

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

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2015/0006

BETWEEN:

ANTONIO STOUTT

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mde. Esco L. Henry
The Hon. Mr. Dexter Theodore

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

Appearances:

Mr. Stephen Daniels for the Appellant
Ms. Tiffany Scatliffe, Director of Public Prosecutions, for the Respondent

2024: May 24;
2025: October 17.

Magisterial criminal appeal – Appeal against conviction – Unlawful possession of explosives – Sections 6 and 26 of the Explosives Ordinance – Whether the offence of unlawful possession of explosives was made out – Definition of ‘explosive’ - Whether a judicial decision which sets a precedent in law can be applied retroactively to a conviction – Section 11(2)(a) of the Firearms and Air Guns Act - Carrying a firearm without a licence – Presumption of ownership of firearm - Section 12 of the Firearms and Air Guns Act –Whether legal possession was made out on the evidence before the magistrate – Common law and statutory standards of proof - Whether the magistrate applied the correct standard of proof or properly assessed whether the appellant had discharged the evidential burden on a balance of probabilities imposed by the deeming provision in section 12 of the Firearms and Air Guns Act – Unlawful joint enterprise - Section 20 of the Criminal Code of the British Virgin Islands – Principles of joint enterprise distinct from joint possession

On 1st July 2015, the appellant was convicted in the Magistrate’s Court in the Territory of the Virgin Islands of the offences of: i) carrying a firearm without a licence, contrary to section 11(2)(a) of the Firearms and Air Guns Act, (the “Firearms Act”) of the Revised Laws of the Virgin Islands and; ii) unlawful possession of explosives, contrary to section 6 and section 26 of the Explosives Ordinance of the Revised Laws of the Virgin Islands. The case for the

prosecution was that on 14th April 2013, members of the Royal Virgin Islands Police Force were on patrol in the Road Town area when at about 4:15pm, they saw a Suzuki jeep (“the vehicle”) bearing license plate PD 46, traveling from the Purcell roundabout in a westerly direction, heading towards the Road Town area. The police officers followed the vehicle and subsequently intercepted same. The appellant was the driver of the vehicle, and Edwin Ortiz-Claxton, the co-defendant, was seated in the passenger seat. Upon conducting a search of the vehicle, a 9mm Luger firearm containing 4 rounds of ammunition was retrieved from underneath the front passenger seat where the co-defendant sat.

The appellant and his co-defendant were arrested and transported to the Road Town Police Station where they were subjected to separate caution interviews. In the appellant’s caution interview and in his evidence on oath, he denied knowledge of the firearm and ammunition and asserted that he was not aware that his co-defendant was in possession of the same. Neither the appellant nor his co-defendant was licensed to own firearms. The appellant’s co-defendant gave evidence at trial that he was not the owner of the vehicle, and it was the appellant who was the driver and that when he entered the vehicle, he did not see a firearm. The co-defendant, however, confirmed that he saw the appellant with a firearm in his hand at Free Bottom and the appellant handed the gun to him. He further stated that he handled the gun and returned it to the appellant. The co-defendant also explained that he was involved in a conversation with a group of persons including the appellant where the gun was shown. There were no other persons in the vehicle.

Both defendants were convicted on 1st July 2015. The appellant promptly filed a notice of appeal on 6th July 2015 which was later amended on 29th April 2024. The appellant challenged his conviction on both charges. With respect to the conviction for the offence of unlawful possession of explosives, the appellant contended that in view of this Court’s decision in *Selvin Chinnery v The Commissioner of Police* which settled that ammunition is not explosives, the Court should allow the appeal and set aside the conviction. With respect to the offence of carrying an unlicensed firearm, the appellant argued that the learned senior magistrate erred in law, by applying the common law inference test for the joint possession of the unlicensed firearm and that the learned senior magistrate failed to properly direct herself on the law of the deeming provision as contained in section 12 of the Firearms Act. In addressing the law on section 12 of the Firearms Act, the appellant introduced the following sub-issues, namely: i) whether the learned senior magistrate directed herself on the appellant’s required burden and standard of proof, in discharging, that he was not in possession of the firearm and; ii) whether the learned senior magistrate directed herself on the issues raised by the appellant in discharging his evidential burden on a balance of probabilities.

Having regard to the grounds of appeal and the parties’ submissions, the legal issues which arose for determination in the appeal are categorised as follows: a) whether the offence of unlawful possession of explosives is made out given that based on the Court of Appeal decision in *Selvin Chinnery v Commissioner of Police*, ammunition may no longer fall under the definition of explosives; b) whether legal possession is made out on the evidence before the magistrate and; c) whether the principles of joint enterprise and liability ought to have been applied by the learned magistrate.

Held: allowing the appeal against conviction for unlawful possession of explosives, and dismissing the appeal against the conviction for carrying a firearm without a licence, that:

1. Applying **Selvin Chinnery v The Commissioner of Police**, the definition of the term 'explosive' as found in section 2 of the **Explosives Ordinance** of the Laws of the Virgin Islands does not encapsulate ammunition.

Selvin Chinnery v The Commissioner of Police BVIMCRAP2018/0002 (delivered 24th February 2020, unreported) followed.

2. In criminal law, the concept of retrospectivity refers to the application of new laws or judicial interpretation to cases that occurred prior to their enactment. There is a presumption against the retrospective application of statutes, which is rooted in the idea of fairness and justice. It is presumed that Parliament does not intend to alter the law applicable to past events so as to alter the rights and obligations of the parties in a manner which is unfair to them unless a contrary intent is clearly demonstrated. The rationale for the presumption is to engender certainty in the law and to prevent the harsh and chaotic operation of law. However, judicial decisions which set a precedent in law do have retrospective effect. Therefore, notwithstanding the delay in disposing the appeal which was filed in July 2015 (some four years prior to the **Selvin Chinnery** judgment), the appellant's appeal against his convictions remained pending and would not have been completed at the time that the decision in **Selvin Chinnery** would have been handed down. It follows that the judgment in **Selvin Chinnery v The Commissioner of Police** may be relied upon and applied.

Maxwell on The Interpretation of Statutes, 12th ed (1969) applied; **Maxwell v Murphy** (1957) 96 CLR 261 applied; **Cadder v Her Majesty's Advocate** [2011] 3 LRC 100 considered; **A v Governor of Arbour Hill Prison** [2006] 4 IR 88 applied.

3. Even if one were to assume that **Selvin Chinnery v The Commissioner of Police** could not be applied, the Court in considering the appeal is entitled to consider whether in relation to the ammunition, the appellant could have been properly charged and convicted under the **Explosives Ordinance** for possession of explosives. Applying the principle of *ejusdem generis*, the interpretation of the term 'explosive' under section 2 of the **Explosives Ordinance** cannot be construed to include ammunition. Consequently, the appellant could not have been properly charged and convicted of possession of explosives contrary to sections 6 and 26 of the **Explosives Ordinance**. Accordingly, the conviction in that regard must be set aside.
4. The offence created by section 11(2)(a) of the **Firearms Act** involves an element of possession. In this case, the offence was particularized as 'keeping a firearm' without a licence. The word 'keep' is not defined by the **Firearms Act** and therefore the magistrate considered the ordinary meaning of the word which she concluded to be synonymous with possession. The magistrate there considered the common law definition of possession. However, given the way in which the prosecution had advanced its case, the magistrate was compelled to consider the deeming provision set out in section 12 of the **Firearms Act**, that is, whether the firearm was in the possession and control of the appellant as he was in possession and control of the

motor vehicle in which it was found. No issue can be taken with the learned magistrate's consideration of both the common law definition of possession as well as the concept of 'deemed possession'.

5. Deemed possession does not abolish common law possession but rather supplements it and expands upon the traditional understanding of possession by including situations where the traditional elements of possession are not fully present but where the law still deems possession to exist for the purpose of criminal liability. Where the prosecution relies on the deeming provision created by section 12 of the **Firearms Act**, it must show that the accused was the owner of the house, premises, vehicle, vessel, boat or conveyance in which the firearm is found, bearing in mind that the consequence of this conclusion is that the accused would be deemed to be in possession of the firearm. The section also makes it clear that deemed possession due to ownership of the premises, vehicle, vessel, boat or conveyance can be rebutted. The **Firearms Act** makes clear that it is the defendant who has the onus of rebutting the presumption of possession. It follows that deemed possession due to ownership can be rebutted by the accused proving, on the balance of probabilities, that they were unaware that the firearm was on the premises or in the vehicle or vessel or that they had no intention to exercise control over the firearm.

Section 12 of the **Firearms and Air Guns Act**, Cap 124 of the Revised Laws of the Virgin Islands applied.

6. A review of the record of evidence, the submissions advanced by the appellant in the court below, and the learned magistrate's analysis of the same reveals that it was clear that the magistrate was fully seized of all of the elements of the appellant's defence and that she correctly analysed and treated with each aspect of the same in determining whether he had discharged his burden to rebut the presumption of possession. As it relates to the lack of DNA evidence linking the appellant to the firearm, the presence or absence of DNA or fingerprints is not determinative of the guilt or innocence of any defendant. The absence of DNA is one factor among many that ought to be considered. As such, the absence of DNA does not preclude a finding of possession where the circumstantial evidence is otherwise sufficient.

R v Crawford [2015] UKPC 44 followed.

7. Additionally, the appellant's defence of complete denial and ignorance or knowledge of the firearm ignores the fact that while knowledge of the firearm is a requirement of possession, (as defined by the common law) it is not a requirement when the prosecution relies on deemed possession under section 12 of the **Firearms Act**. While the magistrate may not have made clear that in advancing his rebuttal of the presumption, the appellant's standard of proof was on a balance of probabilities, she did not apply any higher standard in her analysis of his case. Ultimately, the magistrate was not persuaded by the appellant's defence, and was clearly perturbed that the appellant could offer no credible explanation to the police as to how the

firearm and ammunition came to be in a vehicle owned by him that was, according to him, always clean.

R v Fuller & Zazzaro [2012] SASFC 101 considered.

8. The appellant's contention that the magistrate convicted him simply because he was the driver of the vehicle, without additional supporting evidence or that her decision was unreasonable or unsupported by the evidence presented is not made out. There was ample basis upon which the learned magistrate was justified in her findings of guilt including the appellant's admission that he always had custody of his vehicle and always kept it clean which the magistrate concluded showed that the appellant had reasonable opportunity to ascertain its contents whether availed, or not. Additionally, there was the evidence of the co-defendant who gave critical evidence as to the appellant's interaction with the firearm. The magistrate also came to the view that the appellant was not a believable witness. It is only in rare cases that an appellate court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. Against the background of the appellant's ownership, possession and driving of the motor vehicle in which the unlicensed firearm was found, there was sufficient basis for the learned magistrate to infer ownership and keeping (possession) of the firearm in the absence of any credible explanation from the appellant. Even in the face of his previous good character, the magistrate was nevertheless obliged to assess his demeanour, consistency and plausibility and come to a conclusion as to his credibility. Therefore, in all the circumstances, it cannot be said that the magistrate failed to properly direct herself on the issues raised by the appellant in his defence and on the prosecution's case, in support of him discharging his evidential burden, on a balance of probabilities that he was not in possession of the firearm.

R v Crawford [2015] UKPC 44 followed.

9. The legal concept of joint enterprise in criminal law involves two or more people acting together to commit a criminal offence, where each person may have a different role. This is not to be conflated with the concept of joint possession which refers to situations where two or more people share control or dominion over an object such as a firearm or controlled drug. Where joint possession is involved, the co-defendants are joint principals where each does an act amounting to the *actus reus* of the offence. Each is liable for his own act, rather than for participating in the act of another, to the extent of his own *mens rea*. It is not in every case where there are two or more defendants who are jointly charged for a joint offence that the court will be obliged to consider whether joint enterprise is made out. Where two or more defendants are jointly charged, it only means that more than one person is being charged in one count. The charges against the defendants are individual and it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent.

Accordingly, the appellant's contention that the magistrate should have gone on to consider the elements of joint enterprise under section 20 of the **Criminal Code**, that is, whether the appellant shared a common intention with the co-defendant to possess the firearm and further what was the requisite conduct of the appellant to assist the co-defendant, in the possession of the firearm, so that he shared with him such an intention, is not supported by law on the facts of this case. The appellant's appeal against conviction for carrying a firearm without a licence contrary to section 11(2)(a) of the **Firearms Act** is therefore dismissed.

Section 20 of the **Criminal Code**, Act No 1 of 1997 considered; **Julio Romero and Oscar Macrado v R** Grenada Criminal Appeals No. 7 & 8 of 1993 (delivered 4th July 1994, unreported) followed; **R v Searle & Others** (1971) Crim. L.R. 592 distinguished.

JUDGMENT

- [1] **ELLIS JA:** This is an appeal against the conviction of the appellant following the 1st July 2015 decision of the senior magistrate wherein he was found guilty of the offences of:
- i. Carrying a firearm without a licence, contrary to section 11(2)(a) of the **Firearms and Air Guns Act**, (the "**Firearms Act**"), as amended, Chapter 126 of the Revised Laws of the Virgin Islands; and
 - ii. Unlawful possession of explosives, contrary to section 6 and section 26 of the **Explosives Ordinance** Chapter 124 of the Revised Laws of the Virgin Islands.

The Factual Background

- [2] On 14th April 2013 the members of the Royal Virgin Islands Police Force were on patrol in the Road Town area. At about 4:15pm, they saw a Suzuki jeep ("the vehicle") bearing license plate PD 46, traveling from the Purcell roundabout in a westerly direction, heading towards the Road Town area.
- [3] The police officers followed the vehicle and the same was intercepted by the police and made to stop. The appellant was the driver of the vehicle, and Edwin Ortiz-Claxton, the co-defendant was seated in the passenger seat.

- [4] A search of the said vehicle was conducted in the presence of the appellant and his co-defendant after being cautioned. The search revealed a 9mm Luger firearm that contained 4 rounds of ammunition underneath the front passenger seat where the co-defendant sat. The police officers asked them what the item was and who it belonged to. The co-defendant remained silent, and the appellant stated “Boss, I don’t know what that is.”
- [5] The appellant and his co-defendant were arrested and transported to the Road Town Police Station where they were subjected to separate caution interviews. In the appellant’s caution interview and his evidence on oath, he denied knowledge of the firearm and ammunition and asserted that he was not aware that his co-defendant was in possession of the same. The police checked the firearm’s holder register and were able to confirm that neither the appellant nor his co-defendant were licensed to own firearms.
- [6] The appellant’s co-defendant gave evidence at trial that he knew the appellant, as he was in a relationship with the appellant’s sister. He further indicated that he was not the owner of the vehicle, and it was the appellant who was the driver and that when he entered the vehicle, he did not see a firearm. The co-defendant, however, confirmed that he saw the appellant with a firearm in his hand at Free Bottom and the appellant handed the gun to him. He further stated that he handled the gun and returned it to the appellant. The co-defendant also explained that he was involved in a conversation with a group of persons including the appellant where the gun was shown. There were no other persons in the vehicle.¹
- [7] The case against the appellant and his co-defendant proceeded on the basis of a joint unlawful enterprise and both were convicted on 1st July 2015.

The appeal

¹ Record of Appeal, pages 218-232.

[8] The appellant filed a notice of appeal on 6th July 2015 and an amended notice of appeal on 29th April 2024. The grounds of appeal in the amended notice of appeal were as follows:

- “1. the legal evidence substantially affecting the merits of the case was rejected by the Court;
2. the decision was unreasonable and cannot be supported having regard to the evidence;
3. the Appellant is not guilty;
4. the Appellant seeks leave to add and amplify his grounds of appeal when the transcripts of the proceedings and a copy of the written judgment of the senior magistrate are made available;²
5. the decision of the learned Senior Magistrate was erroneous in point of law, to wit:
 - a) The learned Senior Magistrate erred at law, by applying the common law inference test for the joint possession of the unlicensed firearm; and
 - b) The learned Senior Magistrate failed to properly direct herself on the law of the deeming provision as contained in section 12 of the Firearms Act Chapter 126.”

[9] The reasons for the grounds of appeal were also stated in the amended notice of appeal in the following terms:

- “1. the Appellant had no knowledge that the co-accused was in possession of a firearm.
2. there was absolutely no evidence from the Prosecution that the Appellant had any knowledge that the co-accused was in possession of a firearm under his passenger seat; which knowledge that Appellant did not have.
3. the Appellant rebutted the presumption as provided for under Section 11(2) of the Firearms Act, Chapter 126 as amended by (No. 6 of 1993) of the Laws of the Virgin Islands - presumption of ownership of a firearm, unless and until the contrary is proven.
4. the DNA test excluded the Appellant as a contributor to the DNA found on the firearm, thereby exonerating the Appellant.
5. there was no fingerprint evidence against the Appellant.
6. the co-accused admitted to having the firearm in his possession.
7. the DNA test proved that the co-accused had possession of the firearm.
8. the co-accused was convicted previously, in 2010 for the same offence - carrying an unlicensed firearm and being in possession of explosives.
9. the co-accused was caught in several lies under cross examination; such so that the Court rejected his testimony as being untruthful.
10. the co-accused is subject of a Deportation Order.
11. the Appellant is a person of previous good character. Not having any convictions, including any traffic citations.”

² Ground 4 does not constitute a legitimate ground of appeal.

Appellant's submissions

- [10] With respect to Complaint BVIMCR2013/0123A - Unlawful Possession of Explosives, the appellant submitted that in view of the decision in **Selvin Chinnery v The Commissioner of Police**³ whereby it was held that ammunition is not explosives, the Court should allow the appeal and set aside the conviction.
- [11] The appellant also argued that the issues which arose with respect to Complaint BVIMCR2013/0123B -Carrying an unlicensed firearm were:
- (1) Whether or not the learned senior magistrate erred at law, by applying the common law inference test for the joint possession of the unlicensed firearm.
 - (2) Whether or not the learned senior magistrate failed to properly direct herself on the law of the deeming provision as contained in section 12 of the **Firearms Act**.⁴
- [12] It was posited that the law of joint enterprise in the Territory of the Virgin Islands is governed by section 20 of the **Criminal Code**.⁵ The appellant also submitted that under the authority of **Jevone Demming v The Queen**,⁶ section 20 requires the following two conditions for the liability of parties to a joint enterprise:
- i. two or more persons with a shared intention to prosecute an unlawful purpose in conjunction with each other; and
 - ii. that while pursuing the unlawful purpose, an offence is committed that was the probable consequence of the prosecution of the unlawful purpose.
- [13] The appellant contended that although the crown relied on the section 12 of the **Firearms Act** as he was the driver and had physical custody of the vehicle and its contents to deem that he was in physical custody or control of the firearm, the section

³ BVIMCRAP2018/0002 (delivered 24th February 2020, unreported).

⁴ Chap 126 of the Revised Laws of the Virgin Islands 2013.

⁵ Act No. 1 of 1997.

⁶ BVIHCRA2015/0001 (delivered 14th January 2020, unreported).

also gives him a defence to rebut the presumption that he was the owner of the said firearm, by proving that he was not in possession or custody or control of same on a balance of probabilities. Additionally, the appellant relied on **R v Lambert**⁷ and **Fitzroy Farrell v the Queen**⁸ to further support this contention.

[14] Additionally, the appellant argued that the learned magistrate ought to have addressed her mind to the following questions: a) In relation to the joint offence, whether the appellant shared a common intention with the co-defendant to possess the firearm; b) What was the requisite conduct of the appellant which assisted his co-defendant, in the possession of the firearm, so that he shared with him such an intention; c) Whether the basis for the appellant's possession was him being the driver, and whether having physical custody and control of the vehicle gave rise to a presumption, which was rebuttable, by proof on a balance of probabilities of the absence of the physical custody or control of the firearm, or the ignorance of such custody or control.

[15] The appellant submitted that the senior magistrate's reliance on **Faultin v Attorney General of Trinidad and Tobago**⁹ in her analysis at paragraphs 186-188 in the written decision¹⁰ was flawed as this reasoning was not relevant in the Virgin Islands. Instead, she ought to have applied section 20 of the **Criminal Code**, which relates to joint enterprise/possession, as well as the learning of Sir Vincent Floissac in the case of **Julio Romero and Oscar Macrado v The Queen**,¹¹ and section 12 of the **Firearms Act**, which is a deeming provision in regard to possession of the firearm.

[16] In addressing the law on section 12 of the **Firearms Act**, the appellant introduced the following sub-issues, namely: i. Whether the learned senior magistrate directed herself on the appellant's required burden and standard of proof, in discharging, that he was not in possession of the firearm?; ii. Whether the learned senior magistrate

⁷ [2001] UKHL 37.

⁸ MNIHCRA2015/0005 (delivered 3rd October 2017, unreported).

⁹ [1978] 30 WIR 351.

¹⁰ See pages 337-338 of the Record of Appeal.

¹¹ GDAHCRA1993/0007 & 0008 (delivered 4th July 1994, unreported).

directed herself on the issues raised by the appellant in discharging his evidential burden on a balance of probabilities?

- [17] In answer to the 1st sub-issue, the appellant examined the learned senior magistrate's analysis at paragraph 184 of her written decision¹² which stated:

“There is no dispute that Stoutt is the owner of PD-46 a vehicle in which a firearm and ammunition was found, and as such the deeming provision in section 12 applies to him. It deems him as the owner of such ammunition and firearm in circumstances where he has not discharged his evidential burden by rebutting the presumption.”

The appellant was of the view that the learned senior magistrate failed to direct herself on the appellant's standard of proof (on a balance of probabilities) that is required in discharging his evidential burden, that he was not in possession of the said firearm.

- [18] Additionally, the appellant submitted that the senior magistrate did not direct herself to those rebuttable issues raised by the appellant in her application of section 12 of the **Firearms Act**. The appellant maintained that the senior magistrate treated the appellant's defence of complete denial and ignorance of knowledge of the firearm as a common law defence, without any application of the legal requirements of section 12 of the **Firearms Act**. Further, the appellant argued that the issue of the lack of the appellant's DNA on the firearm, together with the absence of any other evidence implicating him, ought to have been weighed in deciding whether he had discharged his evidential burden on a balance of probabilities. Thus, the appellant posited that the learned senior magistrate failed to properly direct herself on the issues raised by the appellant in his defence and on the prosecution's case, in support of him discharging his evidential burden, on a balance of probabilities that he was not in possession of the firearm.

- [19] The appellant submitted that the decision of the senior magistrate was unreasonable, given the evidence. Further the prosecution's case, taken at its highest, is that the

¹² Page 336 of the Record of Appeal.

appellant was the driver of the motor vehicle, in which the firearm was found under his co-defendant's right front passenger seat. As a result, the conviction was flawed.

- [20] Citing the cases of **Fitzroy Farrell v The Queen** and **R v Lambert**, the appellant posited that the senior magistrate convicted him simply because he was the driver, without additional supporting evidence. The appellant, therefore, maintained that the senior magistrate's decision was unreasonable and unsupported by the evidence presented. (These cases will be examined more thoroughly later in this judgment.)

Respondent's submissions

- [21] Addressing grounds 1, 2, 3 and 5 of the appeal, counsel for the respondent submitted that they demonstrate a failure on the part of the appellant to apply the well-established principles of appellate restraint. Citing the judgments in **Wendell Anthony et al v The Commissioner of Police**,¹³ **R v Crawford**,¹⁴ **Benmax v Austin Motor Co Ltd**¹⁵ and **R v Cook**,¹⁶ the respondent submitted that the appellant failed to show that the learned magistrate was unaware of the relevant legal principles and incorrectly exercised her discretion, or that she was wrong in coming to her decision or that there was no material which she could have properly relied upon in arriving at her decision.
- [22] In response to the appellant's contention that the crown's case failed to establish that the appellant had possession of the firearms and ammunition found in the vehicle used exclusively by the appellant, counsel for the respondent submitted that the evidence disclosed that the appellant was in possession of the firearm and that he not only had control but knowledge that could be imputed from the evidence. Counsel relied on the test of possession set out in **Ortiz (Jose), Castillo (Julio), Ortiz (Edwardo) and Newball (Luis) v The Police**¹⁷ which referenced the judgment in **The Director of Public Prosecutions v Wishart Brooks**¹⁸ and submitted that the learned senior magistrate was able to confirm that the elements of possession were met in this case from the following:

¹³ BVIMCRAP2014/0016 (delivered 23rd November 2016, unreported).

¹⁴ [2015] UKPC 44.

¹⁵ [1955] AC 370.

¹⁶ [1959] 2 QB 340.

¹⁷ [1974] AC 862.

¹⁸ (1974) 21 WIR 411.

- a) The Appellant admits he was the person using the Suzuki PD 46 the most, and was the person driving the vehicle on the day of the traffic stop. There was no evidence lead (sic) through cross-examination or on the Appellant's case to suggest that anyone else had the vehicle besides the Appellant.
- b) There was no evidence to refute that the Appellant and Ortiz were the only persons in the vehicle.
- c) That the contents of the Appellant's evidence were never put to the Crown's witnesses through cross-examination.
- d) The Appellant did not challenge the contents of the interview under caution that was tendered through Sergeant Prevost.
- e) The evidence of Ortiz placed the gun in possession of both Accused, and Ortiz upheld his answers when cross-examined.
- f) The Learned Senior Magistrate when giving her reasons for her decision stated as follows –

'It is also not contested on any fronts that the two defendants were the sole occupancy (sic) of the vehicle in which the firearm and ammunition were found. The two men on their own account had been riding along together making various stops at various places for several hours prior to their interception.' [sic]¹⁹

[23] Turning to the DNA report which revealed that no profile that matched the appellant was found on the firearm but that the co-defendant could not be excluded, the respondent submitted that this 'does not mean that possession was not properly established by the evidence'.²⁰ Relying on **R v Crawford**, the respondent submitted that the absence of the appellant's DNA on the firearm would not mean he was not in possession of the firearm as there was other evidence which support possession.

[24] The respondent also refuted the appellant's assertion that the learned magistrate failed to properly apply the law on possession, noting that the court in **R v Lambert**²¹ held that:

"...where the prosecution proves that the accused had a container with something in it in his possession and control and that the thing in it was a controlled drug, it is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug."

[25] Counsel appeared to rely on the same legal arguments advanced on behalf of the Crown in that case to the effect that "[a] person does not possess something of which

¹⁹ Record of Appeal page 328 paragraph 186.

²⁰ Crown's Submission in Response, page 8 at paragraph 18.

²¹ [2002] 2 AC 545.

he is completely unaware. Where he is in possession of a container, he will not be in possession of its contents (i) where he believes that the container is empty or (ii) where he has no opportunity or right to open the container and ascertain the nature of the contents. Ignorance of, or mistake as to the quality of, the substance in question does not, however, prevent him from being in possession of it..."

- [26] In support of this submission, counsel for the respondent relied on the judgment in **Faultin v The Attorney General**²² where (on a charge of unlawful possession of firearms or ammunition) the court ruled that "on the proof that a person had custody or control of a vehicle, that a firearm and ammunition were found inside it and in close proximity to him, the inference may properly be drawn that they were there with his knowledge and that he intended to retain or control them".
- [27] In addition, the respondent referred to the judgment of **Jenkins v The Director of Public Prosecutions**²³ as being similar to the case at bar. In that case, a passenger in the appellant's vehicle placed a 'stun gun' in the appellant's glove compartment, after which they were stopped by the police. The appellant in that case, like the appellant in the case at bar, appealed his conviction on the basis that the stun gun belonged to the passenger and not him. The court upheld the magistrate's decision and expressed the view that the magistrate notwithstanding accepting the evidence of the appellant was correct in finding that he had custody and control of the item and had the knowledge.
- [28] The respondent further submitted that all of the quoted authorities establish that possession is determined by custody and control and knowledge. In this case, the appellant had the Suzuki (PD46) in his use, which he admitted, and no evidence was presented to refute this. Further, that the appellant by his own admission and the evidence of the co-defendant was that on the day of the incident they dropped the appellant's sister to work, then drove around, they went to Matcha, then to Free Bottom, and then to get gas; they were driving to Road Town when they were

²² (1978) 30 WIR 351 at page 351.

²³ [2020] EWHC 1307 (Admin).

stopped. The respondent submitted that there was no evidence that any other person was in the vehicle or had access to the vehicle. Further, the co-defendant giving evidence in court, said that the appellant showed him a firearm when they were at Free Bottom that the co-defendant handled.

[29] Moreover, the respondent submitted that the crown's case was not undermined in cross-examination as the evidence of the armourer and investigating officer went unchallenged. The respondent noted that the learned senior magistrate in making her decision made the following points:

- "1.The case for the Appellant was inconsistent between his account in the caution interview, cross-examination of the Crown witnesses and the evidence before the Court.
- 2.The Appellant's demeanour was poor. He showed reluctance in answering certain questions, and at times was rude and evasive.
- 3.That the Appellant's evidence was a story of an unrelated incident that was at no time out the Crown's witnesses (sic).
- 4.That the Court considered to (sic) the totality of the evidence in making their decision."

[30] Counsel for the respondent submitted that the learned senior magistrate in rendering her decision on the no case submission discussed the legal principles of possession and adequately outlined the crown's evidence that supported that there was a case to answer.²⁴ In light of this, the respondent submitted that it was 'reasonable' for the learned senior magistrate to come to the conclusion that a reasonable inference could be drawn on the crown's case to show guilt. He further submitted that the learned magistrate exercised her discretion correctly; that she is deemed to be aware of all legal principles; that the appellant has failed to show that the learned magistrate was not fully aware of the legal principles and that accordingly the appeal should be dismissed.

[31] In respect of ground 4, the respondent submitted that the appellant wishes this Court to 'retroactively apply' its decision in **Selvin Chinnery v The Commissioner of**

²⁴ Record of Appeal at pages 102 -116.

Police²⁵ to quash the conviction on possession of explosives. The respondent noted that the learned senior magistrate ruled on this matter in 2015, four years prior to the Court of Appeal's ruling in **Chinnery**, and that the law which obtained then was that ammunition was deemed to be an explosive.

- [32] The respondent further submitted that the appellant has not demonstrated that substantial injustice has been suffered by him and submitted that the appeal be dismissed as the grounds of appeal advanced are without merit.

Appellant's submissions in reply

- [33] In response to the respondent's submissions it was contended by the appellant that the learned senior magistrate had failed to apply the evidence required to satisfy the two conditions pursuant to section 20 of the **Criminal Code**, thus, the evidence led at the no case submission or otherwise at the trial amounts to an error at law, warranting the Court's intervention.
- [34] The appellant submitted that the case of **Faultin v Attorney General of Trinidad & Tobago** should not apply in this case and ought to be distinguished from the case at bar for the following reasons:
- a. In **Faultin**, the firearm was found under the driver's seat, whereas in the current case it was under the passenger's seat.
 - b. The court in **Faultin** relied on a common law inference test rather than statutory provisions like section 12 of the **Firearms Act**. In contrast, the magistrate in this case relied on section 12 but failed to address the correct burden of proof (balance of probabilities) and did not consider the evidential issues raised by the appellant.
 - c. **Faultin** did not address joint enterprise, yet the magistrate applied the inference test from **Faultin** to establish joint possession between the appellant and his co-defendant, contrary to section 20 of the **Criminal Code**.

²⁵ BVIMCRAP2018/0002 (delivered 24th February 2020, unreported).

d. The appellant, the driver, was aware that the 'stun gun' was placed in the glove compartment by his passenger of his car, unlike the case at bar, whereby the appellant has denied knowledge of the said firearm and ammunition.

[35] In relation to grounds No. 2 and 5, as it relates to Complaint No. BVIMCR2013/0123A - Unlawful possession of explosives; the appellant submitted that in the event that this Court finds that the judgment in **Selvin Chinnery v The Commissioner of Police** does not apply, the appellant can still rely on all arguments advanced in respect of the other firearm offence, as the legal principles are the same.

Analysis and Conclusion

[36] The issues which arise in this appeal are myriad. They engage the learned magistrate's application of legal principles, her findings of fact and to a certain degree her exercise of discretion. In considering these issues this Court must be guided by the established principles of appellate interference. In **Wendell Anthony et al v Commissioner of Police**²⁶ this Court held that:

"A magistrate, as the judge of the facts and the law, must be taken to have been aware of and to have applied basic principles relative to the admission and treatment of evidence, unless the contrary is shown to be the case or his reasoning and decision were so clearly based on a lack of awareness or lack of application of the relevant legal principles."

[37] In arriving at this conclusion, the Court went on to apply the now well-established principle that "an appellate court will only overturn a factual finding made by a lower court if it can be shown that the finding is so against the weight of the evidence as to be obviously and palpably wrong". This principle found some elucidation in the judgment of the Judicial Committee of the Privy Council in **Kwok Kin Kwok v Yao Juan**²⁷ where the Board observed that:

"40. An appellate court should not interfere with a judge's findings of primary fact unless they are 'plainly wrong', which in this context connotes that either there was no evidence to support the finding, or the finding was based

²⁶ BVIMCRAP2014/0016 (delivered 23rd November 2016, unreported).

²⁷ [2022] UKPC 52 at paragraphs 40 - 43.

on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached (or, as it is sometimes put, 'outside the bounds within which reasonable disagreement is possible').

41. The appellate court will be rarely justified in overturning a finding of fact which turns on the credibility of the witnesses. It should not do so unless it is satisfied that any advantage enjoyed by the trial judge by having seen and heard the witnesses could not be sufficient to explain or justify his conclusions.

42. The inhibition on interfering with the trial judge's findings of fact extends to his evaluation of the facts and any inferences to be drawn from them: see e.g. *Beacon Insurance* at para 17.

43. The reasons for such appellate restraint are not limited to the advantage enjoyed by the trial judge of having seen and heard the witnesses. They include the recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. The judge will be totally familiar with the evidence at trial, and is likely to gain a far deeper insight from living with the case over several days than the appeal court, whose view of the case will be circumscribed by the issues raised on appeal."

[38] The Court must also be guided by the dicta in **R v Cook**²⁸ in which the English court noted and applied the well-established principle that appellate courts "...will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision."

[39] The appellant in this appeal must therefore persuasively demonstrate to this Court that the learned magistrate lacked the awareness of the relevant legal principles or that being aware of the same she failed to apply them in arriving at his verdict or that her findings of fact were plainly wrong. Applying this appellate approach, I will now consider the grounds of this appeal. The legal issues which arise for determination can be conveniently categorized in the following terms:

(a) Whether the offence of unlawful possession of explosives (Sections 6 & 26 of the **Explosives Ordinance**) is made out given that based on the Court of

²⁸ [1959] 2 QB 340.

Appeal decision in **Selvin Chinnery v Commissioner of Police**, ammunition may no longer fall under the definition of explosives. The question arises whether **Chinnery** can be applied retroactively to a 2015 conviction.

- (b) Whether legal possession is made out on the evidence before the magistrate. The appellant takes issue with the magistrate's treatment and the weight accorded to the lack of the DNA or fingerprints connecting the appellant to the firearm and the admissibility and weight of the co-defendant's testimony given his credibility concerns. This larger issue also calls upon this Court to consider whether the magistrate applied the correct standard of proof or properly assessed whether the appellant had discharged the evidential burden imposed by the deeming provision in section 12 of the **Firearms Act**. The appellant further agrees that the failure to distinguish between statutory and common law standards i.e. the use of inference tests (common law) versus application of statutory presumption under section 12 also falls for consideration.
- (c) Whether the principles of joint enterprise and liability (Section 20 of the **Criminal Code**) ought to have been applied by the learned magistrate.

A. Unlawful Possession of Explosives (Sections 6 & 26 of Explosives Ordinance)

- [40] The appellant's written legal submission on the issue was solely premised on the application of the appellate judgment in **Selvin Chinnery v The Commissioner of Police**. This was a watershed judgment which represented a quantum shift in the way in which the term 'explosives' was defined. In that case, Mr. Chinnery was charged with the offences of carrying a firearm without a licence contrary to section 11(1)(a) of the **Firearms and Air Guns Ordinance** and possession of explosives contrary to sections 6 and 26 of the **Explosives Ordinance**. On the advice of his then legal practitioners, Mr. Chinnery pleaded guilty to the offences mentioned above and was later sentenced to a 5-year term of imprisonment for the offence of illegal possession of a firearm and 3 months imprisonment for possession of explosives. He later appealed against this conviction. During oral submissions, it emerged that this appeal raised the critical question - whether in relation to the ammunition, he could have been properly charged under the **Explosives Ordinance** for possession of

explosives? Counsel for Mr. Chinnery contended that the three rounds of .22 ammunition do not fall within the definition of ‘explosive’ set out in the **Explosives Ordinance**. He submitted that a review of the entire legislative framework shows that the **Explosives Ordinance** is directed at explosives as defined therein.

[41] In a judgment rendered by Blenman JA (as she then was), this Court construed section 2 of the **Explosives Ordinance** which defines explosives as:

“(a) nitro-glycerine, dynamite, gun-cotton, blasting powder, gunpowder, and any other substance or mixture capable of being used for the purpose of producing an explosion;
(b) any detonating fuse, igniter cord, safety fuse, fuse igniter, detonator or percussion cap and every adaptation or preparation of any explosive;
(c) any other substance which the Minister may from time to time, by Notice in the Gazette, declare to be an explosive;”

Blenman JA reasoned:

“[42] It is obvious that the definition of explosives must be gleaned from the **Explosives Ordinance**. The *ejusdem generis* principle of construction clearly supports Mr. Thompson’s contention that ammunition cannot fall into the category of explosives. In this regard, the learned authors of **Bennion on Statutory Interpretation** formulate the principle as follows:

‘The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words’.

[43] In the context of this appeal, the focus rests on the words ‘any other substance or mixture capable of being used for the purpose of producing an explosion’. It seems to me that the common and dominant feature is that there is a chemical or other substance which by itself or when mixed can create a destructive and large-scale explosion. I fail to discern how, on any reading of the definition of explosives and moreso within the context of the legislation, these words could be expanded to embrace ammunition.”²⁹

²⁹ BVIMCRAP2018/0002 (delivered 24th February 2020, unreported) at paragraphs 42 and 43.

- [42] The judgment in **Selvin Chinnery v The Commissioner of Police** was handed down on 24th February 2020. This is noteworthy because as was pointed out by counsel for the respondent, the learned magistrate in this appeal delivered his ruling in 2015, four (4) years prior to the judgment in **Selvin Chinnery v The Commissioner of Police**. Counsel for the respondent argued that at that time, the state of the law was that ammunition was deemed to be an explosive within the definition of section 2 of the **Explosives Ordinance**. Counsel cited the judgments of **R v Jawad**³⁰ and **Roberts and others v R**³¹ in support of this submission.
- [43] During the course of his oral submissions, counsel for the appellant appeared to have conceded that **Selvin Chinnery v The Commissioner of Police** could not be applied retroactively. However, he argued that all was not lost as the appellant could still rely on the arguments raised in respect of the issue of joint possession to set aside his conviction.
- [44] However, the position as prescribed by both parties is not as straightforward as submitted. The application of retrospectivity in criminal law has been described as a complex and controversial issue. In criminal law, the concept of retrospectivity refers to the application of new laws or judicial interpretation to cases that occurred prior to their enactment. The cases relied upon by counsel for the appellant essentially concerned the presumption against the retroactive operation of statutes. This is a firmly established rule whose rationale is to engender certainty in the law and prevent the harsh and chaotic operation of law.³² The principle is rooted in the idea of fairness and justice, as it would be unjust to punish someone for an act that was not criminal at the time it was committed.
- [45] The statement in **Maxwell on The Interpretation of Statutes**, 12th ed (1969), p 215 is frequently quoted:

³⁰ [2013] EWCA Crim. 644.

³¹ [2021] 99 WIR 224.

³² *Hugh Desmond Hoyte v Liberation Press Ltd* (1975) 22 WIR 175.

“Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.”

- [46] The essence of the core common law rule is conveniently stated by Sir Owen Dixon CJ in **Maxwell v Murphy**:³³

“The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.”

- [47] Again, the rationale for this common law presumption is clear – if penal statutes were made retroactive, a convict could find himself or herself serving an additional sentence for something for which he or she had been sentenced years prior. It is therefore presumed that Parliament does not intend to alter the law applicable to past events so as to alter the rights and obligations of the parties in a manner which is unfair to them unless a contrary intent is clearly demonstrated.³⁴ It follows that legislation would not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force.

- [48] However, the facts in the appeal do not concern the retroactive operation of a statute. Instead, the Court is asked to consider whether a judicial decision which sets a precedent in law has retrospective effect. The importance of this question cannot be overstated because the progressive development of the criminal law through judicial law-making is an essential part of our jurisprudence. However clearly drafted a legal provision may be, in any system of law, including criminal law; there is an inevitable

³³ (1957) 96 CLR 261 at 267.

³⁴ *Wilson v First Country Trust Ltd* (No 2) [2004] 1 AC 816 (HL), p 831.

element of judicial interpretation. Where a court elects to discharge that obligation, such decision may operate retroactively to undermine conviction which would have been previously obtained in reliance. It is therefore not surprising that this thorny issue has been the subject of repeated judicial and legal analysis.

[49] In **Cadder v Her Majesty's Advocate**³⁵ the English Supreme Court applied the very full judgments in **A v Governor of Arbour Hill Prison**³⁶ and at paragraph 101, cited the following extract from the judgment of Murray CJ (at [36]–[38]):

“[36] Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.

[37] Only a narrow approach based on absolute and abstract formalism could suggest that all previous cases should be capable of being reopened or relitigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a court of appeal should be set aside or, where possible, retried in the light of subsequent decisions where such subsequent decision could be claimed to provide a potential advantage to a party in such a retrial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.

[38] It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so

³⁵ [2011] 3 LRC 100.

³⁶ [2006] 4 IR 88.

would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices.”

[50] Although in this matter, the criminal proceedings before the learned magistrate in the court below would have resulted in convictions on 1st July 2015, a formal notice of appeal would have been filed (and would have remained pending) on 6th July 2015. Notwithstanding the considerable delay in disposing of this appeal, it follows that this matter would not have been completed at the time when the decision in **Selvin Chinnery v The Commissioner of Police** would have been handed down. As this appeal was pending (not yet finally determined) before this Court, I am satisfied that the judgment in **Selvin Chinnery v The Commissioner of Police** may be relied upon and applied.

[51] Further and in any event, even assuming that **Selvin Chinnery v The Commissioner of Police** could not be applied, I am satisfied that in considering the appeal herein, this Court is entitled to consider whether in relation to the ammunition, the appellant could have been properly charged and convicted under the **Explosives Ordinance** for possession of explosives. Applying the principle of *ejusdem generis*, I am satisfied that the interpretation of the term ‘explosive’ under section 2 of the **Explosives Ordinance** cannot be construed to include ammunition. It follows that the appellant could not have been properly charged and convicted of possession of explosives contrary to sections 6 and 26 of the **Explosives Ordinance**. I therefore find that the learned magistrate would therefore have erred (having looked at the elements of the offence and having considered the evidence and applied the law to the same) in concluding that the appellant would have been guilty (beyond a reasonable doubt) of the offence of unlawful possession of explosives contrary to sections 6 and 26 of the **Explosives Ordinance**. Accordingly, the conviction in that regard must be set aside.

B. Whether legal possession is made out on the evidence?

[52] Counsel for the appellant in this appeal has submitted that there were special features in this case that warranted the quashing of the appellant’s conviction in

respect of the offence carrying a firearm without a licence. First, he contended that the learned magistrate erred in law by applying the common law inference test for joint possession of the unlicensed firearm and further that she failed to properly direct herself on the law of the deeming provision as set out in section 12 of the **Firearms Act**. Secondly, he contended that the learned magistrate's decision was unreasonable and cannot be supported by the evidence. He argued that the learned magistrate failed to properly direct herself on the required burden and standard of proof and more particularly on the issues raised by the appellant in discharging his evidential burden on a balance of probabilities.

[53] In the criminal proceedings before the learned magistrate, the appellant was tried together with a co-defendant in respect of the same offences. During the course of the trial, the prosecution advanced that the firearm was in the possession and control of the appellant as he was in possession and control of the motor vehicle in which it was found. It is clear from the reasoning of the learned magistrate that she was correctly seized of the elements of the offence created at section 11(2)(a) of the **Firearms Ordinance** which prescribes that no person, (other than a firearms dealer in the course of his or her trade) shall—keep or carry any firearm unless such person has a licence to keep such firearm, or carry such firearm, as the case may be.

[54] At page 320-321 of the Record, the magistrate examines the elements of the offence noting that while the word 'keep' is not defined in the **Firearms Act** applying the ordinary meaning of the word 'keep' is synonymous with possession. She went on to conclude that:

“The actus reus of the offence is ‘possession’. The word possession is not defined in the legislation and will take its ordinary meaning. The test for possession is often taken from the Privy Council case of *DPP v Brooks* as argued by the Crown. In that case His Lordship Diplock opined, and I accept that:

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... The actus reus ...is

that the (thing) should be physically in the custody or under the control of the accused.”

[55] The learned magistrate there considered the common law definition of ‘possession’. However, given the way in which the prosecution had advanced its case, the magistrate was compelled to consider section 12 of the **Firearms Act**³⁷ which provides that:

“The owner of any house or premises, vehicle, vessel, boat or conveyance in which any firearm, or ammunition shall be found shall, for the purposes of this ordinance, be deemed to be the owner or keeper of such firearm or ammunition as the case may be until the contrary is proved.”

[56] No issue can be taken with the learned magistrate’s consideration of both the common law definition of possession as well as the concept of ‘deemed possession’ under this section of the **Firearms Act**. In the Virgin Islands, the concept of ‘deemed possession’ under the **Firearms Act** does not completely replace the common law definition of possession. Deemed possession does not abolish common law possession, but rather supplements it by including situations where the traditional elements of possession are not fully present but where the law still deems possession to exist for the purpose of criminal liability. It expands upon the traditional understanding of possession by deeming certain situations to be instances of possession, even if they might not traditionally be considered as such under common law. This allows the law to address a wider range of situations where property is improperly dealt with, even if it does not fit neatly into the traditional definition of possession.

[57] It is apparent from her reasoning that (as it relates to the appellant) the learned magistrate, placed extensive reliance on the deeming provision set out in section 12 of the **Firearms Act** which supports proof of possession.

[58] When the prosecution relies on section 12, it must show that the accused was the owner of the house, premises, vehicle, vessel, boat or conveyance in which the

³⁷ Amended and revised as s. 19 of the Firearms and Air Guns Act as at June 2013.

firearm is found, bearing in mind that the consequence of this conclusion is that the accused would be deemed to be in possession of the firearm. The section also makes it clear that deemed possession due to ownership of the premises, vehicle, vessel, boat or conveyance can be rebutted. However, the **Firearms Act** is very clear on who bears the onus of rebutting the presumption of possession. At section 52, the **Firearms Act** provides that “[w]henever in any prosecution under this Act the defendant claims to have been licensed or claims any qualification or exemption from liability, the burden of proving such licence, qualification or exemption shall lie on him or her.”³⁸

[59] It follows that deemed possession due to ownership can be rebutted by the accused proving, on the balance of probabilities, that they were unaware that the firearm was on the premises or in the vehicle or vessel or that they had no intention to exercise control over the firearm. Counsel for the appellant contends that the magistrate failed to properly direct herself on the issues raised by the appellant in his defence and on the prosecution’s case, in support of him discharging his evidential burden, on a balance of probabilities that he was not in possession of the firearm. Having reviewed the record of evidence, the submissions advanced by the appellant in the court below, and the learned magistrate’s analysis of the same, I cannot agree with that submission.

[60] The salient analysis of the magistrate commences at page 327 of the Record. At paragraphs 140 – 164 of her decision she summarizes and analyses the case for the appellant. At paragraph 140, she notes that his defence is premised on a complete denial of any knowledge of the firearm. Further to submissions made by counsel for the appellant, at paragraphs 140 – 141, she agrees that his previous good character should be taken into account when considering the truthfulness of his evidence and when considering whether he is less likely to have committed this offence. At paragraph 142, she addresses his contention that the absence of DNA evidence

³⁸ This reflects the fact that the onus is on the accused to rebut possession as it is defined at common law.

linking the appellant to the firearm supports his defence. The magistrate makes it clear that this factor would not without more exonerate him because there is other evidence which would support a finding of guilt. At paragraphs 143-160, she assesses his credibility, making critical observations about his demeanour and the various inconsistencies which arose in his evidence. She concluded that despite his previous good character, she was not satisfied that he was a witness of truth. At paragraph 163-164 she rejected the appellant's case as a whole indicating that she did not believe his account of what took place on 14th April 2013 or that he was not in possession of the firearm.

[61] In my judgment, it is clear that the magistrate was fully seised of all of the elements of the appellant's defence and that she correctly analysed and treated with each aspect of the same in determining whether he had discharged his burden to rebut the presumption of possession.

[62] With regard to the lack of DNA evidence linking the appellant to the firearm, the appellant contends that the absence of his DNA on the firearm supports his case and that the magistrate failed to give proper weight to this evidence. The respondent, however, submits that the absence of DNA is not determinative, as DNA is not always left by a person who handles an object.

[63] I accept that although she may not have cited the relevant authority in **R v Crawford**, the learned magistrate would have correctly concluded (as did the trial judge in **Crawford**) that the presence or absence of DNA or fingerprints was not determinative of the guilt or innocence of any defendant. In **Crawford** the trial judge would have directed himself that a person who handles a gun may not always leave either recoverable fingerprints or DNA upon it and in upholding that direction, the Board would have observed:

“Firstly, as has been common ground before the Board, the judge's self-direction that DNA is not necessarily left by a person who handles an object was entirely correct. Such a warning is necessarily given to juries in every case in which the absence of such scientific evidence is asserted, as it often is, to be evidence demonstrating that the defendant did not handle the object or was not present on the relevant occasion. And since DNA once deposited may sometimes persist and sometimes

may not, it is equally true that the presence of someone else's on the object in question is evidence suggesting that that person has at some point handled the object, but does not tell anyone that the defendant has not done so also.”³⁹

- [64] The magistrate was entitled to consider the absence of DNA as one factor among many. The absence of DNA does not preclude a finding of possession where the circumstantial evidence is otherwise sufficient. The magistrate's approach was consistent with the authorities (**R v Crawford**) and I therefore find no fault with the magistrate's treatment of this issue.
- [65] The main crux of the appellant's defence was the complete denial and ignorance or knowledge of the firearm. Counsel for the appellant contends that the learned magistrate treated with this as a common law defence without application of the deeming provisions in section 12 of the **Firearms Act**. This submission, however, ignores the fact that while knowledge of the firearm is a requirement of possession, (as defined by the common law)⁴⁰ it is not a requirement when the prosecution relies on deemed possession under section 12 of the **Firearms Act**.⁴¹
- [66] The judgment of **R v Fuller & Zazzaro**⁴² in the Supreme Court of South Australia (Court of Criminal Appeal) while not binding on this Court, is persuasive in its reasoning. In that case, the Australian Court of Criminal Appeal considered the deeming provisions or section 5(14)(c) of the Firearms Act 1977 noting that if the prosecution proved beyond reasonable doubt that the appellants occupied the premises in which the firearms were located, they are presumed to be in possession of those firearms pursuant to section 5(14)(c) of the 1977 Act. In that case, the trial judge directed the jury that in order to rebut the presumption of possession created by section 5(14)(c) each appellant had to establish on the balance of probabilities that he or she did not know and could not reasonably be expected to know that the firearm was on the premises. At paragraph 72 of the judgment the court held:

³⁹ [2015] UKPC 44 at paragraph 26.

⁴⁰ DPP v Brooks [1974] AC 862.

⁴¹ R v Henderson & Warwick (2009) 22 VR 662, at paragraph [112].

⁴² [2012] SASCFC 101, [72] – [73]).

“In my view, s 5(14) does not require an accused to have knowledge that the object is a firearm in order for them to be presumed to be in possession of it, nor does s 5(15)(a) enable an accused to rebut the presumption of possession created by s 5(14)(c) by establishing that they knew (sic) did not know that the object the subject of the charge was in fact a firearm. Section 5(15) of the Act is directed only to the presence of the firearm at the premises and not knowledge that it was in fact a firearm. Both sections are concerned with custody of the firearm and do not require proof of any knowledge, or lack thereof, on behalf of an accused that the object over which they have custody is indeed a firearm.

It follows that the prosecution was not required to prove that either appellant knew that the pen gun was a firearm. Once the elements necessary to prove the offence were established under s 5(14)(c), a *prima facie* offence contrary to s 11 of the Act was made out. The burden then shifted to each appellant to either rebut the presumption of possession under s 5(15) or to prove a defence pursuant to s 36A of the Act. Aside from counsel in their opening, the issue of s 36A defence was never raised.”

[67] I find no merit in the appellant’s contention that the magistrate did not direct her mind to the case levied in rebuttal of the presumption of ownership/possession of the firearm under section 12 of the **Firearms Act**. While she may not have made clear that in advancing his rebuttal of the presumption, the appellant’s standard of proof was on a balance of probabilities, I am not satisfied that she applied any higher standard in her analysis of his case. Ultimately, she was not persuaded by the appellant’s defence, and was clearly perturbed that the appellant could offer no credible “explanation to the Police as to how the firearm and ammunition came to be in a vehicle owned by him that was always clean, according to him.”⁴³

[68] The appellant also contends that his conviction is flawed and the decision of the magistrate is unreasonable, given the weight of the evidence. He submitted that taken at its highest, the prosecution’s case was that the appellant was the driver of the motor vehicle, in which the firearm was found under the right front passenger seat occupied by his co-defendant. Again, I find no merit in this submission.

⁴³ Page 329, paragraph 188 of the Record.

[69] Having reviewed the totality of the evidence before the magistrate, I am satisfied that there was a wealth of evidence which would support the finding of guilt. At paragraph 184 – 186 of her decision, the magistrate made the following critical findings:

“There is no dispute that Stoutt is the owner of PD-46 a vehicle in which a firearm and ammunition was found, and as such the deeming provision in section 12 applies to him. It deems him as the owner of such ammunition and firearm in circumstances where he has not discharged his evidential burden by rebutting the presumption.

Stoutt as the owner of the vehicle has admitted that he has always had custody of it. He told the police, ‘I always in my vehicle...It might seem a little dusty but my vehicle always clean. Papers don’t be in my vehicle no muck don’t be in my vehicle.’ He continued that only ‘dust does be in [his] vehicle’. As such he has had a reasonable opportunity to ascertain its contents whether availed, or not.

It is also not contested on any fronts that the two defendants were the sole occupants of the vehicle in which the firearm and ammunition were found. The two men on their own account had been riding along together making various stops at various places for several hours prior to their interception.”

[70] The magistrate had the contents of the appellant’s interview under caution tendered into evidence by Sgt. Prevost. She also had the evidence of the co-defendant Ortiz who placed the firearm in the possession of the appellant. Importantly, although Ortiz denied that he was in possession of the firearm when the motor vehicle in which he was a passenger was stopped and searched by the Police, he gave critical evidence as to the appellant’s interaction with the firearm which the magistrate was obliged to consider.

[71] Critically, the learned magistrate came to a view about the appellant’s credibility. After an extensive review of his evidence, she concluded at paragraphs 163 - 164:

“Having considered the Defendants case as [a] whole, I reject it. I do not believe his account of what happened on the 14th April 2013 at Pasea Estate.

I do not believe him at all. His account, his testimony was woefully inadequate and unbelievable. It was marked with inconsistencies and changes of case. I did not believe that he was not in possession of the firearm and the ammunition. As such I reject his case.”

[72] In so far as the assessment of the appellant's credibility, it is clear that it is only in rare cases that an appellate court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. In **R v Crawford** Lord Hughes noted:⁴⁴

"It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in *The Hontestroom* [1927] AC 37 at 47- 48:

'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute. ... It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board, under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty. ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'"

⁴⁴ See paragraph 9.

[73] This appellate approach has been repeatedly approved and applied by this Court in judgments which are too numerous to restate here.

[74] Notwithstanding this clarification for appellate restraint, the appellant asks that this Court interfere with the magistrate's assessment in respect of both the appellant and the co-defendant. In my judgment, the appellant has advanced no persuasive basis upon which this Court could interfere in either regard. Having observed both of the accused defendants, the magistrate clearly did not find either of them credible.

[75] Against the background of the appellant's ownership, possession and driving of the motor vehicle in which the unlicensed firearm was found, there would in my judgment be a sufficient basis for the learned magistrate to infer ownership and keeping (possession) of the firearm in the absence of any credible explanation from the appellant. Even in the face of his previous good character, the magistrate was nevertheless obliged to assess his demeanour, consistency and plausibility and come to a conclusion as to his credibility. She clearly did so. In those circumstances it seems to me that there was ample basis upon which the learned magistrate was justified in her findings. I therefore do not accept that the magistrate convicted the appellant simply because he was the driver, without additional supporting evidence or that her decision was unreasonable or unsupported by the evidence presented.

C. Whether the principles of joint enterprise and liability (Section 20 of the Criminal Code) ought to have been applied by the learned magistrate.

[76] Finally, the appellant argues the magistrate erred by applying the common law inference for joint possession rather than the statutory test under section 20 of the **Criminal Code** which provides that:

"Offences committed by joint offenders in prosecution of common purposes

20. When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such unlawful purpose, an offence is committed of such a nature that its

commission was a probable consequence of the prosecution of the unlawful purpose, each of them is deemed to have committed the offence.”

[77] Counsel for the appellant submitted that the learned senior magistrate ought to have directed herself with not only the test for possession but also on the principles governing joint enterprise. According to counsel, the magistrate was obliged to consider in relation to the joint offence, whether the appellant shared a common intention with the co-defendant to possess the firearm and further what was the requisite conduct of the appellant to assist the co-defendant, in the possession of the firearm, so that he shared with him such an intention.

[78] In my judgment this submission is misconceived. It seeks to conflate two distinct legal concepts, joint possession and joint enterprise. While both concepts relate to how multiple individuals can be held accountable for a criminal offence, joint possession refers to situations where two or more people share control or dominion over an object such as a firearm or controlled drug. Joint enterprise, on the other hand, involves two or more people acting together to commit a criminal offence, where each person may have a different role. In the former the co-defendants are joint principals where each does an act amounting to the *actus reus* of the offence. Each is liable for his own act, rather than for participating in the act of another, to the extent of his own *mens rea*. It is this reasoning which would have informed the very following useful dicta of **Julio Romero and Oscar Macrado v R**.⁴⁵ In that case a bag of cannabis was found concealed in the number 1 hatch of a vessel called ‘Don Caesar’ which was berthed in the island of Carriacou and of which the first appellant (Julio Romero) was the captain and the second appellant (Oscar Macrado) was a member of the crew. The appellants and two other accused persons were charged on an indictment containing two counts. The first count was that the appellants and the other accused did have in their possession a controlled drug contrary to section 6(2) of the Drug Abuse (Prevention and Control), Act No. 7 of 1992. The case for the prosecution was that the cannabis was in the joint possession of the appellants. The prosecution relied on the first appellant's captaincy and comprehensive physical custody and control of

⁴⁵ Grenada Criminal Appeals No 7 & 8 of 1993 (delivered 4th July 1994, unreported).

the vessel and on the second appellant's suspicious behaviour in the No.1 hatch as the basis of the possession of the first appellant and the second appellant respectively. Although this was a relatively simple case, it was complicated by the fact that the appellants were charged jointly for a so-called joint offence. After a trial by jury presided over by Moore J., the appellants were acquitted of the offence of importation but were convicted of the offence of possession and were each sentenced to imprisonment for a term of 7 years.

- [79] On appeal, the appellants argued that the learned trial judge erred in law when he failed to give proper direction to the jury with respect to the co-accused being jointly charged and therefore in joint possession of the drug cannabis. They contended that the learned trial judge ought to have instructed the jury that joint possession must be established. In short, the sort of direction to which the learned trial judge should have opened the jury's mind was to ask them to consider whether the drugs formed a common pool from which all had the right to draw. This ground of appeal was said to be premised on the decision of the English Court of Appeal in **R v Searle & Others**⁴⁶ in which Lord Widgery, C.J. would have observed:

"The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and **whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them.**" [Emphasis added]

- [80] This argument (striking in its similarity to that advanced by the appellant in this appeal) was summarily dealt with by Sir Vincent Floissac CJ who, at paragraphs 7 - 8 of **Julio Romero and Oscar Macrado** observed:

"In my judgment, **nothing said by Lord Widgery, C.J. in Searle's case was intended to be a mandatory catechism or incantation for judges in every case of a joint charge for a joint offence. The learned Chief Justice's dictum was intended to be confined to the particular circumstances of the case before him.** Otherwise, the dictum would amount to a total repudiation of the legal principle relating to the criminal liability of a secondary party (an accessory or accomplice) by reason of the secondary party's complicity in a crime. According to that legal principle,

⁴⁶ (1971) Crim. L.R. 592.

where a crime (including unlawful possession) is committed by a principal offender and either before or during the commission of the crime, a secondary party renders assistance (either by way of aid, abetting, counsel, procurement or encouragement) to the principal offender in the commission of the crime, the secondary party will be held to have been guilty of the crime as a party to it if he rendered the assistance with the mens rea necessary for guilt of that crime or with knowledge, contemplation or foresight of a substantial degree of probability (as distinct from a bare or remote probability) that the crime was being committed or would be committed by the principal offender. [Emphasis added]

The proper approach to joint charges for joint offences was explained in the decision of the House of Lords in *D.P.P. v Merriman* (1972) 3 A.E.R. 42. There, Lord Morris said (at p46):

'But in answering the question it is important to consider what is meant by a 'joint charge'. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having himself committed an offence. All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty.'... [Emphasis added]

Lord Diplock⁴⁷ concluded as follows:

'I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent. This was held to be the law by Street CJ and Owen and Herron JJ in the Supreme Court of New South Wales in *R v Fenwick* - a case of rape. I respectfully agree with their reasoning.'

[81] After considering whether the learned judge properly directed the jury on the law relating to unlawful possession of a controlled drug, the law relating to joint charges

⁴⁷ Lord Diplock in *DPP v Merriman* (1972) 3 A.E.R. 42.

for so-called joint offences and the law relating to complicity in a crime, Sir Vincent Floissac CJ concluded:

“...the learned judge's direction to the jury on the joint charge of the appellants for the joint possession of the controlled drugs was impeccable. He clearly explained to the jury in simple language (1) that the offence of unlawful possession of a controlled drug consisted of the actus reus of physical custody or control of the drug and the mens rea of knowledge of that custody or control (2) that notwithstanding the joint charge, the actus reus and the mens rea of possession had to be proved separately against each appellant (3) that in the case of the first appellant, the basis of the alleged possession was his captaincy and physical custody and control of the vessel which gave rise to a presumption which was rebuttable by proof (on a balance of probabilities) of the absence of physical custody or control of the drug or the ignorance of such custody or control...”

[82] The appellant herein concedes that the learned magistrate ought to have directed herself on the issue of possession. His contention that the magistrate should have gone on to consider the elements of joint enterprise is not supported by law on the facts of this case.

[83] For the reasons given above, I would dismiss the appellant's appeal against the conviction for carrying a firearm contrary to section 11(2)(a) of the **Firearms Act** and affirm his conviction. In relation to his conviction for possession of explosives contrary to sections 6 and 26 of the **Explosives Ordinance**, I would allow his appeal and set aside that conviction and sentence.

[84] For the reasons set out above, the Court orders as follows:

- i. The appeal against conviction for carrying a firearm without a licence is dismissed. The conviction is affirmed.
- ii. The appeal against conviction for unlawful possession of explosives is allowed. The conviction is quashed and the sentence consequently set aside.

[85] The Court expresses its gratitude to counsel for their assistance and regrets the delay in the delivery of this judgment.

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Dexter Theodore
Justice of Appeal [Ag]

By the Court

Chief Registrar