

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBMCRAP 2017/0004
SKBMCRAP 2017/0005

BETWEEN:

[1] TENIELLE PERCIVAL
[2] KENRICK SIMMONDS

Appellants

and

THE CHIEF OF POLICE

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C Farara

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

Appearances:

Dr. Henry Browne, KC with him Ms. Marissa Hobson-Newman and Mr. O'Grenville Browne for the Appellants
Mr. Valston Graham, Director of Public Prosecutions and Ms. Terrilyn Hunte for the Respondent

2022: June 21;
November 10.

Criminal appeal – Appellate approach to challenges to findings of fact – Sections 6(2) and (3) 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 - Ras Sankofa Maccabee v The Commissioner of Police and another - What effect would the decision in Ras Sankofa Maccabee v The Commissioner of Police and another have on the convictions of the appellants – Constructive possession - Whether the evidence establishes beyond a reasonable doubt that Mr. Percival had constructive possession of the cannabis on the boat – Admissibility of evidence - Whether the learned magistrate erred in admitting and relying on the telephone records – Section 146 of the Evidence Act 2011 - Whether the learned magistrate erred in her decision as to the validity of the search warrants for searching the cell phones seized in the operation – Electronic Crimes Act – Whether the learned magistrate erred in her

decision as to the validity of the search warrants for searching the cell phones seized in the operation - Joint enterprise – Whether the learned magistrate erred in the application of principles of joint enterprise to the facts of the case – Section 10 of the Small Charges Act - Whether the learned magistrate erred in finding that the cannabis was imported into St. Christopher and Nevis on the drug boat and the resulting conviction for importation – Sentencing – Whether the sentences imposed by the learned magistrate were excessive

On 15th October 2015, Mr. Tenielle Percival and Mr. Kenrick Simmonds, also known as 'Rico' ("the appellants") were arrested during a tactical operation carried out by the police on Conaree Beach on the island of St. Kitts. In the course of the operation, police observed Mr. Percival in an orange pickup truck on the beach. The police also observed him using his cell phone, searching nearby bushes, and piling palettes in the area. The police intercepted Mr. Percival and a plain clothes officer took his place in the orange pickup truck. While waiting in the truck, the police officer observed a cell phone ringing, displaying "Rico calling". A boat later arrived at the beach with two men on board; the boat's captain and Mr. Greg Williamson. While attempting to anchor the boat, the boat's captain received a call on his cell phone and immediately opened fire on the police. The police returned fire killing the captain. The police arrested Mr. Williamson. They also arrested Mr. Simmonds who was on a nearby hill overlooking Conaree Beach with binoculars.

The police recovered 23 kilograms of cannabis from the boat with an estimated street value of EC\$607,200.00. The police also searched an apartment said to be rented by Mr. Simmonds and used as a 'drug kitchen'. They found cannabis shreds, large ziplock bags, empty dime bags, a digital scale, a trowel, a handsaw, two broken blades for the saw, two loaf pans coated with cannabis resin and a travel bag bearing the name of Mary Simmonds. Mary Simmonds is the mother of Mr. Simmonds. The police also recovered two cell phones taken from Mr. Simmonds, Mr. Percival's cell phone (found in the orange pickup), the cell phones of Mr. Williamson and the boat's captain, and \$US1,855.00 from the orange pickup truck. The pickup is owned by Mr. Simmonds. The police cybercrime expert obtained search warrants to search the phones. He tested and searched the phones and recorded his findings.

The appellants were charged with various offences under the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act** ("the Drugs Act") and were tried by the learned magistrate. The learned judge in her reasons for decision concluded that all the evidence taken together established that the appellants were guilty of the charges laid against them and convicted them. She sentenced Mr. Percival to pay \$60,000.00 in to be paid in three months, in default four years imprisonment with hard labour on the importation conviction, and Mr. Simmonds to a fine of \$300,000.00 to be paid in five months, in default four years imprisonment with hard labour, on the importation conviction.

Mr. Percival and Mr. Simmonds appealed against their convictions and sentences. The main issues which arise for the Court's determination are: (i) what effect would the decision in **Ras Sankofa Maccabee v The Commissioner of Police and another** have on the convictions of the appellants; (ii) whether the evidence establishes beyond a reasonable doubt that Mr. Percival had constructive possession of the cannabis on the boat; (iii) whether the learned magistrate erred in admitting and relying on the telephone records; (iv) whether the learned magistrate erred in finding that the search warrants for searching the cell phones seized in the operation were valid; (v) whether the learned magistrate erred in the application of principles of joint enterprise to the facts of the case; (vi) whether the learned magistrate erred in finding that the cannabis was imported into St. Christopher and Nevis ("the Federation") on the boat and the resulting conviction for importation; and (vii) whether the sentences imposed by the learned magistrate were excessive.

Held: making the orders in paragraph 82 of the judgment that:

1. Sections 6(2) and (3) of the Drugs Act deal with different matters and though possession is common to both offences, the declaration of unconstitutionality of section 6(2) in **Ras Sankofa Maccabee** does not apply to offences under section 6(3) of the Drugs Act. Therefore, the appellants who sought to quash their convictions under both sections 6(2) and (3) can only successfully quash their convictions for possession under sections 6(2) of the Drugs Act. While the Court finds that the convictions of the appellants under section 6(2) of the Drugs Act is unconstitutional in this case, this finding is based on a concession from the Director of Public Prosecutions and is not a declaration that section 6(2) is unconstitutional for all purposes.

Sections 6(2) and (3) 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; **Ras Sankofa Maccabee v The Commissioner of Police and another** (delivered 3rd May 2019, unreported) applied.

2. Constructive possession can be established by evidence that a person, though not in physical possession, nonetheless is aware of the presence of the drug and has some control over it. The learned magistrate having considered several circumstances that pointed to Mr. Percival knowing that the cannabis was on board the boat to be delivered to him and Mr. Simmonds, and having had the benefit of seeing and hearing the witnesses give their evidence and observing their demeanour, was entitled to make the finding of fact that Mr. Percival was in constructive possession of the cannabis on the boat. There is no basis for this Court to interfere with the finding that Mr. Percival had possession of the cannabis.

Director of Public Prosecutions v Wishart Brooks (1974) 21 WIR 411 at 415 applied; **R v Boyesen** [1982] 2 All ER 161 at 163 applied; **Ortiz and others v The Police** (1993) 45 WIR 118 applied; **Malcolm Maduro v The Queen** HCRAP2007/004 (delivered 19th December 2008, unreported) applied; **R v Pentecost** [1998] EWCA Crim J0310-2 considered; **R v North** [2001] EWCA Crim 544 considered.

3. Section 146 of the Evidence Act provides that a person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. In this case, the prosecution led evidence in the court below which satisfied the requirements in section 146 of the Evidence Act. The learned magistrate did not err in her decision to treat the search warrants for searching the cell phones seized in the operation as valid.

Evidence Act 2011 No. 30 of 2011 of the Laws of St. Christopher and Nevis applied; **Kevin Fearon v R** [2014] 3 SCR 621 considered.

4. There is no requirement for the police to comply with the provisions of the Electronic Crimes Act in securing the search warrants to search cell phones in respect of a suspected drug smuggling offence. The police followed the standard procedure in the Magistrate's Code of Procedure Act for securing warrants. Further, there was nothing irregular about the Justice of the Peace issuing warrants.

Electronic Crimes Act Cap. 4.41 of the Laws of Saint Christopher and Nevis applied.

5. The telephone evidence in this case was authenticated and was not tenuous. It establishes beyond reasonable doubt a connection between the appellants and the persons who were on the drug boat. It includes information and directions on both sets of phones about The Gate and how to navigate through it. The learned judge therefore did not err in admitting and relying on the telephone records.
6. Where A and B embark on a joint criminal enterprise, each will be liable for acts committed in pursuance of the joint enterprise with the necessary intent. It is inconsequential which party committed the fatal act. Both parties are liable so long as the fatal act was a part of the joint enterprise. In this case, the evidence shows that there was a joint enterprise between the appellants, the captain of the boat and Mr. Williamson to possess and import drugs into the Federation. The finding of a joint enterprise is based on the strong circumstantial evidence that was before the learned magistrate. Its effect is that the appellants and Mr. Williamson are guilty of possessing the cannabis and importing it into the Federation and it does not matter what roles

they played and who had physical custody of the drugs. They were all in possession and are equally guilty.

Charles v R (2017) 90 WIR 267 applied.

7. There was ample evidence before the learned magistrate to convict Mr. Simmonds of aiding and abetting Mr. Percival and Mr. Williamson to commit the offences of possession with intent and importation. Further, the finding that there was a joint enterprise between the appellants, the captain of the boat and Mr. Williamson is sufficient in law to find Mr. Simmonds guilty, whether as principal or accessory.

Small Charges Act Cap. 4.36 of the Laws of Saint Christopher and Nevis applied.

8. A person can be convicted of an offence based on circumstantial evidence. However, the circumstantial evidence must point to the guilt of the accused person and if there is a reasonable alternative explanation or conclusion, he is to be given the benefit of the doubt. In the instant case, the circumstantial evidence before the learned judge was enough to sustain the conviction for importation under section 4 of the Drugs Act. The learned magistrate, who had the benefit of seeing the witnesses give their evidence and observing their demeanour, was entitled to come to the conclusion that she was satisfied beyond reasonable doubt that the drug boat was entering the Federation from a place outside the Federation based on the cumulative effect of the circumstantial evidence and the other evidence in the trial, and there was no evidence of a reasonable alternative explanation. Therefore, there is no proper basis for this Court to interfere with the learned magistrate's finding that the cannabis was imported into the Federation on the drug boat and the resulting conviction for importation.

Section 4 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; Blackstone's Criminal Practice 2022 at F1.22 applied.

9. The sentences imposed on Mr. Percival and Mr. Simmonds were not excessive having regard to the seriousness of the offences, the detailed planning of the offences and the amount of drugs involved. Further, the learned magistrate adequately articulated her reasons for imposing a higher fine on Mr. Simmonds. The learned judge's sentencing exercise cannot be impugned.

JUDGMENT

[1] **WEBSTER JA [AG.]**: On 15th October 2015, Tanielle Percival, Kenrick Simmonds and Greg Williamson (together “the Defendants”) were charged with various offences under the **Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act**¹ (“the **Drugs Act**”). They were tried by the learned magistrate for District A, Ms. Josephine Mallalieu (“the Magistrate”), on 10th February 2017 and were convicted of the following offences:

(i) Tanielle Percival:

- (1) importation of a controlled drug, to wit portions of the plant cannabis (“cannabis”), into the Federation of Saint Christopher and Nevis (“the Federation”) contrary to section 4(1) of the **Drugs Act**;
- (2) possession of cannabis contrary to section 6(2) of the **Drugs Act**;
- (3) possession of cannabis for the purpose of supplying it to another, contrary to sections 6(3) of the **Drugs Act**.

(ii) Kenrick Simmonds:

- (1) importation of cannabis into the Federation contrary to section 4(1) of the **Drugs Act**;
- (2) aiding, abetting, counselling and procuring **Tanielle Percival** in the commission of the offences of:
 - (a) possession of cannabis contrary to section 6(3) of the **Drugs Act**.
 - (b) possession of cannabis for the purpose of supplying it to another contrary to sections 6(3) of the **Drugs Act**;
 - (c) importation of cannabis into the Federation contrary to section 4(1) of the **Drugs Act**.
- (3) aiding, abetting, counselling and procuring **Greg Williamson** in the commission of the offences of:
 - (a) possession of cannabis contrary to section 6(2) of the **Drugs Act**;
 - (b) possession of cannabis for the purpose of supplying it to another contrary to sections 6(3) of the **Drugs Act**;

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

(c) importation of cannabis into the Federation contrary to section 4(1) of the **Drugs Act**.

(iii) Greg Williamson:

- (1) importation of cannabis into the Federation contrary to section 4(1) of the **Drugs Act**;
- (2) possession of cannabis for the purpose of supplying it to another contrary to sections 6(3) of the **Drugs Act**.

[2] The Magistrate imposed the following penalties:

- (i) Mr. Tenielle Percival was ordered to pay \$60,000.00 in 3 months, in default four years imprisonment with hard labour, on the importation conviction. The Magistrate did not impose additional penalties for any of the other convictions against Mr. Percival.
- (ii) Mr. Kenrick Simmonds was sentenced to a fine of \$300,000.00 to be paid in five months, in default four years imprisonment with hard labour, on the importation conviction. The Magistrate did not impose additional penalties for any of the other convictions against Mr. Simmonds.
- (iii) Mr. Greg Williamson was sentenced to a fine of \$300,000.00 to be paid in five months, in default four years imprisonment with hard labour, on the importation conviction. The Magistrate did not impose additional penalties on Mr. Williamson for the convictions of possession of a controlled drug and possession of a controlled drug with intent to supply.

[3] Mr. Percival and Mr. Simmonds (together “the Appellants”) appealed against their convictions and their sentences. Mr. Williamson did not appeal his convictions or his sentence.

[4] The appeals were heard together on 21st June 2022. This is the decision on the appeals.

The factual background

The facts in this judgment are taken mainly from the facts outlined in the Magistrate's Reasons for Decision.²

- [5] On 1st October 2015 at 3:30 in the morning, the police went on a tactical manoeuvre to Conaree Beach in the area of "The Gate". The Gate is an area in the sea where there is an opening or gateway in the stretch of reef off the Conaree coastline where boats can come to shore from the Atlantic Ocean. The police went into hiding in the nearby bushes. At about 5:15 a.m. Mr. Percival arrived at the beach driving an orange pickup truck. The pickup is owned by Mr. Simmonds aka "Rico". Mr. Percival walked towards the sea while using his cell phone. Mr. Percival then searched the bushes in the immediate area and placed palettes in the area. At about 6:05 a.m. a second vehicle arrived and the driver of that vehicle also searched the bushes in the area. When he got to the place where the police were hiding he quickly turned around, ran to his vehicle and sped off. Shortly after, Mr. Percival's cell phone rang, he answered it and ran to the orange pickup. However, the pickup got stuck in the sand. He started digging in the sand (in an effort to allow the pickup to move), when the police arrived and took him into custody and went back into hiding. At this time a boat was seen approaching from The Gate. One of the police officers, Superintendent Adolph Adams, took off his uniform and sat in the orange pickup (in plain clothes). While waiting, a cell phone in the pickup rang displaying "Rico calling". He did not answer.
- [6] The boat arrived with two persons on board – the captain, Obi Browne ("the Captain") and Mr. Williamson. Superintendent Adams waved to the boat and the captain said to him "come for the goods". Superintendent Adams told the Captain that the other guy could not make it and the boss asked him to come. He asked the Captain to bring the boat closer because he (Superintendent Adams) could not swim. Mr. Williamson jumped unto a yellow boat anchored in the area and tied his boat to the yellow boat. At this stage, the Captain's phone rang. He answered,

² Hearing bundle 1 e-page 116 et seq.

dashed to the controls of the boat, took up a gun and started firing at Superintendent Adams. The other officers then emerged from the bushes and returned fire. The Captain tried to drive the boat away but by then it was tied to the yellow boat and it could not leave. The Captain was shot and died on the spot. The police commanded Mr. Williamson to turn off the engine of the boat, which he did. He surrendered with his hands in the air.

- [7] The boat was pulled to shore. It contained four large plastic containers with false bottoms that contained compressed cannabis. The jugs are about two feet tall with a base measurement of 1½ square feet. They were later found to contain 23 kilograms or 50.6 pounds of cannabis with an estimated street value of EC\$607,200.00.
- [8] During the stakeout at Conaree Beach another police officer was stationed on the hill overlooking Conaree Beach in an area known as Halfmoon Bay. She testified that she saw Mr. Simmonds drive to the Halfmoon Bay area at about 5:30 a.m., where he parked facing the sea, and was on his cell phone constantly. When the gunshots were heard Mr. Simmonds attempted to leave but she cut him off and took him into custody. There were two cell phones and a pair of binoculars in his vehicle which she also took into custody.
- [9] Messrs. Percival and Williamson were taken to the Basseterre Police Station. Mr. Percival was transported in the orange pickup that he had earlier driven to Conaree Beach. At the station, the pickup was locked and the key was given to the crime scene department. Thirteen days later the pickup was searched in the presence of Mr. Simmonds and US\$1,855.00 was found. The cash was in three layers of plastic wrapping. Mr. Simmonds said the cash was not his.
- [10] At the time Mr. Simmonds was living with his parents. The police took him to an apartment close to his parents' home. Mr. Simmonds denied at first that he rented the apartment. The police told Mr. Simmonds that they had a warrant to search the

apartment and that they would break the door if necessary. Mr. Simmonds then said: "So what a man can't have a cabin stabbing". The apartment was searched. The police found cannabis shreds, large ziplock bags, empty dime bags, a digital scale, a trowel, a handsaw, two broken blades for the saw, two loaf pans coated with cannabis resin and a travel bag with the name of Mary Simmonds. Mary Simmonds is the mother of Mr. Simmonds. The police did not find any indication that anyone lived in the apartment. The Magistrate found that the evidence pointed to the apartment being used as a drug kitchen, and that this was highly relevant to the charge of importation.

[11] In addition to the two cell phones taken from Mr. Simmonds the police took charge of Mr. Percival's cell phone (found in the orange pickup), and the cell phones of Mr. Williamson and the Captain. The police cybercrime expert, Corporal Travis Henry, obtained search warrants to search the phones. He tested and searched the phones. I will deal with his findings later in this judgment.

[12] The Magistrate concluded that "...all this evidence together established that the defendants were guilty of their charges."³ She convicted the defendants and imposed the sentences set out in paragraph 2 above. I will deal with the facts and the Magistrate's findings in further detail when I come to deal with the issues in the appeal.

The appeal

[13] The notice of appeal by Mr. Percival pleads the following grounds:

- "1. The conviction cannot be supported having regard to the evidence. There is no or no sufficient admissable (sic) evidence to connect the Defendant to all three (3) charges.
2. The sentence imposed was unduly severe."

Mr. Simmonds filed a notice of appeal in the same terms except that the reference to number of charges at the end of ground 1 is seven (7).

³ Hearing bundle 1 e-page 132.

[14] On 10th March 2022 the Appellants applied by notice of motion to amend their grounds of appeal to add a further ground:

“That the conviction of the Appellants under section 6(2) of the Drugs (Prevention and Abatement of Misuse and Abuse of Drugs) Act (The Drugs Act) CAP 9.08 be quashed”.

Particulars of the new ground of appeal are set out in paragraphs 3 and 4 of the motion:

“3. That the said Sections (sic) 6(2) of the Drugs Act under which the Appellants were convicted were on 3rd May 2015 declared unconstitutional by Mr. Justice Ventose in his judgment dated 3rd May 2015 [see paragraphs 105 & 107 of Judgment attached.]

4. That given the declarations of unconstitutionality (supra) as a matter of law the said Sections were void ab initio in the result no conviction or penalty can be properly founded on the said sections 6(2) and 6(3).”

The amendment was granted without objection and I will deal with it below.

Appellate approach to challenges to findings of fact

[15] The first ground of appeal, as developed by counsel in his written and oral submissions, involves challenges to findings of fact by the Magistrate. The general approach of this Court is that it will rarely interfere with findings of fact by a magistrate because of the advantages enjoyed by the magistrate in seeing and hearing the witnesses give their evidence and observing their demeanour. The Court will interfere only when it is clear from the record that the magistrate did not take proper advantage as the trier of the case and as result his or her findings are plainly wrong. These principles, with necessary variations depending on the facts of the case being reviewed, are routinely applied by this Court. In **St. Kitts Marriott Resort v Deborah Stevens**⁴ the Court noted –

“To succeed the Hotel (as appellant) must satisfy this Court that either that the Magistrate erred in principle in considering the evidence, or because it unmistakably appears from the evidence that she has not taken proper advantage of having seen and heard the witnesses, or that her findings on the evidence were plainly wrong. It is not enough for the appellant to say that the Magistrate came to the wrong conclusions or that this Court,

⁴ SKBMCVAP2016/0001 (delivered 30th October 2020, unreported).

reviewing the evidence, should come to different conclusions on the facts."⁵

This was an appeal from a civil case in the Magistrate's Court but the principles apply equally in a criminal appeal and I will bear them in mind when considering the issues in this appeal, to which I now turn.

Issues on appeal

[16] The issues for determination in this appeal arising from the amended notices of appeal, as elaborated in the skeleton arguments of counsel, are:

- (i) The effect of the decision in **Ras Sankofa Maccabee v The Commissioner of Police and another**⁶ ("Ras Sankofa") on the convictions of the Appellants.
- (ii) The application of the law of possession, including constructive possession, to the facts of this case;
- (iii) The validity of the search warrants for searching the cell phones seized in the operation.
- (iv) The admissibility of the records retrieved from the cell phones;
- (v) The application of the principles of joint enterprise to the facts of this case;
- (vi) The validity of the convictions for importation.
- (vii) The appeals against sentence.

I will deal with these issues in the order set out above.

⁵ SKBMCVAP2016/0001 (delivered 30th October 2020, unreported) at paragraph 14.

⁶ SKBHCV2017/0234 (delivered 3rd May 2019, unreported).

Ras Sankofa

[17] I will start with the amended ground of appeal which seeks the quashing of the Appellants' convictions under section 6(2) of the **Drugs Act** (possession). However, the motion also challenges the convictions under section 6(3) (possession with intent to supply). The Appellants' written and oral submissions are clear – they seek the quashing of the convictions under sections 6(2) and (3). The success or failure of this ground of appeal depends on the interpretation and effect of the decision of Ventose J in **Ras Sankofa**.

[18] Ras Sankofa Maccabee, a member of the Rastafari religion, was charged with and convicted of possession of cannabis contrary to section 6(2) of the **Drugs Act** and cultivation of cannabis contrary to section 7(1) of the **Drugs Act**. He applied to the constitutional court seeking declarations that his convictions were unconstitutional and should be quashed on the ground that they infringed his constitutional rights to freedom of conscience (religion) and protection for his personal privacy guaranteed by section 11 and section 3 respectively of the Constitution of the Federation. Ventose J found that Rastafari is a religion and that Ras Sankofa Maccabee's constitutional rights to freedom of conscience and his right to privacy had been hindered. He granted various declarations including declaration 6:

“A Declaration is granted that section 6(2) of the Drugs Act read with Part II of the Second Schedule to the Drugs Act is inconsistent with and therefore infringes the Claimant's constitutional right to privacy under sections 3 and 9 of the Constitution to the extent to which it makes no exemption for possession by an adult in a private place of any amount of cannabis for his or her personal use in private.”

Ventose J noted in paragraph 105 of his judgment that the effect of the declaration that he made is that:

“...they allow the use, possession and cultivation of cannabis by an adult in a private place of any amount of cannabis for his or her personal use in private.”

[19] There was no appeal against the decision of Ventose J.

[20] Lead counsel for the Appellants, Dr. Browne KC, submitted that the effect of the declarations by Ventose J is that section 6(2) is null and void and should be treated as if it never existed. The Appellants were convicted of possession of cannabis under a section that does not exist. Dr. Browne KC went further and submitted that possession with intent to supply under section 6(3) is a kindred offence depending on a finding of possession, and the convictions under section 6(3) should also be quashed.

[21] The learned Director of Public Prosecutions, Mr. Valston Graham, did not dispute that a declaration by a competent court that legislation that infringes a person's guaranteed rights under the Constitution is null and void should be struck down. He did not dispute the Appellants' argument that Ventose J declared section 6(2) to be unconstitutional and that the convictions under the section be set aside.

[22] He disputed the Appellants' contention that the declaration of unconstitutionality also applied to section 6(3). He agreed that possession is an essential element of a charge under section 6(3) but that the common element of possession is not sufficient to apply the principles in **Ras Sankofa** to declare the section unconstitutional. This is clear from the judgment of Ventose J. The learned DPP referred to paragraph 102 of the judgment where Ventose J said:

"The decision that the court makes today is not to be taken as undermining the State's legitimate interest in the war on illegal and dangerous drugs. The constitutional issues in this case are narrow ones, and focus *only* on the use, possession and cultivation of cannabis by adults for use in the Rastafari religion and also the use, possession and cultivation of cannabis by adults in private for personal consumption. They *do not* touch or concern the issue of trafficking in cannabis, illegal drugs or other illegal activities."

[23] This passage supports the DPP's point. Even more to the point is paragraph 12 (also relied on the DPP) where Ventose J said:

"Since section 6(3) of the Drugs Act does not involve or relate to the fundamental rights and freedoms with which we are concerned here, it does not form part of the analysis in this matter. Section 6(3) of the Drugs Act is concerned with the possession of cannabis with the intention to supply it to another, which is a trafficking offence. I therefore agree with Counsel for

the Defendants that this section has nothing to do with the private or religious use by adults of cannabis and that the Claimant correctly did not argue that he has a right to supply cannabis to others.”

[24] One just has to read these two passages and the judgment as whole to appreciate that it deals only with sections 6(2) (possession) and 7(1) (cultivation). The ratio of the case is that sections 6(2) and 7(1) are unconstitutional in so far as they criminalise the possession and cultivation of cannabis without making exceptions for the possession of these drugs for religious or private use. Any reference in the judgment to section 6(3) was obiter and no decision was made in respect of that section. This is a complete answer to the appellants’ submission that section 6(3) is somehow swept up and included in the declaration of unconstitutionality of sections 6(2) and 7(1). Sections 6(2) and 6(3) deal with different matters and, though possession is common to both offences, the declaration of unconstitutionality of section 6(2) does not apply to offences under section 6(3). Ventose J made that very clear in his judgment.

[25] Before leaving **Ras Sankofa** I would make the point that, notwithstanding the DPP’s concession regarding the effect of the case on the convictions for possession under section 6(2), the issue of the interpretation of Ventose J’s judgment on the extent of the declaration of unconstitutionality of section 6(2) and 7(1) should be reserved for full argument if and when the issue arises. This Court’s decision should not be interpreted as declaring or affirming that section 6(2) of the Drugs Act is void or unconstitutional for all purposes.

[26] Based on the DPP’s concession I would allow the new ground of appeal to the extent of quashing the convictions against the Appellants for possession of a controlled drug, cannabis.

Possession

[27] The offences of possession and possession with intent to supply to another are found in sections 6(2) and (3) of the **Drugs Act** which provide:

(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).

[28] To secure a conviction under section 6(2) or (3) of the **Drugs Act** the prosecution must prove beyond reasonable doubt that the accused person was in possession of the controlled drug. Possession is made up of two elements: physical control or custody of the drug with knowledge that you have it in your custody. In **Director of Public Prosecutions v Wishart Brooks**,⁷ a decision of the Privy Council on appeal from the Court of Appeal of Jamaica, Lord Diplock described possession as:

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

Lord Scarman's description in **R v Boyesen**⁸ is:

“Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it.”

[29] In legal terms, physical possession or custody is the *actus reus* and knowledge that you have the drug in your possession is the *mens rea*.

[30] There are two other principles of possession that are relevant to this case. Firstly, possession of the items on a boat are deemed to be in the possession of the captain. In **Ortiz and others v The Police**,⁹ a 1993 decision of this Court sitting in the

⁷ (1974) 21 WIR 411 at 415.

⁸ [1982] 2 All ER 161 at 163.

⁹ (1993) 45 WIR 118.

Commonwealth of Dominica, the four appellants were found on board a boat that had 51 bags of cocaine concealed in a water tank on the boat. Mr. Ortiz was the captain and the other appellants were crew members. All four were convicted by the magistrate. The captain's appeal failed in part because as captain he had custody and control of the boat and its contents and was presumed to have known that the bags of cocaine were a part of the boat's cargo. The appeals by the crew members succeeded because the prosecution did not adduce sufficient evidence that they had custody or control of the concealed bags of cocaine.

[31] In the instant appeal the Captain, as a matter of law, had control and custody of the drug boat and its contents. The four large jugs with the cannabis were on deck and not concealed. Mr. Williamson must have been aware of the jugs. When he was arrested, he told Inspector Bradshaw, after being cautioned, "I made a foolish mistake". He also told the inspector that he knew what was inside the jugs. The Magistrate admitted this evidence following a *voir dire* to determine its admissibility. The fact that Mr. Williamson was convicted means that the Magistrate was satisfied that he had custody of the jugs and was aware of their contents. He did not appeal against the Magistrate's decision.

[32] The other relevant principle of possession is constructive possession. Mr. Percival did not have physical possession of the cannabis. It was on the blue boat until the police took it into custody and there is no evidence that he was ever on board the boat. Proof of Mr. Percival's possession involves consideration of the principle of constructive possession. The prosecution discharged the burden of proving possession by Mr. Percival by relying on the principle of constructive possession considered in the context of the evidence in the case, and the further principle of joint enterprise which I deal with below.¹⁰

[33] Constructive possession can be established by evidence that a person, though not in physical possession, nonetheless is aware of the presence of the drug and has

¹⁰ Paragraphs 59-62.

some control over it. This can be illustrated by the decision of this Court, sitting in the Virgin Islands, in **Malcolm Maduro v The Queen**.¹¹ Two divers found an unmanned dinghy floating in the sea with eight bags of cocaine. They handed over six of the bags to the police. Later they were approached by Mr. Maduro and another man. They demanded the return of “their two bags of drugs” or payment for them. The divers denied having the two bags. They were threatened by Mr. Maduro and his companion. The next day they went to the divers’ dive shop. The divers called the police and Mr. Maduro left. Mr. Maduro was later arrested and charged with blackmail and possession of a controlled drug. He was convicted on both counts by a jury. In his appeal he contended that he should not have been convicted of possession because he never had physical possession of the drugs. The Court of Appeal rejected this argument and effectively affirmed the jury’s decision that, on the facts, Mr. Maduro had constructive possession of the drugs. The unanimous decision of the Court was delivered by Chief Justice Rawlins. At paragraph 33 the Chief Justice referred to the English Court of Appeal decision of **R v Pentecost**,¹² a case on constructive possession, and continued –

“This, the English court said, was because it is perfectly possible in law for possession to exist without physical custody. In my view this latter statement throws light on the present case in the sense that it was open to the jury to believe that Mr. Maduro could have possessed the 2 bags of drugs without having physical custody of them or of the boat from which they were recovered. In other words, by constructive possession.”

- [34] The learned DPP also referred to the case of **R v North**¹³ for the basic principle that whether a person is in possession is a question of fact.
- [35] The issue in this appeal is whether the evidence establishes beyond reasonable doubt that Mr. Percival had constructive possession of the cannabis on the boat. In other words, did he know that the approaching boat had cannabis on board to be delivered to him and Mr. Simmonds. In reviewing the facts, I remind myself that the Magistrate had the benefit of seeing and hearing the witnesses give their evidence

¹¹ HCRAP2007/004 (delivered 19th December 2008, unreported).

¹² [1998] EWCA Crim J0310-2.

¹³ [2001] EWCA Crim 544.

and observing their demeanour and this Court should not interfere with those findings unless I am satisfied that she was plainly wrong.¹⁴

[36] The Magistrate described the case correctly as one involving circumstantial evidence to prove the guilt of the defendants. As stated above, Mr. Percival did not have physical possession of the drugs, but the circumstances pointed to him knowing that the drugs were on board the blue boat to be delivered to him and Mr. Simmonds. I have already summarised the facts and I now turn to the Magistrate's treatment of the facts and the inferences that she drew from the primary facts.

[37] The Magistrate set out a very helpful summary of the circumstances that she considered that pointed to the guilt of the appellants at e-page 131 of Hearing Bundle 1 under the heading "Findings of fact and evidence relied on by Court". In summary, she said that it was not coincidental that:

- (a) The appellants arrived at Conaree Beach just after 5 o'clock in the morning, Mr. Percival driving Mr. Simmonds' pickup and shortly thereafter the blue boat arrived coming through the Gate.
- (b) Mr. Percival acted suspiciously by piling palettes, searching the bushes and running back to the pickup after receiving a telephone call.
- (c) US\$1,855.00 was in the pickup, wrapped in three layers of plastic waterproofing suggesting that it was to be delivered to a boat.
- (d) The owner of the pickup that Mr. Percival was driving, Mr. Simmonds, was close by overlooking Conaree Beach and the Gate with binoculars.
- (e) The captain told the person on the beach (Supt Adams) to come for the stuff.
- (f) Mr. Simmonds has a rented apartment that is used as a drug kitchen..

¹⁴ See paragraph 16 above.

[38] This is not a complete listing of the circumstantial evidence considered by the Magistrate in coming to her conclusion that “Percival was not an innocent pickup man but knew he had come to collect drugs.” This is a finding of fact by the Magistrate based on the evidence that she clearly set out and considered that Mr. Percival had constructive possession of the cannabis on the boat. It reinforces her earlier finding on the page numbered 126 of her Reasons, where, after referring to **Malcolm Maduro v The Queen**, she stated:

“Likewise the court in this case found that Percival being the pickup man had constructive possession of the drugs because he had come to collect the drugs and the drugs had in fact arrived in the Federation, because the boat was in sight, (about 700 to 800 feet away), when Percival was whisked away into hiding by the police and the captain sought to deliver them to the undercover cop posing as the pickup man.”

[39] There is no basis for this Court to interfere with the finding that Mr. Percival had possession of the cannabis.

The telephone records

[40] The Magistrate found the case against the Appellants proved without the evidence extracted from the cell phones. Having done so, she proceeded to deal with the cell phone evidence as what she described colloquially as “merely icing on the cake”.¹⁵ I will also deal with this evidence because I find it to be compelling. I will deal with it under the headings of content, objections to admissibility, and effect.

Content of the records

[41] The telephone evidence was extracted from the cell phones taken from the Appellants, Mr. Williamson and the deceased Captain. The phones were examined by Corporal Travis Henry. Corporal Henry testified on behalf of the Crown. He gave evidence of his training and experience in cybercrime and was treated by the Magistrate, without objection by counsel for the Appellants, as an expert witness.

¹⁵ Hearing bundle 1 e-page 135.

He gave evidence about the procedures that he used to extract the information from the phones and how the information was logged and preserved.

[42] The information consisted of:

- (a) written transcripts of Whatsapp voice messages between the phones taken from Mr. Percival and Mr. Williamson;
- (b) pictures and GPS coordinates of the drop site on the phones taken from Mr. Simmonds, Mr. Williamson and the Captain;
- (c) records of several telephone calls during the hour before the boat arrived from Mr. Simmonds' phone to phones of Mr. Percival and Mr. Williamson.

The Appellants did not object to the admission of the cell phones. It is the information from the phones listed above that they objected to trenchantly.

Objections to the telephone evidence

[43] The Magistrate relied on **Kevin Fearon v R**,¹⁶ a decision of the Supreme Court of Canada, for the proposition that there is a common law right to search a cell phone found on a person as an incident of a lawful arrest. She also noted that the cybercrime officer had applied for search warrants for the specific purpose of searching the phone.

[44] The Appellants submitted that the Magistrate erred in proceeding this way. Without commenting specifically on **Fearon** they submitted that the telephone records are an electronic record within the meaning of the **Evidence Act, 2011**¹⁷ and the Magistrate should have had regard to section 146 of the Act. The DPP did not seriously dispute that the telephone records are electronic records for the purposes of the Evidence Act. His position was that the prosecution had complied with the

¹⁶ [2014] 3 SCR 621.

¹⁷ No. 30 of 2011.

provisions of section 146. Section 146 provides under the heading “Authentication” that:

“The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.”

[45] Corporal Henry’s evidence about his training and expertise and the procedures and equipment that he used to extract and store the records is unchallenged. There is no evidence challenging the systems used by the police for retrieving the information or alleging that there was tampering with the evidence. The bald statements of counsel that the records do not comply with section 146 is not enough.

[46] I also note that there is a general rule about the admissibility of electronic records in section 145 which states that:

“Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.”

[47] I am satisfied that the evidence led by the prosecution in the court below satisfied the requirements in section 146 and the Appellants’ objection on this ground fails.

[48] The Appellants also relied on the **Electronic Crimes Act**¹⁸ to say that the police had to have regard to this Act when they secured the search warrants to search the cell phones, and only a magistrate can issue such a warrant. Since the warrants in this case were issued by a Justice of the Peace, they are invalid.

[49] I will deal with this submission in short order. The object of the **Electronic Crimes Act** is to prohibit, by criminal sanction, unauthorised access to and abuse of computers and computer systems, and the information contained in these systems. The relevant provision is section 15 which provides that a magistrate can issue a search warrant to search electronic equipment if there are reasonable grounds for

¹⁸ Cap. 4.41 of the Laws of Saint Christopher and Nevis.

suspecting that “an offence under this Act” has been or is about to be committed. The DPP submitted that there is no allegation that an offence had been committed against any of the provisions of the Act. Corporal Henry applied for warrants on suspicion of “...a crime of suspected drug smuggling”.¹⁹ Drug smuggling is an offence under the **Drugs Act**.

[50] I agree with the DPP’s response. There is no requirement for the police to comply with the provisions of the **Electronic Crimes Act** in securing the search warrants to search the cell phones in respect of a suspected drug smuggling offence. They authorised the police to search the cell phones for “...information pertinent to police investigations regarding a crime of suspected drug Smuggling” and “to bring the same, before this Court to be dealt with as the law directs.”²⁰ The police followed the standard procedure in the **Magistrate’s Code of Procedure Act**²¹ for securing the warrants. There was nothing irregular about a Justice of the Peace issuing the warrants.

[51] To bolster its case on the reliability of the voice note evidence, the prosecution led evidence by Inspector Travis Rogers who knew Mr. Simmonds for 23 years. During that time, he had frequent conversations with Mr. Simmonds, both as a teenager and as an adult, and he was familiar with his voice. He testified that he recognised Mr. Simmonds’ voice on three of the voice notes.²²

[52] Finally, Dr. Browne made the point that there was no evidence that the Appellants had the phones when the notes and pictures were sent. That does not matter. The phones were in the Appellants’ possession when they were arrested and there is no evidence to suggest that the phones were not in their possession during the preceding two days. The Appellants’ phones showed communications with the phones of the Captain and Mr. Williamson up to and including the day of the drug

¹⁹ Hearing bundle 2 e-page 38.

²⁰ Ibid.

²¹ Cap. 3.17 of the Laws of Saint Christopher and Nevis.

²² Hearing bundle 1 e-page 82.

drop on 1st October 2015. The question of who had possession of the phones when the notes and messages were sent goes to weight, not admissibility.

[53] I find that the Magistrate did not err in admitting and relying on the telephone records.

Effect of the telephone evidence

[54] In addition to the circumstantial evidence outlined above, there is the evidence of the telephone records. The evidence is outlined in paragraph 42 above.

[55] The only explanation for the voice messages between the phones of Mr. Percival and Mr. Williamson in the two days leading to the drug drop on 1st October 2015 is that there was something going on between the two men. The thing that was going on is clear from the messages and the other evidence including the arrival of the cannabis on 1st October 2015. For example, both phones have the following identical message:

“PTT-201550929 WA0003

“Yeah de gate, de gate if you look on you left and you look on your right you gon see a little bit of white water. Yeah dats de gate dere in between. Wa happen is, is very calm now so you, e gon be harder to see it because usually when e have a lil water you got de, those where de waves break, you got de white water on your left hand and on you right. When you see those ahm, da little white water dere on de left and right das, das de end of de gate.”²³

The evidence is that letters and numbers at the top of the message indicate the date of the voice note – 29 September 2015. This was two days before the boat’s arrival. There are five other voice notes between the said two phones between the 26th and 29th of September, all dealing with the location of The Gate and how to navigate a boat through it.

[56] The telephone evidence also includes pictures and GPS coordinates of the drop site on Mr. Simmonds’ phone that corresponded with similar images on the phones of the Captain and Mr. Williamson. The records also reflect telephone calls between the Appellants in the hour before the boat landed on 1st October 2015.

²³ Hearing bundle 2 e-page 119.

[57] The Magistrate noted that the prosecution was relying on the telephone records "...to establish that there was a link between the defendants by showing that Simmonds and Williamson were in communication with each other."²⁴ Dr. Browne KC said that if this evidence is authenticated (as required by section 146 of the **Evidence Act**) it is tenuous and does not prove a connection. The telephone evidence was authenticated and it was not tenuous – it was compelling. It establishes beyond reasonable doubt a connection between the Appellants and the persons who were on the drug boat. It includes information and directions about The Gate and how to navigate through it. It is more than a coincidence that two days after the voice note messages, at just after 5 o'clock in the morning, the boat with the cannabis navigated through The Gate with the cannabis on board and was met by Mr. Percival (with Mr. Simmonds observing from a distance).

Joint enterprise

[58] It is a basic principle of criminal law that where A and B embark on a joint criminal enterprise, each will be liable for acts committed in pursuance of the joint enterprise with the necessary intent. It does not matter which one committed the fatal act, such as shooting the deceased. Both are liable so long as the fatal act was a part of the joint enterprise.²⁵ The Appellants submitted in their submissions that there was no evidence of an agreement between them and Mr. Williamson sufficient to find a joint enterprise.

[59] The Magistrate did not make a specific finding of joint enterprise, but it is apparent from her decision that she treated the case as one of joint enterprise. Why else would the Appellants submit in their submissions that the Magistrate used joint enterprise to propel her to a finding that the Appellants were guilty?²⁶ And then Dr. Browne pursued the issue of joint enterprise in his oral submissions submitting that there was no evidence of a joint enterprise. The DPP's response was that there was sufficient

²⁴ Page 133 of the Magistrate's Reasons for Decision.

²⁵ Charles v R (2017) 90 WIR 267.

²⁶ Paragraph 30 of the Appellants' submissions.

evidence that the Appellants, the Captain and Mr. Williamson were involved in a joint criminal enterprise to possess and import cannabis into the Federation, and it does not matter who had physical custody of the cannabis and the roles that they played. They are all guilty.

[60] I agree with the DPP's position that there was a joint enterprise between the Appellants, the Captain and Mr. Williamson to possess and import drugs into the Federation. The finding of a joint enterprise is based on the strong circumstantial evidence outlined above. The inference of a joint enterprise becomes irresistible with the addition of the telephone records which establish beyond reasonable doubt the link between the parties at the material time. It was, as the Magistrate said, "the icing on the cake".

[61] The effect of the finding of joint enterprise (as submitted by the DPP) is that the Appellants and Mr. Williamson are guilty of possessing the cannabis and importing it into the Federation and it does not matter what roles they played and who had physical custody of the drugs. They were all in possession and are equally guilty. This finding is consistent with several authorities in England and the Eastern Caribbean including the decision of this Court in **Charles v R**,²⁷ where the appellant was convicted of murder even though there was no evidence to show which of the three armed men who went to the scene of the killing fired the fatal shots. It was a joint enterprise and they were equally responsible.

Aiding and abetting

[62] Responsibility for a criminal offence may be incurred either as a principal or as an accessory. The principal is the actual perpetrator of the offence while the accessory aids, abets, counsels or procures the commission of the offence.²⁸

²⁷ Ibid note 24.

²⁸ Blackstone's Criminal Practice 2017, at A4.1.

- [63] The charges and convictions for aiding and abetting are against Mr. Simmonds and are set out in paragraph 1(ii)(b) and (c) above. In short, he was convicted of aiding, abetting, counselling and procuring Mr. Percival and Mr. Williamson (in separate charges) in the possession and importing charges.
- [64] Section 10 of the **Small Charges Act**²⁹ authorises a magistrate to try a person for aiding, abetting, counselling and procuring the commission of any offence punishable on summary conviction. The charges against the Appellants and Mr. Williamson are triable summarily. Dr. Browne submitted that there was no proof that Mr. Simmonds aided or abetted Messrs. Percival or Williamson in the commission of their crimes or conscientiously did anything to contribute to the success of the crimes. Further, there is no evidence that Mr. Williamson committed any offence for which he has been charged and convicted. The difficulty with this submission is that it does not take account of the evidence in the case.
- [65] The evidence against Mr. Simmonds that he assisted Mr. Percival includes: (a) allowing Mr. Percival to use his pickup to go to the drop site at 5 a.m. on 1st October 2015; and (b) observing proceedings on the beach that morning from a lookout point while being in cell phone contact with Mr. Percival before the arrival of the drug boat.
- [66] The evidence of assisting Mr. Williamson is more powerful. It includes (a) sending voice notes and pictures to him about The Gate and the drop site; and (b) acting as the lookout person on the morning of the delivery of the cannabis. The suggestion that there is no proof that Mr. Williamson had possession of the cannabis and was not guilty of any offence is untenable. He was the engineer on the boat where the jugs were on the deck; he told the police that he made a mistake and that he knew what was in the jugs; and he was convicted by the Magistrate and did not appeal his convictions.

²⁹ Cap. 4.36 of the Laws of Saint Christopher and Nevis.

[67] There was ample evidence before the Magistrate to convict Mr. Simmonds of aiding and abetting Mr. Percival and Mr. Williamson to commit the offences of possession with intent and importation. Further, the finding that there was a joint enterprise between the Appellants, the Captain and Mr. Williamson is sufficient in law to find Mr. Simmonds guilty, whether as principal or accessory. The role that he played is of less importance in a joint enterprise (see paragraphs 59-62 above).

Importation

[68] The importation of controlled drugs is prohibited by section 4 of the **Drugs Act** which provides:

“Subject to subsection (2), (a) the importation of a controlled drug; and (b) the exportation of a controlled drug; are hereby prohibited.”

[69] The Defendants were convicted and fined for importing cannabis into the Federation. To sustain the conviction for importation the prosecution had to prove that the boat was coming from a place outside the Federation with the cannabis on board. There was no direct evidence of where the boat was coming from, far less of how and where the cannabis was put on board. The prosecution sought to prove that it was coming from outside the Federation by circumstantial evidence. The circumstantial evidence consists of:

- (a) the Captain and Mr. Williamson did not live in the Federation;
- (b) the records of the border management system of the Immigration Department show that Mr. Williamson had visited and departed from the Federation on two previous occasions;
- (c) the drug boat had an Antiguan registration number;
- (d) Conaree Beach is not a lawful port of entry; and
- (e) there was no record of the boat, being a foreign registered boat, and its crew, being foreign nationals, getting clearance to enter the Federation.

[70] Based on this evidence the Magistrate was satisfied (beyond reasonable doubt) that there was no record of the boat entering the Federation lawfully, and therefore it had entered the Federation unlawfully from outside. In her words:

“Foreign nationals on a foreign boat with no record of them or the boat entering the Federation was enough in the court’s opinion to show that the boat was entering from outside the Federation.”³⁰

[71] The Magistrate found that the circumstantial evidence was sufficient to convict the Defendants.

[72] This is a finding based entirely on circumstantial evidence and there is no gainsaying that a person can be convicted of an offence based on circumstantial evidence. But the circumstantial evidence must point to the guilt of the accused person and if there is an alternative reasonable explanation or conclusion he is to be given the benefit of the doubt. The learned editors of **Blackstone’s Criminal Practice** put it this way:

“However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that: ‘It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’ (*Teper v The Queen* [1952] AC 480, per Lord Normand at p.489). Nonetheless, there is no requirement, in cases in which the prosecution’s case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v DPP* [1973] 1 All ER 503.”³¹

[73] The authorities show that circumstantial evidence, though often reliable, must be approached with caution. The evidence that the Magistrate relied on may have been sufficient to infer that the boat was entering the Federation from outside. But was it sufficient to find that the cannabis was placed on the boat outside the Federation and brought into the Federation. There is no record of when the boat entered the Federation and it could be that it entered illegally before 1st October

³⁰ Hearing Bundle 1 e-page 128.

³¹ Blackstone’s Criminal Practice 2022 at F1.22.

2015, picked up the drugs and then came to Conaree Beach. This is speculative, but the kind of speculation that the Appellants relied on.

[74] Dr. Browne KC submitted, for example, that the cannabis could have been put on board the boat in Nevis (an island in the Federation) and then brought to Saint Kitts. When this hypothesis was put to the learned DPP by the Court he responded by agreeing that it was possible that the drug boat could have been coming into the harbour at Conaree Beach from a place within the Federation where the cannabis could have been loaded onto the boat. Therefore, there was reasonable doubt about the conviction for importation and he conceded that the conviction should be quashed.

[75] I do not accept his concession. The prosecution invited the Magistrate to infer from the direct evidence that the boat came into St Kitts with the cannabis on 1st October 2015. The defence is saying that there is another inference – that the boat may have been coming from within the Federation. However, there is no evidence that suggests that the drug boat arrived in the Federation some time before 1st October 2015 and then came to Conaree Beach during the morning of 1st of October 2015. The suggestion that it may have been coming from Nevis (or elsewhere in the Federation) is based on nothing more than speculation. The alternative to the prosecution's case should have some evidentiary basis. There was none in this case. As stated above, the Magistrate had before her evidence of a foreign registered boat entering the Federation illegally from the Atlantic Ocean through the Gateway early in the morning on the 1st October 2015. The Magistrate, who had the benefit of seeing the witnesses give their evidence and observing their demeanour, was entitled to come to the conclusion that she was satisfied beyond reasonable doubt that the drug boat was entering the Federation from a place outside the Federation based on the cumulative effect of the circumstantial evidence and the other evidence in the trial. There is no proper basis for this Court to interfere with the Magistrate's finding that the cannabis was imported into the Federation on the drug boat and the resulting conviction for importation.

[76] I would dismiss the appeals against the convictions for importation and affirm the sentences imposed by the Magistrate.

[77] The Court was addressed on the alternative situation of the impact on the sentences for possession with intent if the convictions and sentences for importation were quashed. The latter were the only convictions on which the Magistrate imposed a sentence. Dr. Browne KC's submission was that if the convictions for importation were quashed (as he contends), and the convictions for possession with intent were affirmed (contrary to his submissions), the sentences imposed on the convictions for importation could not be transferred to the convictions for possession with intent. This is an entirely academic exercise because the appeals against the importation convictions are dismissed. Further, at the end of the hearing on 21st June 2022 the parties were ordered by the Court to file written submissions in relation to the application of Part XVI of the Evidence Act and on the Court's powers to substitute or impose a fresh sentence on the possession with intent convictions if the importation convictions were quashed ("the Directions Order"). The deadline for filing the submissions was 19th July 2022. No submissions were filed and the Court proceeded to settle its judgment on the appeals without the benefit of additional submissions. Subsequently, on 17th October 2022, the Appellants filed written submissions. I note the following:

(a) the submissions were filed almost three months after the deadline for filing with no explanation for the inordinate delay and no request for an extension of time;

(b) the submissions consist of 22 paragraphs. The first 15 paragraphs deal with an issue relating to the search warrants that was not requested by the Directions Order. It is a blatant attempt to make additional submissions after the completion of the hearing of the appeal without the Court's permission; and

(c) the remaining 6 paragraphs of the submissions deal with the sentencing issue which is now redundant because of the decision on the importation appeals.

[78] In the circumstances I would not consider the late submissions filed by the Appellants on 17th October 2022 and note that even if the last six paragraphs of the submissions were considered they would not have had an effect on the sentences.

Appeals against sentence

[79] The Appellants were convicted of importing into the Federation 23 kilograms or 50.6 pounds of cannabis with an estimated street value of EC\$607,200.00. Mr. Percival was fined \$60,000.00 to be paid in three months and in default four years imprisonment. His notice of appeal contains a ground of appeal against the sentence but it was not pursued in his counsel's written and oral submissions. I treat it as having been withdrawn, but if it is still being pursued in silence I would dismiss it. The sentence was not excessive. If anything, it was lenient having regard to the seriousness of the offence, the detailed planning of the offence, and the amount of drugs involved.

[80] Mr. Simmonds was fined \$300,000.00 to be paid in five months and in default four years imprisonment. Mr. Simmonds pursued his appeal against sentence on the ground that it was excessive and disproportionate to the \$60,000.00 imposed on Mr. Percival. The Magistrate's reasons for imposing a higher fine on Mr. Simmonds are clearly articulated in her Reasons. She found that he was higher up in the drug hierarchy, he owned the vehicle that was used by Mr. Percival, and he rented the drug kitchen. This is ample justification for imposing a higher fine on Mr. Simmonds. Further and for the reasons stated in the final sentence of the preceding paragraph, I do not find that a fine of \$300,000.00 is excessive.

[81] I would dismiss the appeals against sentence.

Disposal

[82] I would make the following orders:

- (1) The appeal by Mr. Percival against his conviction for possession of a controlled drug, cannabis, is allowed and the conviction is quashed.
- (2) The appeals by Mr. Percival against his conviction for possession of a controlled drug for the purpose of supplying it to another, and importation, are dismissed.
- (3) The appeal by Mr. Simmonds against his convictions for aiding and abetting Mr. Percival in the possession of a controlled drug is allowed and the conviction quashed.
- (4) The appeal by Mr. Simmonds against his conviction for aiding and abetting Mr. Williamson in the possession of a controlled drug is allowed and the conviction quashed.
- (5) The appeals by Mr. Simmonds against his convictions for importation, aiding and abetting Mr. Percival in the importation of a controlled drug, and aiding and abetting Mr. Percival in the possession of a controlled drug for the purpose of supplying it to another are dismissed.
- (6) The appeals by Mr. Simmonds against his convictions for aiding and abetting Mr. Williamson in the importation of a controlled drug, and for aiding and abetting Mr. Williamson in the possession of a controlled drug for the purpose of supplying it to another are dismissed.

(7) The appeals by the Appellants against their sentences for importation of a controlled drug are dismissed and the sentences are affirmed.

I concur
Gertel Thom
Justice of Appeal

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

By the Court

Chief Registrar