake as to the quality of a thing under the defendant's control is not enough to prevent him being in possession. For instance, if a man is in possession of heroin, believing it to be cannabis or believing it perhaps to be aspirin. Thirdly, if the defendant believes that the thing is of a wholly different nature from that which in fact it is, then the result, to use the words of Lord Pearce, would be otherwise. Fourthly, in the case of a container or a box, the defendant's possession of the box leads to the strong inference that he is in possession of the contents of whatsoever it is inside the box. But if the contents are quite different in kind from what he believed, he is not in possession of it.

". . . the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had no reasonable opportunity since receiving the package of acquainting himself with its actual contents."

- [44] Lord Lane continued:

"It seems to us, in order to make sense of the provisions of s 28, and also to make as clear as can be possible the decision in **Warner**, the draftsman of the Act intended that the prosecution should have the initial burden of proving that the defendant had, and knew that he had, in these circumstances the box in his control and also that the box contained something. That, in our judgment, establishes the necessary possession. They must also of course prove that the box in fact contained the drug alleged, in this case cannabis resin. If any of those matters are unproved, there is no case to go to the jury...

Once the prosecution proved that the defendant had control of the box, knew that he had control and knew that the box contained something which

was in fact the drug alleged, the burden in our judgment, is cast upon him to bring himself within those provisions.”(emphasis added)

[45] These statements of principle were expressly endorsed in **Salmon v HM Advocate** by the Lord Justice General, who stated that that passage states the law correctly, subject to the qualification that the section which the appellant in **McNamara** was required to bring himself within was 28(2) rather than section 28(3)(b)(i).

[46] The Lord Justice General then summarised the position thus:

“In broad terms the courts have decided that it is sufficient for the Crown to prove that the accused knew that he had the container and that there was something in it. In that situation, if he had the necessary control of the container and its contents, the accused is held to have been in possession of the contents even though he did not know that they were controlled drugs.” (emphasis added)

[47] This statement of principle was expressly endorsed by the House of Lords in **R v Lambert**.¹⁸ At paragraph 59, Lord Hope stated:

“As the Lord Justice General (Rodger) said in *Salmon v HM Advocate* 1999 JC 67, 78E, after a careful review of the English and Scottish authorities including *R v McNamara* 87 Cr App R 246, the prosecution discharge their initial burden by proving that the accused knew that there was something in the bag and that it contained something which turned out to be the controlled drug and that the bag and its contents were under his control. It is not necessary for the prosecution to prove that he knew that the thing was in law a controlled drug for him to be found in possession of it. Then there are the statutory defences. If the accused says that he did not know or suspect or have reason to suspect that the bag contained the substance which turned out to be a controlled drug (section 28(2)) or that he did not know or suspect or have reason to suspect that the substance or product was a controlled drug (section 28(3)(b)(i)), the judge’s task is to direct the jury to consider whether they are satisfied, on the balance of probabilities, that the defence has been made out: *Salmon v HM Advocate*...” (emphasis added)

[48] Lord Slynn articulated the justification for shifting the burden to an accused person in such circumstances in these terms at paragraph 36:

“I am satisfied that there is an objective justification for some interference with the burden of proof in prosecutions under section 5 of the 1971 Act.

¹⁸ [2002] 2 AC 545.

The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secrete drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.”¹⁹

[49] I respectfully agree that this justification holds with respect to the shifting of the burden to a defendant to show lack of knowledge by virtue of section 29(2) of the **Drugs Act**.

[50] The proposition that I distil from these authorities is that it suffices for the prosecution to prove that the accused knew that he had the container or box in his physical custody or under his control and that there was something in it. That is the degree of knowledge and control that the prosecution is initially required to prove, which vests the accused with the necessary possession of the container and its contents. The burden then shifts to the accused to bring himself within the scope of section 29(2) to prove that he neither knew nor suspected nor had reason to suspect that the box contained cannabis. This is the evidential burden and means no more than that he should adduce sufficient evidence to raise a doubt about his guilt on a balance of probabilities: **R v Lambert**. This is not to be taken to mean that the defendant must give evidence in order to discharge this evidential burden. The Lord Justice General in **Salmon** made this clear and gave examples of other means by which a defendant discharges this burden:

“It is perhaps worth stating explicitly that, even though subsections (2) and (3) speak to the accused proving something, this does not imply that, to establish a defence, the accused must necessarily give evidence. Doubtless, that would often be the simplest mode of proof, but the necessary evidence might come, for example, from a ‘mixed’ statement or from witnesses speaking to what the accused was told was in the container or to the accused’s apparent astonishment when the contents of the container were revealed and found to be a controlled drug. It goes almost without saying that the facts necessary for any defence under section 28 can be proved on the basis of uncorroborated evidence.”

¹⁹ Ibid, para 36.

[51] Applying these principles to the case at bar, the prosecution was required to prove that the appellant knew that he had the box in his physical custody or under his control and that he knew that there was something in it. This is sufficient to vest him with possession of the box and its contents. The burden then shifted to the appellant to bring himself within the scope of section 29(2) by proving on the balance of probabilities that he neither knew nor suspected nor had reason to suspect that the box contained cannabis.

[52] Against the backdrop of these legal principles, I turn now to examine the magistrate's reasons.

The magistrate's reasons

[53] The magistrate commenced his analysis by examining the elements of the offence of possession and by considering the defences available under section 29 of the **Drugs Act**. In interpreting this section, the learned Senior Magistrate adopted Lord Slynn's dicta in **R v Lambert**, which he set out at page 48 of the Record of Appeal:

"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 scrutinized, 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 (54) or Section 28 of the 1971 Act."

[54] The learned Senior Magistrate also went on at page 51 of the Record of Appeal to consider the four propositions which **R v McNamara** had extracted from the speeches in **Warner**, particularly the fourth one, which stated that 'in the case of a package or box, the defendant's possession of it led to a strong inference that he

was in possession of its contents. However, if the contents were quite different in kind from what he believed, he was not in possession of them.’

[55] In view of the foregoing, the criticism that the learned Senior Magistrate misdirected himself in relation to the elements of the offence of possession is unsustainable. The Senior Magistrate clearly appreciated that he was dealing with a ‘box possession case’ and that the interplay between section 6(3) and sections 29(2) and (3) had to be considered. The authorities on which he relied to inform himself of the elements of the offence and what must be proved and by whom were the seminal cases on the point.

[56] The appellant isolates the following passage found at page 52 of the Record of Appeal and invites the Court to view it as furnishing evidence that the Senior Magistrate misdirected himself in law as to the mens rea of the offence of possession, in circumstances where, it is said, the prosecution had failed to adduce any evidence to prove that the appellant knew that the box contained drugs:

“The fact that the accused knew (sic) nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.”

[57] This passage must be viewed in its proper context and in light of the principles which the Senior Magistrate had carefully set out immediately preceding this passage. The Senior Magistrate was not here saying that knowledge is not an element of the offence of possession. Rather, this passage addresses the defence under section 29(3) and whether it is a defence for the appellant to say that he neither knew nor suspected that the substance or product in question was the **particular** controlled drug. The point the Senior Magistrate makes is that this is not a defence and that it is not for the prosecution to prove that the appellant knew that it was the **particular** drug in question. That statement is in accordance with what was said in **R v**

Lambert. In fact, that passage practically reproduces what Lord Hope said at paragraph 69:

“As it is not a defence for the accused to prove that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.”

[58] The criticized passage is therefore a correct statement of principle as it relates to the defence under section 29(3). In any event, as I have previously indicated, the defence under section 29(3) was not engaged on the facts of this case. The appellant was not saying that he did not know that the vegetable matter was a controlled drug or that he was mistaken about the type of drug that was in the box. Rather, based on evidence adduced by the prosecution, he is saying that he did not think that cannabis was in the box at all; he thought it contained school supplies.

[59] The learned Senior Magistrate’s reference to the section 29(3) defence is quite understandable, however, as he was quoting **R v McNamara**. But as the Lord Justice General cogently demonstrated in **Salmon v HM Advocate**, the Court of Appeal in **R v McNamara** erroneously referenced the section 29(3) defence when on the facts of the case, the defence engaged was section 29(2). There is nothing to this point, however, as, when viewed as a whole and in context, the Senior Magistrate correctly appreciated the degree of knowledge and control that the prosecution was required to establish.

[60] In so far as the appellant contends that the mental element in the offence of possession is not made out unless the prosecution proved that the appellant knew that the substance or product in his possession was a controlled drug, the House of Lords in **R v Lambert** rejected a similar argument made by counsel for the appellant there. The submission, and the House of Lords’ rejection of it, are seen in the following passages:

“60...Relying to a great extent on the speech of Lord Reid in **R v Warner** [1969] 2 AC 256 and your Lordships’ decision in **B (A Minor) v Director of**

Public Prosecutions [2000] 2 AC 428, he said that the mental element in the offence of possession of a controlled drug was not satisfied unless the prosecution proved that the defendant knew that the substance or product in his possession was a controlled drug. He said that the offences described in section 5 of the 1971 Act required proof of possession not of a container or an article of whose character the defendant was unaware but of a controlled drug. Knowledge that it was a controlled drug must be taken to be an essential element in the mens rea of the offence.

61. I would reject this argument. I consider the settled law to be correct on this point. As far as the 1971 Act is concerned, there are two elements to possession. There is the physical element. The physical element involves proof that the thing is in the custody of the defendant or subject to his control. The mental element involves proof of knowledge that the thing exists and that it is in his possession. Proof of knowledge that the thing is an article of a particular kind, quality or description is not required. It is not necessary for the prosecution to prove that the defendant knew that the thing was a controlled drug which the law makes it an offence to possess.”

[61] For the same reasons, the appellant’s submissions in this regard must be rejected.

[62] Further, the appellant’s argument that the appellant was not in possession because he did not have ‘exclusive’ physical custody and control of the box cannot be sustained. It is settled that ‘it is perfectly possible for possession to exist without physical custody’.²⁰ This proposition applies to the facts of this case. At the close of the prosecution’s case, the evidence before the magistrate was that a box containing cannabis was brought into Saint Kitts from Miami. There is no dispute that the appellant was the consignee of that box: the bill of lading bore his name, address and telephone number. By virtue of section 2 of the **Customs Act**, as consignee, the appellant is in law the importer of that box. As importer, the appellant was the one who caused the box to be imported into Saint Kitts. To cause something to be brought into Saint Kitts is to exercise control over that thing. Though the appellant did not have physical custody of the box he exercised control over that box and was in constructive possession of it.

²⁰ See *R v Pentecost* [1998] EWCA Crim J0310-2; *Malcolm Maduro v The Queen*; and *Tenielle Percival and Kenrick Simmonds v The Chief of Police* SKBMCRAP2017/0004; SKBMCRAP2017/0005 (delivered 10th November 2022, unreported).

- [63] The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading, fully intending to take physical custody of the box subject, obviously, to the payment of any applicable customs duties. Further, the prosecution established that the box contained cannabis. The quantity of the cannabis gave rise to the presumption that the appellant possessed the cannabis with intent to supply.
- [64] In short, the prosecution had established that the appellant had exercised control in importing a box into Saint Kitts containing something. The appellant knew that he had done so: he went to claim the box. It turned out that the box contained cannabis. These facts created a strong presumption that the appellant knew that cannabis was in the box: **R v Warner**. These circumstances called for an answer.
- [65] As Lord Steyn put it in **R v Lambert**:
- “First, the relevant facts are usually peculiarly within the knowledge of the possessor of the container and that possession presumptively suggests, in the absence of exculpatory *evidence*, that the person in possession of it in fact knew what was in the container. This is simply a species of circumstantial evidence. It will usually be a complete answer to a no case submission. It is also a factor which a judge may squarely place before the jury. After all, it is simple common sense that possession of a package containing drugs will generally as a matter of simple common sense demand a full and adequate explanation.” (original emphasis)
- [66] In my view, the no-case submission was bound to fail, and the learned Senior Magistrate was right to overrule it. The appellant not having given evidence, and the magistrate by his verdict obviously not having accepted the truth of his statement to the police that he was expecting school supplies, the appellant did not discharge the evidential burden placed on him by section 29(2) to show that he neither knew nor suspected nor had reason to suspect that the box contained cannabis. The manner in which the cannabis was concealed was quite sophisticated and professional. It seems rather unlikely that a drug smuggler would go through such trouble to ship drugs to a person who has no knowledge of the presence of the drugs and who is not expecting to receive drugs. In the absence of evidence from the

appellant, the magistrate was entitled to draw the inference that the appellant knew that the box contained cannabis and to convict him.

- [67] In the premises, I would dismiss the appellant's contentions, as advanced in grounds 1, 2, and 3, that the magistrate erred in overruling the no-case submission in relation to the charge of possession with intent to supply.

No-case submission - The importation offences (Ground 4)

- [68] This ground of appeal raises the issue of whether the offences of importation under sections 4(1)(a) of the **Drugs Act** and sections 103(1)(b) and 108 (1)(a) of the **Customs Act** are strict liability offences.

- [69] Section 4(1) of the **Drugs Act** provides so far as is material:

"Restriction of importation and exportation of controlled drugs.

4. (1) Subject to subsection (2),
 (a) the importation of a controlled drug; and
 (b) the exportation of a controlled drug;

 are hereby prohibited...

(2)...

- (3) Any person who imports or exports controlled drugs contrary to subsection (1), commits an offence and shall be liable, on conviction, to the penalties laid down in section 15."

- [70] Subsection (2) contains exceptions to subsection (1) which are not material to this appeal.

- [71] Section 103(1)(b) of the **Customs Act** prohibits the importation of prohibited and restricted goods specified in Part 2 of the Fourth Schedule to the **Customs Act**. It provides:

"103. (1) No person shall import—

- (a) any goods or any class or description of goods specified in Part 1 of the Fourth Schedule; or
(b) any goods specified in Part 2 of the Fourth Schedule, except in accordance with the conditions and restrictions imposed in that Part.

(2) The Minister may, by Regulations, amend Part 1 or 2 of the Fourth Schedule.

(3) A prohibition or restriction imposed by Regulations made under subsection (2) may—

(a) be general;

(b) be limited to the importation of goods from a specified place or by or from a specified person or class of persons; or

(c) whether general or limited, be absolute or conditional.”

[72] Cannabis sativa is among the items listed in Part 2 of that schedule.

[73] Section 108 prescribes various offences and penalties in respect of the importation and exportation of goods that are prohibited under 103:

“108. (1) A person commits an offence and is liable on summary conviction to a fine of twenty-five thousand dollars if the person—

(a) imports, unloads, unships or lands in Saint Christopher and Nevis goods, the importation of which is prohibited under this Part;

(b) exports, or transports with intent to export, from Saint Christopher and Nevis goods, the exportation of which is prohibited under this Part;

(c) is knowingly concerned in the commission of an offence under paragraph (a) or (b);

(d) without lawful justification or excuse, removes from a customs controlled area imported goods the importation of which is prohibited under this Part;

(e) is knowingly concerned, or conspires, in the removal from a customs controlled area of goods, the importation of which is prohibited under this Part;

(f) commits a breach of, or fails to comply with, a term or condition of a licence or permit or consent which has been granted under this Part; or

(g) is knowingly concerned in the commission of an offence under paragraph (f).

(2) It is not a defence in a prosecution for an offence referred to in subsection (1)(a), (b), (d) or (f) that the defendant had no knowledge or no reasonable cause to believe that the goods in respect of which the offence was committed were prohibited imports or prohibited exports.”

[74] The words “goods”, “import” and “importer” are defined in section 2 of the Customs Act as follows:

““goods” includes any tangible property, including personal property, livestock, conveyances, stores, baggage, documents (including in electronic form), currency and mail packets imported by post, and includes prohibited or restricted goods;...

“import” means to bring goods or cause goods to be brought into Saint Christopher and Nevis or the territorial sea or contiguous zone;

“importer”, in relation to the importation of goods, means the person, including the owner or consignee, or other person beneficially interested in the goods, or an agent acting on behalf of that person;”

[75] I will deal with the arguments in relation to the importation offences under the **Customs Act** first, mainly because the authorities relied on by the appellant were concerned with importation offences under the Customs Acts of Trinidad and Tobago and Australia.

[76] The appellant submits that mens rea, in the sense of intention to import with knowledge of the presence of cannabis in the box, is an essential ingredient of the offence of importation. In advocating that this proposition is correct, Mr. Joseph sought to buttress his contention by referring the court to **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**²¹ and **He Kaw Teh v R.**²²

[77] In **Feese**, the respondent was at the Piarco International Airport in transit from Guyana to Britain. A police officer conducting a random passenger check searched the respondent's suitcase and found two wooden picture frames containing photographs of the respondent. Concealed within each of the frames, were three plastic packages wrapped with brown tape and containing cocaine. The packages weighed a total of 1412.8 grams. The respondent was charged with possession of cocaine for the purpose of trafficking under section 5(4) of the Dangerous Drugs Act, Chapter 11:25, and with importing certain prohibited goods, namely cocaine, contrary to section 213(a) of the Customs Act of Trinidad and Tobago. That section

²¹ Supra note 9.

²² Supra note 10.

is in substance the same as section 108(a) of the Saint Kitts and Nevis **Customs Act**, and is in the following terms:

“Section 213:

Any person who—

(a) imports or brings or is concerned in importing or bringing into Trinidad and Tobago any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the goods are unloaded or not;

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

shall, in addition to any offence for which he may be convicted under any written law, incur a penalty—

(i) on summary conviction in the case of a first offence, to a fine of fifty thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of eight years;

(ii) on summary conviction in the case of a second or subsequent offence, to a fine of one hundred thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of fifteen years; and

(iii) on conviction on indictment, to imprisonment for a term of twenty years, and in any case the goods may be forfeited.”

[78] The Court of Appeal considered the principles expressed in **Sweet v Parsley**²³ and **He Kaw Teh v R**, a decision of the High Court of Australia, which examined the analogous section 233B(1)(b) of the Australian Customs Act 1901.

²³ [1970] AC 132.

[79] The Court of Appeal of Trinidad and Tobago also considered the increased penalties imposed by amendments made to section 213 of the Customs Act in 2007 to include fines ranging from fifty thousand dollars to one hundred thousand dollars, with terms of imprisonment ranging from eight to twenty years. The court cited **Sweet v Parsley** for the proposition that ‘modern attitudes to interpretation indicate that the more serious the offence, the less likely the Court is to interpret the offence as one of strict liability.’ These considerations led Yorke-Soo Hon J.A. to conclude that section 213 ought not to be construed as creating a strict liability offence, and that ‘intention for importing and exporting can be established by showing knowledge or awareness of the likelihood that what is being imported is a prohibited good on the part of the alleged perpetrator’.

[80] In **He Kaw Teh v R**, the defendant’s suitcase was found to have a false bottom into which narcotics were secreted. The defendant was charged with importing narcotics into Australia contrary to section 233B(1). So far as is material, that section provided:

“Any person who –

...

(b) imports, or attempts to import into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies;

(c) without reasonable excuse (proof whereof shall lie upon him) has in his possession or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act;

...

shall be guilty of an offence.”

[81] This offence carried very severe penalties, including life imprisonment. The defendant’s defence was that he honestly and reasonably believed that he was not importing any drugs into Australia. The High Court held that on its true interpretation, the statutory offence of importing narcotics into Australia required the prosecution to prove that the defendant knew he was importing drugs.

[82] It does not appear that the appellant was aware that **Feese** was overruled by the Trinidad and Tobago Court of Appeal. The occasion to revisit whether **Feese** was correctly decided arose in **Darren Bhola [Customs and Excise Officer II] v Canserve Caribbean Limited and others**.²⁴ Though a magisterial appeal, the appeal was heard before a panel of three judges instead of the customary two because the Court of Appeal was being invited by the respondent to either depart from the decision in **Feese** or to ‘qualify and restrain its application’.

[83] In determining whether the offences created by sections 213(a) and 214 require mens rea or were strict liability, the Court of Appeal considered a number of factors, including the structure of the section, which it noted created a number of offences, some of which expressly required mens rea as signified by the word ‘knowingly’. The Court of Appeal also considered the severity of the penalties provided and public policy considerations. The Court concluded:

“84. The overall legislative scheme of the relevant Customs legislation under consideration is a coherent and consistent one. Section 213 of the Customs Act sets out different categories of offences. The Customs and Excise Division has jurisdiction over a relatively narrow set of offences. For those offences which stand at or near the centre of the frontal violation of the legislation and which defeat its core purpose, such as the category of offences under section 213 (a) and (b), it is logical and rational that those offences should be construed as being of strict liability. It is therefore unsurprising that the word “knowingly” is omitted from section 213(a) and (b) as the offences under those sub-sections concern the importation and exportation of prohibited goods and the importation of goods not corresponding to the relevant customs declaration form. Those offences can be said to go to the root of the mischief intended to be addressed by the Act, that is, the prevention and control of smuggling.

85. For the offences under section 213 (c), (d) and (e), a mental element is clearly signified by the use of the word “knowingly”. The category of offences under these sub-sections include ‘harbouring’ and ‘acquiring possession’ of goods which do not inevitably form an integral part of the offences of importing and unloading prohibited goods as those under section 213 (a) and (b)...

94. In light of the foregoing, we are of the view that the presumption of mens rea has been displaced, thereby making the offences of importing

²⁴ TT 2017 CA 34.

prohibited goods and importing/exporting goods not corresponding with the relevant entry, under sections 213 and 214 of the Customs Act, strict liability offences. The isolated factor of the progressive strengthening of the penalties under that section does not overshadow and overwhelm the cumulative effect of the other factors considered at paragraphs 68-85 above. In addition, *He Kaw Teh v R* is capable of being distinguished as outlined in paragraph 88 above, having regard to the type of criminal offence that was there under consideration as well as the extreme seriousness of the maximum penalty that was there involved. Further, as the decision in *R v Brown* illustrates, the factor of the seriousness of the penalty, while undoubtedly important, is not necessarily conclusive for the purpose of evaluating whether the offence is one of strict liability or not.

95. The Court of Appeal in *Feese* did not have the benefit of the very extensive and exhaustive arguments on both sides that we have had in the case at bar. We must respectfully disagree with and disapprove of the decision in *Feese* where it was held that sections 213 and 214 of the Customs Act required proof of knowledge or mens rea. As a panel of three judges sitting in this magisterial appeal, unanimous on the issue, we respectfully depart from that position.”

[84] The Court of Appeal also rejected a suggestion that the reasoning in **Feese** ought to be confined to cases of importation of narcotics but not necessarily to other types of importation offences. The Court stated at paragraph 89:

“Adopting this approach would lead to an inconsistent interpretation of the legislation, dependent on the nature of the prohibited substance.”

[85] The effect of this is that the importation of narcotics under section 213(a) was held to be an offence of strict liability.

[86] This case was appealed to the Privy Council.²⁵ The Board upheld the Court of Appeal’s decision, confirming that sections 213(a) and 214 created strict liability offences. In so concluding the Board examined, among other factors, the statutory language of the provisions; applied the presumption that mens rea is required before a person can be convicted of a criminal offence; and considered whether Parliament intended a defendant to be criminally liable even if he does not know that he has in

²⁵ *Nurse v Republic of Trinidad and Tobago; Canserve Ltd v Republic of Trinidad and Tobago* [2019] UKPC 43.

fact imported, or made a declaration about prohibited goods, in the mistaken belief that they are goods of a different category from prohibited goods.

- [87] While noting that knowledge of any element of the offence is not expressly required by the sections under consideration, the Board however, noted at paragraph 30 the observations of Lord Reid in **Sweet v Parsley**:

“It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word ‘knowingly’, is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say ‘must have been’ because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.”²⁶

- [88] The Board treated the absence of the word ‘knowingly’ as one factor to be considered alongside the scheme of the legislation, the character and seriousness of the mischief which constitutes the offence, the severity of the penalties, and the importance of the public interest in deterring smuggling offences. Having done so the Board concluded that the sections, including section 213(a), created offences of strict liability. The Board’s reasoning bears setting out in some detail:

“39. Offences under sections 212 to 214 primarily affect those who import or export goods and consignees of goods from abroad. Such persons are likely to have a contractual or commercial relationship with the consignor of the goods and so they can stipulate that the consignor is to take steps to ensure that the correct goods are consigned or even appoint an agent to inspect the container on his behalf before it is sealed and shipped to Trinidad and Tobago. The taking of these steps is likely to assist in reducing or preventing smuggling.

40. Given the fact that the offences cover a wide variety of circumstances arising in connection with the import or export of goods, the Board does not accept the submission of Mr Carter that the fact that the express wording of the offences in certain respects clearly requires mens rea (see for example subsections (c), (d) and (e) of section 213, which use the word “knowingly”) means that all the offences created by sections 212 to 214 must do so, or

²⁶ Supra note 23 at 149.

that the decision in Patel would have for that reason to be revisited. There is no reason why Parliament should not in the same context create some offences which require mens rea and some which do not.

41. The Board appreciates that an individual who is not involved in any way in the business of import or export may be charged with an offence under these sections. It is also possible (to take one more example) that a stevedore unloading goods on the instructions of another could be alleged to be within section 213(b).

42. In argument, counsel referred to such a person as a “luckless victim”, which is indeed how Lord Evershed (with whom that particular phrase may have originated) referred to him or her: [1963] AC 160, 174. Mr Carter placed considerable emphasis on the fate of the luckless victim.

43. The Board agrees that the potential for unfairness to luckless victims has to be taken into account as a factor weighing against the inference of an intention on Parliament’s part that the offence under sections 212 to 214 should carry strict liability. The luckless victim might be the person who picks up the wrong bag off the carousel when he arrives at the airport at his destination, or on whom material is planted at the airport without his knowledge. But the luckless victim in that example would not even know that he had brought in the goods. That is a completely different case from the situation where a person knows that he is importing goods and the identity of those goods turns out to be something different from what he thought.

44. Phrases similar to “luckless victim” have been used in other cases, such as Frailey v Charlton [1920] 1 KB 147 at p 153, as the Court of Appeal in this case explained. The Board does not consider that it is necessary to come to any conclusion about exposure to criminal liability in these situations because they are not in issue on this appeal. The defendants in this case knew that they were importing goods. Their case is that they were mistaken about the nature of those goods. The case of the stevedore is also not before the Board on this appeal.

45. Lord Reid refers to the stigma attached to a conviction as one of the factors outside the Act to be considered: [1970] AC 132, 149. Breaking the law is always a serious matter, particularly when it involves the importation of machines that can feed addiction. Though a conviction for importing gambling machines might not be as serious as, say, importing guns, it is still serious.

46. The court also has to take into account as one of the factors outside the Act whether the public interest justifies the imposition of strict liability in the case of smuggling offences, as that would make it more likely that Parliament would have intended that result. So, too, in R v Brown [2013]

UKSC 43; [2013] 4 All ER 860, the Supreme Court of the United Kingdom held that the statutory offence of unlawful carnal knowledge of a girl under 14 years of age was not subject to a defence where the defendant had reasonable grounds for believing that the girl was over 14 years of age. Lord Kerr, with whom the other members of the court agreed, rejected the argument that this followed from the fact that other offences in the same legislation were subject to such a defence, and held that the absence of a defence to the offence in question was justified: "Precisely the same policy considerations underpin section 4 of the 1885-1923 Acts. Young girls must be protected and, as part of that protection, it should not be a defence that the person accused believed the girl to be above the prescribed age. As Lady Hale said in para 46 of *R v G* (Secretary of State for the Home Department intervening) [2009] AC 92, 'When the child is under 13 ... [the accused] takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do ...'. If you have sexual intercourse with someone who is clearly a child or young person, you do so at your peril." (para 39)

47. The Board considers that the imposition of strict liability for importation is here also warranted by the public interest. It is important that restrictions on importation are strictly observed so that no injurious goods are imported and so that any customs duties that can be levied are duly paid. The authorities show that there are similar offences of strict liability in several jurisdictions.

48. In determining whether the presumption enunciated in *Sweet v Parsley* is rebutted, the Board must therefore take into account where an offence is charged in the circumstances of this case: (1) the absence of wording in the relevant parts of sections 212 to 214 of the Customs Act about the need to show that Mr. Nurse knew that the goods Canserve imported were the goods actually found in the container and that therefore the declaration was false and of the requirement for mens rea in other respects or in other offences within the same sections; (2) the severity of the penalties and the stigma of conviction, and (3) the importance in the public interest of deterring the false or careless completion of customs declarations or other acts in relation to importing or exporting goods.

49. Mr Carter submits that the wording of the relevant subsections ought to be interpreted as requiring mens rea in the light of *Sweet v Parsley*. It is, he submits, implicit in section 212(a) that knowledge is required: one of the factors which leads to this conclusion on his submission is that falsity of the declaration is required. In the Board's view, had the points (1) and (2) in the last paragraph stood alone, the proper conclusion might have been that the presumption has not been rebutted.

50. However, point (3) is a matter to which the Board must give careful consideration. The Board considers that it is of sufficient weight to rebut the

presumption. As the Board has pointed out, the system of customs declaration is important in the interests of the community and depends on the accurate completion of declarations and importers, exporters and others acting within the law. Those who are regularly involved in such activities can take steps to minimise or even obviate the risk of a criminal offence and those who are not regularly so engaged may well use agents who are familiar with the steps that they need to take to avoid committing a criminal offence. It was therefore open to the legislature to take the view that the offence should not require the prosecution to prove that the defendant did not believe that he was making a true declaration or that he was otherwise acting lawfully. In the opinion of the Board, notwithstanding the presumption that Parliament intends criminal offences to require mens rea, in the context both within and outside the Act, that presumption is rebutted in this case.

51. Furthermore, it is not correct to say that the offences in sections 212 to 214 impose absolute liability. Mens rea is required in other respects in relation to these offences: for example, the defendant must know that he is making a customs declaration and not some other completely different document. These points greatly mitigate the consideration discussed above that Parliament cannot have intended to impose criminal liability on a luckless victim and that the imposition of such liability would be unfair.

52. The same conclusion as the Board has reached in relation to section 212(a) must apply to sections 213(a) and 214. Although the penalties are heavier in the case of those sections, the case for applying the Sweet v Parsley presumption is not on analysis stronger in those cases as they do not involve any different type of offence.

53. Once it is clear that there is no scope for reliance on a mistaken belief under the statutory offences with which Mr Nurse was charged, there can be no scope for any defence of mistaken belief for him in this regard at common law. It is unnecessary, therefore, for the Board to consider whether there is any such defence at common law.

54. On that basis, and subject to the argument based on the halfway house, the Board dismisses Mr Nurse's appeal." (emphasis added)

[89] In light of the foregoing, there can be no doubt that the decision in **Feese** can no longer stand. To the extent, therefore, that it was based on **He Kaw Teh**, the Privy Council decision is to be followed. In these circumstances, the appellant's reliance on **Feese** and **He Kaw Teh** cannot avail.

- [90] Applying the same approach taken by the Court of Appeal and the Privy Council in **Nurse** to the case at bar, the starting proposition is that the law presumes that mens rea is required before a person can be convicted of a criminal offence. This presumption is strongest when the offence is 'truly criminal' in character. This presumption is also applicable to statutory offences and may only be displaced where the statute is concerned with an issue of social concern such as public safety. Even so, the presumption applies unless it can be shown that strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.²⁷
- [91] In determining whether the presumption enunciated in **Sweet v Parsley** is rebutted, I consider first the structure and language of the **Customs Act**. Sections 103 and 108 fall under Part IX which regulates importation of prohibited and restricted goods. It is not confined to the importation of narcotics and is thus broader in scope than section 4(1) of the **Drugs Act**. Section 108 prescribes various offences and penalties in respect of the importation and exportation of goods that are prohibited.
- [92] I take into account the absence of the word 'knowingly' in sections 103(1)(b) and 108(a) of the **Customs Act** in relation to the need to show that the accused must know that the box he imported into Saint Kitts contained prohibited goods. This is to be contrasted with the offences under subsections (c), (e) and (g) where the requirement for mens rea is expressly signified by the use of the word 'knowingly'. This suggests that within the same section, Parliament chose to create some offences which require mens rea and some which do not. That it is within Parliament's prerogative to do so as was recognised by the Privy Council in **Nurse**:
- "There is no reason why Parliament should not in the same context create some offences which require mens rea and some which do not."
- [93] I bear in mind at the same time that the use of the word 'knowingly' in relation to the offences under subsections (c), (e) and (g) but not in relation to the offence under section 103(1)(b) and other offences within the section does not necessarily mean

²⁷ Per Lord Scarman in *Gammon (Hong Kong) Ltd and others v Attorney General of Hong Kong* [1985] AC 1.

that Parliament did not intend that mens rea is required, so this is but one factor to consider.

[94] Further, I take into account the severity of the penalties prescribed. A person is liable on summary conviction to a fine of \$25,000.00. This is significantly less severe than the penalties provided for in its Trinidadian and Australian counterparts and strengthens the inference that mens rea is not required. I consider also the stigma of conviction, and the importance in the public interest of deterring the false or careless completion of customs declarations or other acts in relation to importing or exporting goods.

[95] For all of the foregoing reasons I am satisfied that the presumption of mens rea is rebutted and that the offences under sections 103(1)(b) and 108 (1)(a) of the **Customs Act** are strict liability offences.

Section 4(1)(a) of the Drugs Act

[96] Similar considerations apply in relation to the offence of importation contrary to section 4(1)(a) of the **Drugs Act**. I consider first that section 4(1) does not expressly make knowledge a requirement of the offence. I note further that whereas the defence of lack of knowledge is available for other offences under that Act, including possession with intent to supply, the offence of importation is excluded from its ambit. This is consistent with an intention to make it an offence of strict liability. Indeed, it would be incongruous for the offence of importation of narcotics to attract strict liability under the **Customs Act** but require mens rea under the **Drugs Act**.

[97] I consider also the severity of the sentences available upon conviction. Summary conviction attracts a fine of four hundred thousand dollars or three times the street value of the drugs whichever is greater and for a term of imprisonment of up to ten years but not less than five years. The penalty on conviction on indictment may be for a term of imprisonment for life but not less than a term of fifteen years. Harsh as the sentences may appear, as Mohammed JA observed in **Nurse**, the sentencer

can fashion a sentence to suit the particular circumstances of each case. Indeed, in the case at bar, the appellant received a sentence of two years only. While mindful that the severity of the sentence may generally be regarded as a factor that militates against a construction that an offence is one of strict liability, this is not necessarily conclusive for it may still be an offence of strict liability where the proper inference is that it would promote compliance with and further the objectives of the statute. I consider this to be the proper inference to be drawn here. The narcotics trade notoriously spurns domestic and transnational crimes, wreaks havoc on and rends the social fabric, and is ruinous of innocent lives. The imperative to deter this scourge and eliminate the ease with which its perpetrators may say that they did not know that drugs were contained in a shipment which they imported are all matters that lead me to the conclusion that strict liability was intended. I therefore hold that section 4(1) of the **Drugs Act** also creates an offence of strict liability.

[98] In light of my conclusions on these matters, it was sufficient for the prosecution to prove that the appellant imported a box into Saint Kitts and that that box contained cannabis. There was no dispute that the box containing the cannabis was brought into Saint Kitts from Miami in the United States. There is no dispute that the appellant was the consignee of that box. By virtue of section 2 of the **Customs Act**, as consignee, the appellant is in law the importer of that box. As importer, the appellant was the one who caused the box to be imported into Saint Christopher and Nevis. The importation was complete the moment the box entered the territorial seas of Saint Christopher and Nevis. The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading fully intending to take physical custody of the box. This being a strict liability offence, the prosecution was not required to prove that the appellant knew that the box contained cannabis.

[99] The learned Senior Magistrate was therefore right to overrule the no-case submission in relation to the importation charges and to convict the appellant. In the premises, I would also dismiss ground 4.

[100] Before concluding this judgment, I feel constrained to comment on the fact that the prosecution opted to charge the appellant with the offence of importation under both the **Drugs Act** and the **Customs Act** and with other offences under the **Customs Act**. The magistrate simply reprimanded and discharged the appellant on the customs offences. In this regard, I cannot improve on the following observation of Soo Hon J.A. in the **Feese** case, commenting on a similar practice in Trinidad and Tobago:

“Before we dispose of this appeal, we note that it is common practice when persons are found attempting to pass through our ports carrying dangerous drugs to charge them with offences under dangerous drugs and customs legislation. There may be strategic reasons for so doing and also for electing to proceed with one class of offence as opposed to the other. The prosecution, however, should elect between the two since prosecution on both offences cannot be justified.”

[101] I am in respectful agreement with these observations and would invite the prosecution to revisit this practice going forward.

Disposition

[102] For all the reasons discussed in this judgment, I would dismiss the appeal and affirm the appellant’s conviction.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar