

SAINT LUCIA

**EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
(CRIMINAL)**

**CASE NO. SLUCRD2017/0595/0595A**

**BETWEEN**

**WPC 783 CHARLERY**

**and**

- 1. JEMOL POMPEY**
- 2. JULIAN EVANS**

Defendants

**Appearances:**

Stacey-Anne St. Ville for the Crown  
Lorne Theophilus for the Defendants

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2019: February 21.  
May 6<sup>th</sup>  
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**DECISION**

[1] **TAYLOR-ALEXANDER, J.:** At the sufficiency hearing culminating on the 12<sup>th</sup> of February 2019, the Defendants made an oral application for the proceedings to be dismissed for the following reasons:—

- (i) The Crown had not established the elements of the offences of possession of a controlled drug, and possession with intent to supply a controlled drug under the Drug (Prevention of Misuse) Act sections 8(2) and 8(3) Cap 3.02;
- (ii) The documentary evidence submitted by the Crown did not disclose prima facie evidence, that the Defendants committed any offence;
- (iii) The probative value of the documentary evidence submitted is not sufficient for the Court to find as a matter of law, that a jury taking the

evidence in the light most favourable to the prosecution could return a verdict of guilty against the Defendants.

- [2] The Defendants in effect challenged the crown on whether it had met the threshold criteria fixed by Rule 10.3 (1), (2) (4) and (5) of the Criminal Procedures Rules 2015.

### **Background**

- [3] The Defendants are charged with the possession of a controlled drug and possession with intent to supply, for which the Crown at the sufficiency hearing is required to lead evidence on the elements of possession; that what was possessed was in fact a controlled drug, and that it was possessed by the Defendants. Where there are exhibits establishing that what was recovered is a controlled drug, the Crown is under a further duty to prove the exhibit's integrity beyond a reasonable doubt such that it must be shown that the exhibits seized during the investigation, were the same exhibits analyzed and the same exhibits presented in evidence before the court.

### **The Relevant Evidence**

- [4] Officers of the Marine Unit including Corporal 113 Henry were aboard Papa Oscar 10 patrolling the Southern sea of the island, when a vessel was observed moving into Moule A Chique, and parcels were being thrown out overboard. The vessel was intercepted and five (5) polythene bags were recovered from the water with sand bags attached to two (2) of them. The persons on board who are allegedly the Defendants were escorted to the Marine Unit together with the recovered packages which were in five (5) polythene bags and were handed to Constable 783 Charlery. Constable Charlery received the Defendants and the packages from Corporal 113 Henry. She cautioned the Defendants and proceeded to review the content of the five (5) polythene bags in their presence.

[5] Her Evidence is that:—

- (1) The 1<sup>st</sup> polythene bag contained **three (3)** packages wrapped in clear and brown tape with red markings on them. All, upon incision revealed plant material she suspected to be cannabis. She placed evidence tape over the incision to seal it; she signed across the tape and invited the Defendants to do the same. They refused. Officers 480 Mathurin and 113 Henry signed across the tape as well. The packages were placed back in the polythene bag sealed and labelled **1**.
- (2) In the 2<sup>nd</sup> polythene bag, were **three (3)** packages wrapped in clear and brown tape with red marking on them which she suspected was also cannabis. She placed an incision, revealing plant material. She showed the same to the Defendants and told them of her suspicions. The packages were resealed with evidence tape and signed with the Defendants continuing to refuse to affix their mark. They were placed in the polythene bag sealed and labelled **2**.
- (3) The 3<sup>rd</sup> polythene bag contained **four (4)** packages wrapped in clear and brown tape with red markings on them. Incisions were similarly made in the presence of the Defendants, which revealed green plant material suspected to be cannabis. It was shown to the Defendants then resealed in similar fashion. The packages were placed two each in a polythene bag sealed and labelled **3A** and **3B**. She signed across all the seals together with Officers 480 Mathurin and 113 Henry.
- (4) The 4<sup>th</sup> polythene bag contained **three (3)** packages wrapped with clear and brown tape with sliver and green markings on them. Incisions were placed, the content revealed green plant material suspected to be cannabis. A similar protocol was adopted. **Two (2)** packages were placed in each of **two (2)** polythene bags and labelled **4A** and **4B**.

- (5) The 5<sup>th</sup> polythene bag contained **two (2)** packages wrapped in clear and brown tape with red markings and another package with purple markings containing four (4) rectangular packages wrapped in clear tape with purple markings. Incisions were placed in all six (6) packages, and all revealed plant material suspected to be cannabis. The packages were resealed following the same protocol. All were placed in the polythene bag sealed and labelled **5**. The officers affixed their signatures. The Defendants through the entire process objected to their mark being placed on the exhibits.
- [6] WPC 783 Charlery delivered the polythene bags which numbered seven (7) to the forensic lab on the **22<sup>nd</sup> of September 2017** and were handed over to the drug analyst Fernanda Henry sealed and intact and each dated 1<sup>st</sup> September 2017, with the names Jemol Pompey and Julian Evans written on it. She received a drug submission form in the names Jemol Pompey and Julian Evans with the case number 2017 – 0044. The exhibits on submission weighed 107.49 kg.
- [7] On the **21<sup>st</sup> of December 2017** Wpc 783 Charlery proceeded to the forensic lab where she received from the analyst Fernanda Henry seven (7) white polythene bags containing plant material, sealed and intact, together with drug submission form with Jemol Pompey and Julian Evans on it. It had case number 2017-0044 written on it.
- [8] On the **30<sup>th</sup> of April 2018**, she returned to the forensic lab where she again handed over to Fernanda Henry seven (7) white polythene bags with plant material sealed and intact for analysis. Each had the names Jemol Pompey and Julian Evans written on it. She received the drug submission form with case number 2017-0044. The exhibits on submission are alleged to have weighed 107.49 kg.
- [9] The certificate of analyst filed on the 6<sup>th</sup> of February 2019 was headed Agency case numbers SLUCRD2017/0595, 0595A, 0594, 0594A and Lab

case number 2017-0044. It stated that evidence was received by the control unit of the St. Lucia Forensic Lab on the **20<sup>th</sup> of June 2018** at 14:15 hours and returned on the 13<sup>th</sup> of July 2018 at 15:30 hours. A further certificate was filed on the 11<sup>th</sup> of February 2019, containing the evidence submission forms and internal tracking sheets together with a weight calculator and examination notes.

[10]

The Analyst describes the items received as follows:-

| ITEM                | DESCRIPTION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|---------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2017-0044-01</b> | <p data-bbox="751 657 1343 762">One (1) white polythene bag in part marked "(1) and silver markings "A" to the front side and back of the bag "Sealed and Intact. Containing:</p> <p data-bbox="751 768 1343 835">A: One (1) bale of green plant material wrapped in brown tape, and layers of clear plastic.</p> <p data-bbox="751 867 1343 934">B: One (1) bale of green plant material wrapped in brown tape and layers of clear plastic.</p> <p data-bbox="751 966 1343 1033">C: One (1) bale consisting of two (2) smaller bales.</p> <ol style="list-style-type: none"> <li data-bbox="751 1064 1343 1169">1. One (1) bale wrapped in brown tape, layers of black plastic and clear tape containing dried green plant material.</li> <li data-bbox="751 1201 1343 1306">2. One (1) bale wrapped green plant material consisting of two (2) smaller bales (a) and (b) both wrapped in clear plastic.</li> </ol> |
| <b>2017-0044-02</b> | <p data-bbox="751 1350 1343 1528">One (1) white polythene bag in part marked "Type of offense: Poss of c/drugs, Suspect: Jemol Pompey, Julian Evans, Date and Time of recovery: 01.09.17" Sealed and Intact. Containing:</p> <p data-bbox="751 1560 1343 1627">A: One (1) bale of green plant material wrapped in brown tape and black plastic.</p> <p data-bbox="751 1659 1343 1726">B: One (1) bale of green plant material wrapped in brown tape and clear plastic.</p> <p data-bbox="751 1757 1343 1822">C: One (1) bale of green plant material wrapped in brown tape and black plastic.</p>                                                                                                                                                                                                                                                                                                                    |

**2017-0044-03**

One (1) white polythene bag in part marked "Type of offense: Poss of c/drugs, Description of evidence: Two (2) packages of plant material sealed in white polythene bag, Suspect: Jemol Pompey, Julian Evans. "Sealed and Intact. Containing:

A: One (1) bale of green plant material wrapped in brown tape and clear plastic.

B: One (1) bale of green plant material wrapped in brown tape and clear plastic.

**2017-0044-04**

One (1) white polythene bag in part marked "Type of offense: Poss of c/drugs, Description of evidence: Two (2) packages of plant material sealed in white polythene bag." Sealed and Intact. Containing:

A: One (1) bale of green plant material wrapped in layers of brown tape and clear plastic.

B: One (1) bale of green plant material wrapped in layers of brown tape and clear plastic.

**2017-0044-05**

One (1) white polythene bag in part marked: *Description of evidence, two (2) packages of plant material sealed in, Suspect: Jemol Pompey, Julian Evans, Date and Time of Recovery: 01.09.17. Marked 4A in black with A in silver on both sides of the packages.* Sealed and Intact. Containing:

A: One (1) bale of green plant material wrapped in brown tape and clear plastic.

B: One (1) bale of green plant material wrapped in brown tape and clear plastic.

**2017-0044-06**

One (1) brown evidence paper bag in part marked "One package of plant material sealed in a brown exhibit bag." Sealed and Intact. Containing:

A: One (1) bale of green plant material wrapped in brown tape and clear plastic.

**2017-0044-07**

One (1) white polythene bag in part marked "Type of offense: Poss of c/drugs, Suspect:

Jemol Pompey, Description of evidence: Two (2) packages of plant material sealed in, Suspect: Jemol Pompey, Julain Evan.” Sealed and Intact. Containing:

A-D: Four (4) rectangle packages of green plant material wrapped in brown tape and clear plastic.

E-F: Two (2) bales of green plant material wrapped in brown tape and clear plastic.

G: One (1) piece of brown cord.

H: One (1) piece of yellow cord.

I: Clear plastic wrapping.

**The Defendants Submissions:-**

[11] The Defendants challenge whether the evidence presented by the Crown establishes a nexus between the packages recovered by the police during investigation and the packages presented to, received and analyzed by the forensic unit. They submit that there are grave discrepancies in the evidence presented, namely: —

- (i) Discrepancies between the date of submission of the exhibits by the police to the forensic lab vis a vis, the date the lab states it received the exhibits.
- (ii) Distinctions in the evidence of the markings allegedly made by the Investigating Officer and other Officers and the markings identified by the analyst report.
- (iii) The exhibits failed to identify the names of the Defendants when referenced by the analyst, such that it is unclear to which case it referred.
- (iv) Distinctions in packaging.
- (v) Differences in the weight of exhibits as contained in the report and of the analyst and in the chain of custody record submitted by the police to the lab.

(vi) No explanation of relabeling in so far as the analyst report suggests there was relabeling.

[12] The Defendants submit more specifically that there were more exhibits analyzed than were recovered, the markings and weight of the exhibits were different in the police evidence from the analyst report. They contend that the seals and markings, together with the number of packages contained in the marked bags as referenced by the Analyst do not correspond with the number, seals and marking in the evidence of the Investigating officer. According to the Defendants, the report of the analyst suggests that items 2017-0044 – 01 to 2017-0044 – 07, contained a total of twenty one (21) packages extracted from six (6) polythene bags, and one (1) brown paper bag. Further that under the section “result” in the report of the analyst there is ascribed to each of the packages 2017-0044 – 1 to 2017-0044 – 07 a weight, with the total weight of the exhibits reflected as 40.8 kg and not 107.49 kg as stated by the Investigating Officer.

[13] The Defendants submit that these are fatal discrepancies which have damaged the integrity of the evidence and the chain of custody, such that the court cannot on the evidence account for the seizure and storage of the evidence before testing, nor can it satisfy itself that the evidence tested was in fact the evidence recovered at Moule A Chique on the night of the 1<sup>st</sup> of September 2017. The Defendants also submit that the gap in the evidence of the Investigating Officer as to when the exhibits were finally submitted for testing, and the date the lab allegedly received the exhibits is a fatal gap in the chain of custody of the exhibits.

[14] The Crown was offered the opportunity to respond to the incisive submissions of Counsel for the Defendants. The Crown made disclosure of additional notes of the analyst, all to address these discrepancies.

### **Analysis of the submitted Evidence**

- [15] The question requiring resolution is whether the identified discrepancies have been resolved or otherwise explained in the evidence so that I am sure of the integrity of the evidence. In so far as the discrepancies have not been resolved on the documentary evidence provided, whether the probative value of the evidence is compromised.
- [16] I had heard the submissions of the Crown and the Defendants over the course of two hearings and had rendered an oral decision in favor of Crown and committing the Defendants to stand trial. I had promised to reduce my decision to writing and do so now.

### **Chain of Custody**

- [17] To maintain the integrity of real evidence relied upon in court, it is necessary that the prosecution is in a position to account for all the time during which exhibits have been in the possession of the Police Investigators. This includes the storage, custody, testing or examination and/or disposal or retention of this evidence.
- [18] I have not found any statutory or procedural requirement to govern the custody of real evidence in St. Lucia. It is nevertheless recognized under the common law and by our Court of Appeal in **Damian Hodge v The Queen** HCRAP2009/001, Baptiste J said this: —
- “The underlying purpose of testimony relating the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court”.*
- [19] It is a chronological paper trail that documents who collected, handled, analyzed, or otherwise controlled pieces of evidence during an investigation. In order to

uphold the integrity of the evidence, it is necessary that chain of custody is an unbroken trail without gaps or discrepancies.

- [20] While the chain of custody is critical to the weight given to evidence in cases of real evidence, a break or gap in the custody is not always fatal. In **Damian Hodge v The Queen, Baptiste J** said this:—

*“Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the prosecution’s case unless they raise reasonable doubt about the exhibits integrity...”*

This was recently adopted as the correct approach by the in CCJ Appeal No. CR 1 of 2009 on an appeal from Barbados in **Grazette v The Queen** when they adopted the dicta of Romilly J, in the Canadian case of **R v Larsen** (2001) BCSC 597, who said: —

*“... Canadian case law makes it clear that proof of continuity is not a legal requirement and that gap in continuity is not fatal to the Crown’s case unless they raise a reasonable doubt about the exhibit’s integrity.”*

- [21] Based on this guidance, I now proceed to assess the submissions of the Defendants.

[22] **Obvious differences in the dates of Submission of the Exhibits**

The Defendants have appropriately pointed out that the evidence of the investigating officer WPC Charlery refers to two dates of submission of the exhibits. The 1<sup>st</sup> being the 21<sup>st</sup> of December 2017, thereafter on the 30<sup>th</sup> of April 2018. I find this to have been adequately explained away and is not an issue that continues to disturb these proceedings.

- [23] Where the discrepancy lies is in the evidence of WPC Charlery who claims to have resubmitted the exhibits for testing on the 30<sup>th</sup> of April 2018 and the report of the Analyst which states that the exhibits were received at 14:15 hours on the 21<sup>st</sup> of

June 2018. Having reviewed the total evidence submitted by the Crown, I am satisfied that although the Analyst in her report submits that she received the resubmitted evidence on the 21<sup>st</sup> of June 2018, the evidence of WPC Charlery, supported by an evidence submission form, is that the plant material exhibits were in fact submitted and received by the Analyst on the 30<sup>th</sup> of April 2018 at 10:10 a.m. The evidence submission form is signed by the Analyst as being received then. Although the inconsistency of the date documented in the report remains, in the face of a signed receipt by the analyst on the 30<sup>th</sup> of April 2018, I am inclined to accept as correct, the evidence of the Investigating officer. I find there to be no gap in the chain of custody and for the purpose of this submission, the integrity of the exhibits remains intact.

**Differences in the weight of the packages as described in the report and results of the Analyst and what was allegedly described in the Witness Statement of the Investigating Officer.**

[24] I agree that at first blush there appears to be a discrepancy in the weight calculations provided by the investigating officer in her evidence, and that provided by the Analyst. The more detailed report submitted by the Crown however resolves this discrepancy.

[25] It is resolved firstly by the weight calculator which provides the gross weight of each exhibit on arrival, and the leaving weight from the lab. The leaving weight is reflected as being slightly higher, accounted for by the repacking of the exhibits. Secondly, the examination case notes for each exhibit, explains how sampling of the exhibits was undertaken. One bale from each exhibit package, which was sub categorized as (A), and becoming 2017-0044 – 01A, and so on from each of the seven (7) exhibits. Each of these bales were weighed and their weights recorded. Thereafter smaller samples were taken from each of the bales within each of the seven (7) exhibits packages with smaller weights assigned each of these samples recorded as 01A, 01B, 01C, or 02A, 02B, OR 03A, 03B as the case may be. Example:-

| <u>ITEM</u>      | <u>SUBCATEGORY</u> | <u>WEIGHT</u> |
|------------------|--------------------|---------------|
| 2017 – 0044 – 01 | 2017 – 0044 – 01A  | 8.35 kg.      |
| 2017 – 0044 – 02 | 2017 – 0044 – 2A   | 5. 23 kg.     |
| 2017 – 0044 – 03 | 2017 – 0044 – 3B   | 4.70 kg.      |
| 2017 – 0044 – 04 | 2017 – 0044 – 04A  | 6. 24 kg.     |
| 2017 – 0044 – 05 | 2017 – 0044 – 05 A | 7.25 kg.      |
| 2017 – 0044 – 06 | 2017 – 0044 – 06A  | 8.27 kg.      |
| 2017 – 0044 – 07 | 2017 – 0044 – 07A  | 0.76 kg.      |

[26] In so far as the Defendants submit that the weight recordings are reflected as being significantly less at 45 kg as oppose to 107.49 kg recorded by the investigating officer, I am satisfied that the lesser weight is of the samples taken from the larger quantities, and that the exhibit weight when leaving the lab was more consistent with and only slightly higher that the weight of the total exhibits when submitted.

#### **Number of Packages**

[27] The second report of the analyst satisfactorily accounts for difference in numbers of packages between the Investigating officer's audit and the audit of the analyst. Relying on the example of the exhibit 2017-0044 – 01, this was described by the officer in her evidence as containing three (3) packages wrapped in clear and brown tape with red marking..... the report of the analyst of this exhibits provides for a white polythene with silver markings A to the front and side containing three (3) bales of green plant material wrapped in brown tape and layers of clear plastic, but that (C) contained two (2) smaller bales identified as C1 and C2 with C2 containing two (2) smaller bales of C2 (a) and C2 (b). This was all adequately explained and demonstrated in the accompanying photographs. On further review of the case file and the reports, I find there to be no discrepancy, but I am satisfied that the report of the analyst accounts for a closer examination of the exhibits unhindered by their packaging thus revealing the actual number of bales.

### **Markings**

- [28] I am of similar resolve in relation to the markings such that I have also concluded, that the differences in evidence between the Investigating Officer and the analyst, recording of the marking is resolved by the closer examination of the packages by the analyst revealing with specificity the outer markings and color, peeling back and describing each layer of the packaging until revealing the green plant material of all the exhibits, which the analyst subsequently concluded was cannabis.
- [29] In the circumstances and those issues being resolved in favour of the Crown, I find the Crown to have established a legally sufficient case on the evidence for the Defendants to stand committed for the trial of:
- (i) Possession of a controlled drug and
  - (ii) Possession with intent to supply.

**V. GEORGIS TAYLOR-ALEXANDER**  
HIGH COURT JUDGE

**BY THE COURT**

**REGISTRAR**