[2019] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 12/2018

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

ANDREW BROWN v R

Delano Harrison QC instructed by K Churchill Neita & Co for the appellant

Mrs Lenster Lewis-Meade for the Crown

1 May and 4 October 2019

STRAW JA

[1] On 25 March 2018, Mr Andrew Brown ('the appellant') was convicted in the Parish Court for Saint James, of the following offences: (i) possession of cocaine; (ii) dealing in cocaine; and (iii) trafficking cocaine. On 18 June 2018, in respect of the offence of possession of cocaine, he was fined $500,000.00 or three months' imprisonment, and in addition, ordered to serve (mandatory) three years and nine months' imprisonment at hard labour. The learned judge ordered that if the appellant failed to pay the fine imposed, then the sentence was to run concurrently. He was admonished and discharged in relation to the other offences.

[2] The appellant filed a notice of appeal on 27 June 2018 against his conviction. On 1 May 2019, at the conclusion of the hearing of the appeal, this court made the following orders:

> "1) The appeal is allowed.
>
> 2) The convictions are quashed.
>
> 3) The sentences are set aside and judgments and verdicts of acquittal entered."

The court promised that reasons would follow in due course and this judgment is a fulfilment of that promise.

Factual background

[3] On 20 April 2013 at approximately 8:30 pm, the appellant, in the company of another man (his co-accused) was travelling in a Toyota Liteace motor vehicle, marked Guardsman ('the Guardsman van'), along a main road in the Mount Carey area of Montpelier, in the parish of Saint James. The co-accused was the driver of the Guardsman van and an employee of Guardsman Security Limited. The Guardsman van was coming from the direction of Savanna-la-Mar, Westmoreland and heading towards Montego Bay, Saint James when it was intercepted by Detective Sergeant Byron Miller. The appellant was seated in the front passenger seat when the Guardsman van was stopped. A search of the appellant and the driver was done, as well as a search of the Guardsman van. Four white straw bags containing a solid substance resembling cocaine were found in the trunk of the Guardsman van.

[4] Both men were handcuffed and cautioned individually by Detective Sergeant Miller in the presence of Superintendent Leon Clunis who had been subsequently called to the scene. They were asked what they were doing with cocaine. The driver responded by saying it was the appellant who employed him to carry the bags from the border of Saint Elizabeth and Westmoreland. The appellant, who was within arm's length of the driver, said nothing.

[5] The driver was cautioned a second time by Inspector Maurice Pinnock of the Transnational Crime Narcotics Division who arrived on the scene at about 9:30 pm. When asked by Inspector Pinnock if he knew what was in the bag, the driver responded by saying "yes sir, a cocaine inna it, a Andrew Brown give mi fi carry". When asked in the presence and view of the driver if he heard what the driver said, the appellant did not respond. The four bags, which were removed by Inspector Pinnock, contained 53 plastic parcels of a white solid substance which weighed a total of 66 kilograms. Both men were placed in custody pending further investigations. The analysis by the forensic laboratory later confirmed that the solid substance was indeed cocaine.

[6] The following day, 21 April 2013, a caution statement was given by the driver in which he stated that he was asked by the appellant to use the Guardsman van to pick up cocaine for him in Whitehouse, Westmoreland. He stated that he met the appellant in Westmoreland and that the appellant and two men put some white plastic looking rice bags containing cocaine in the motor vehicle. He further stated that his role was to pick up the cocaine for the appellant and get some pay, and that he knew that he was picking up cocaine.

[7] On 25 April 2013 the appellant was charged with the offences of possession of cocaine, dealing in cocaine, taking steps preparatory to exporting cocaine and conspiracy to export cocaine. He was cautioned and he made no statement.

[8] The following week, on 3 May 2013, Inspector Pinnock accompanied Ms Marcia Dunbar and a team from the Forensic Institute of Jamaica to the Burke Military Barracks, located in Whitehouse Saint James. A Toyota Corolla (station wagon) motor vehicle owned by the appellant had been seized on 20 April 2013 and was being stored at the said location. Inspector Pinnock stated that the appellant had told him on the night of the incident that his car had been punctured somewhere along the road in Westmoreland and that he had asked the driver of the Toyota Liteace for a ride to get his tyre fixed. This vehicle was apparently retrieved by an unidentified police officer and driven to the scene that same night. Inspector Pinnock indicated that the appellant had confirmed that the vehicle was his. The ownership of the said Toyota Corolla motor vehicle was also confirmed again by the appellant in an interview as well as by reference to the documents found in the vehicle.

[9] According to Inspector Pinnock, Superintendent Clunis and a team from MOCA (the Major Organised Crime and Anti-Corruption Agency) would have secured this vehicle after he left the scene. The keys for the said vehicle were kept at MOCA and Inspector Pinnock testified that he believed it is one Sergeant Williams who gave him the keys. However, no evidence was led by the Crown as to who drove the said vehicle to the scene or transported it to the Burke Military Barracks. After the said vehicle was examined by Ms Marcia Dunbar, a forensic certificate was subsequently given to

Inspector Pinnock which revealed the presence of cocaine on the dashboard, steering wheel, console and doors. From the evidence, the quantity was stated to be traces, however the actual forensic certificate (containing the findings) appears to be missing from the list of exhibits placed before this court.

[10] There was also a punctured tyre in the back of the Guardsman van which had been identified by the appellant as belonging to his motor vehicle.

[11] The appellant himself stated in his unsworn statement that he was travelling from Westmoreland to Montego Bay and on reaching Waterworks, in the parish of Westmoreland, his car suffered a puncture. He saw the driver of the Guardsman van passing and he stopped him and obtained a ride. The appellant stated that on reaching Mount Carey, the police stopped the Guardsman van in which he was travelling and that he knew nothing of any cocaine in the said van. He further stated that he knew nothing of the traces of cocaine found in his own motor vehicle as he did not put them there and that he was not present when his motor vehicle was being tested.

Grounds of appeal

[12] Queen's Counsel, Mr Harrison, abandoned the original grounds of appeal and sought leave to rely on six supplementary grounds, which are as follows:

> "**GROUND 1**
>
> The learned Parish Court Judge erred in law in that, in convicting the [appellant], she relied significantly on his silence (a) in the face of accusations by his co-accused and, further, (b) after being cautioned by the police."

"**GROUND 2**

The learned Parish Court Judge erroneously rejected the crux of the [appellant's] defence, namely, that his presence in the Guardsman van at the material time was that of an innocent passenger."

"**GROUND 3**

The learned Parish Court Judge erred in her reliance on evidence of cocaine found in the interior of that [appellant's] car as establishing his possession of cocaine found in the Guardsman van, thirteen days after its having been wholly in police custody."

"**GROUND 4**

The learned Parish Court Judge erred in law in her failure to direct herself with respect to the good-character aspect of the [appellant's] defence."

"**GROUND 5**

The learned Parish Court Judge erred in law in her failure to uphold the submission of no case to answer, made at the close of the prosecution case on behalf of the [appellant]."

"**GROUND 6**

The verdict is unreasonable having regard to the evidence."

[13] Queen's Counsel indicated at the outset of the hearing that he would not be pursuing supplementary ground four and leave was granted to argue the remaining grounds.

[14] Having heard submissions from both counsel for the appellant and for the Crown, this court made the orders set out at paragraph [2] as we found that there was

merit in grounds 1 and 3, both of which will be discussed hereafter. The conclusion in relation to both these grounds was sufficient to dispose of the appeal. As such, it was deemed unnecessary to treat with the other grounds advanced.

GROUND 1: The learned Parish Court Judge erred in law in that, in convicting the appellant, she relied significantly on his silence (a) in the face of accusations by his co-accused and, further, (b) after being cautioned by the police.

Submissions on behalf of the appellant

[15] In essence, Queen's Counsel contended that the appellant's conviction should not be allowed to stand as the appellant and the driver were not on even/equal terms when the accusations were levelled by the driver and, as such, the appellant's silence could not be used to infer guilt, as the learned judge did.

[16] Mr Harrison provided the context for his submissions in support of this ground by referring the court to paragraph 90, sub-paragraph (3) of the learned judge's reasons and findings of fact, which states:

> "I found that it was appropriate to draw inferences from Mr. Brown's silence in response to Mr. Glaze's accusations when they were on even terms, as the circumstances called for a response. The only inference that could be drawn from Mr. Brown's silence is that he accepted Mr. Glaze's accusations. This, taken together with his presence in the van and the traces of cocaine made me sure that Mr. Brown had possession and control of the four bags which contained cocaine and knew of the contents of the bags."

[17] It was contended that this finding on the part of the learned judge makes it quite clear that in the words of Panton JA (as he then was) the "silence of the appellant was a dominant feature in [her] mind"[1] in her conviction of the appellant.

[18] Reference was also made to paragraph 76, wherein the learned judge opined:

> "The law is therefore clear that when a statement or an accusation is made by one defendant against another in the presence of that other, in circumstances where one might expect some protest or denial by that other defendant in response, and that other defendant remained silent, the court or jury may draw inferences from such silence alone, or from his silence coupled with other conduct. I have considered the fact that both men had been cautioned before Mr. Glaze made the accusation against Mr. Brown, and I have also considered the nature of the accusation made. Having regard to the nature of the verbal statements made by Mr. Glaze against Mr. Brown in his presence **when they were on equal terms**, I feel it is appropriate to draw inferences from Mr. Brown's silence in response to the verbal statements. There were two instances in which Mr. Glaze made an accusation against Mr. Brown in Mr. Brown's presence, and in both instances Mr. Brown remained silent at a time when a reply might reasonably be expected in the circumstances. In his evidence in court, Mr. Glaze said that he told Sergeant Miller that "anyhow cocaine come into my vehicle, it is Mr. Brown put it in there as none was there before", and that Mr. Brown was an arm's length away at that time. Mr. Glaze did not say that Mr. Brown made any comment or protested in respect of this accusation. Even on Mr. Glaze's account, if believed, Mr. Brown seemingly remained silent in response to the accusation that the drugs belonged to him. However, I accept the accounts of Sergeant Miller and Inspector Pinnock." (Emphasis supplied)

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[1] **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005, at paragraph 8

[19] It was acknowledged that the learned judge sought to rely on a number of authorities for the meaning of the juridical phrase "on even terms". These included **Donald Parkes v R**[2], **Reg v Mitchell**[3] and **Rex v Christie**[4].

[20] Mr Harrison submitted that the repetition and the firmness with which the learned judge affirmed her finding that both the driver and the appellant were on even/equal terms on the two material occasions, demonstrated that the appellant's silence was not merely a dominant feature in the judge's mind but the predominant feature in her mind which was pivotal to the conviction of the appellant.

[21] The case of **R v Latty and Smith**[5] was commended to the court as being helpful in respect of the proper construction and application of the phrase "on even (equal) terms". Mr Harrison submitted that the relevant principle from this case is that an accused person's silence in response to an accusation by another, cannot, in law, sustain an inference of guilt where any police officer or other person in authority charged with the investigation of the crime, is to the knowledge of either of the parties, present or within hearing distance. That is to say, where the accuser and the accused are not on even/equal terms.

[22] In the case at bar, it was submitted that the evidence demonstrated that on the night in question, after the police found a quantity of cocaine in a van driven by the

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[2] [1976] 1 WLR 1251
[3] (1892) 17 Cox CC 503
[4] [1914] AC 545, HL (E)
[5] (1988) 25 JLR 119 (CA)

appellant's then co-accused, the driver levelled accusations against the appellant alleging the latter's knowledge about the cocaine.

[23] Counsel pointed out that on the first occasion, the police officers who were actively engaged in investigating the crime were present, namely Sergeant Miller, Inspector Camille Tracy and Superintendent Clunis. Sergeant Miller cautioned both men before the material accusations. On the second occasion, shortly after, the officers present were Inspector Pinnock (with a team of police officers), Inspector Tracy and Sergeant Miller. Inspector Pinnock cautioned both men before the driver repeated his accusations in the presence of several police officers. It was contended that the several police officers were all at the time charged with the investigation of the crime and definitely in a position of authority.

[24] Accordingly, it was submitted that the police officers being present, to the certain knowledge of the appellant and the driver, meant that the men were not on even/equal terms. As such the appellant's silence when he was "so circumstanced" could in no way have sustained any inference of guilt on his part.

[25] The dictum of Panton JA (as he then was) in **Christopher Belnavis v R**[6] was commended to this court as eminently applicable to the case at bar. Panton JA affirmed:

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[6] (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005

> "…There is no room in the law for anyone to attempt to whittle down the right of an accused person to remain silent in circumstances where he is not on equal terms with his accuser. In the instant situation, the silence was in the presence of a person in authority, and the right in such circumstances is inviolable. Where a judge fails to respect the right, and uses the exercise of that right against an accused, the conviction ought not to be allowed to stand."[7]

Submissions on behalf of the Crown

[26] Crown Counsel, Mrs Lewis-Meade, conceded that the use of the phrase "on even/equal terms" was incorrectly used by the learned judge. She agreed with the submission of Queen's Counsel in relation to the principle from **Christopher Belnavis,** that for parties to be on equal terms, the police officers, the investigating officer or anyone in authority would need to be absent.

[27] Mrs Lewis-Meade contended, however, that there was no miscarriage of justice. She submitted that the inference made by the learned judge from the appellant's silence was not the sole factor used to determine guilt. She pointed the court to paragraph 77 of the learned judge's reasons and findings of fact, which states:

> "There may be a number of reasons (such as fear) for a defendant's silence in the face of an accusation. However, in the instant case, I believe that the circumstances called for an explanation from Mr. Brown, first when Superintendent Clunis was called to the scene and Mr. Glaze was first said to have made the accusation against Mr. Brown, and then later when Inspector Pinnock was called to the scene and Mr. Glaze repeated the accusation against Mr. Brown. I do not find Mr. Brown's silence to be ambiguous or to be caused by some innocent explanation. Mr. Brown had ample

[7] Paragraph 6

> opportunity to deny the allegations made by Mr. Glaze in his presence, but he did not do so. In circumstances where (1) he had not yet been charged, (2) he was on even terms with his accuser and (3) he was given two opportunities to refute Mr. Glaze's accusations, I find that he ought to have responded and it is appropriate to draw an adverse inference from Mr. Brown's silence. I infer from his silence that Mr. Brown accepted Mr. Glaze's accusations and that he knew of the presence of the cocaine in the van, and he was also in possession of the cocaine."

[28] Reference was also made to the subsequent paragraph where the learned judge indicated what the nature and strength of the other evidence against the appellant was. The judge concluded as follows:

> "…In this case, the evidence is circumstantial in nature, namely that (1) he was a passenger when the cocaine was found in the Guardsman van (2) he remained silent when accused by Mr. Glaze of possessing the cocaine when one might expect some protest or denial by him in response the accusation made and (3) traces of cocaine where found on the dashboard, steering wheel, console and doors of the car owned and driven that day by him. I believe that these circumstances taken together are sufficiently cogent that inferences can reasonably be drawn as regards Mr. Brown's guilt."

[29] It was contended, therefore, that the appellant's silence was only a confirmatory factor and that it was not the only evidence relied on in coming to the decision about the guilt of the appellant. Mrs Lewis-Meade also referred the court to paragraph 90, sub-paragraph (3) of the learned judge's reasons and findings of fact (set out at paragraph [16], above). She emphasised the learned judges' words "**This, taken together** with his presence in the van and the traces of cocaine **made me sure** that Mr. Brown had possession and control of the four bags which contained cocaine and knew of the contents of the bags" (emphasis supplied). It was argued that the learned

judge did not accord any more significance to the silence of the appellant so as to make it a "dominant feature" in the conviction of the appellant and that she was entitled to draw an inference based on the appellant's silence in circumstances where an explanation or disclaimer was required as one factor which supported an inference of knowledge and guilty possession.

[30] Mrs Lewis-Meade submitted further that the learned judge could have used the appellant's silence in the context stated in the cases of **R v Daniel Connell**[8] and **R v Monica Williams**[9]. The court was referred to the following passage from **Daniel Connell** at page 582, paragraph H:

> 'In a previous decision of this court, silence in these circumstances was said to "strengthen" the inference of possession: R v Maragh (2) ((1964), 6 W.I.R. at p. 239). In R v Williams (6) – also a case of possession of ganja --- it was regarded as "conduct which the magistrate could properly take into account in determining the question of her guilt." In this latter case, it was thought appropriate and desirable to make it plain to occupiers upon whose premises ganja had been found pursuant to a search under a warrant that, although they were not obliged to say anything when told by the police that it was ganja, nevertheless, **if they should fail to say something, they would have remained silent at the risk of adverse inferences being drawn against them. Silence in those circumstances would acquire an evidential and therefore rebuttable significance.** An occupier of premises who was subsequently charged could destroy all adverse inferences by going into the witness box at his trial and giving a satisfactory explanation for his silence. It was considered that by propounding the law along these lines,

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[8] (1971) 12 JLR 578
[9] (1970) 16 WIR 74

> the criminal processes were being assured of execution in accordance with the dictates of common sense, and citizens were being encouraged to discharge their duty to assist the reasonable investigations of the police." (Emphasis supplied)

And also at page 583, paragraphs B – C which cited **Monica Williams**:

> "The decision in this case is clearly distinguishable from that in R v Williams (6) … where the silence of the accused did not stand by itself as the single fact relied upon to prove guilt, but was a fact confirmatory of other incriminating facts. This is also the position in the instant case. Consequently, if the magistrate found that the appellant had said nothing when told that the vegetable matter discovered was ganja, his silence was one more fact tending to prove his guilty possession."

[31] Finally, it should be noted that in response to a question asked by this court, Crown Counsel conceded that the learned judge did not rely on these authorities.

Discussion and analysis

[32] There is no question that both accusations made by the driver against the appellant were made in the presence of police officers charged with the investigation of the crime. In fact, the accusations were made in response to questions asked by the police officers. In **R v Latty and Smith**[10], an authority relied on by Queen's Counsel, the factual circumstances were that a house occupied by both Latty and Smith was searched by two police detectives in the presence of Smith alone. Ganja was found in each of the two clothes closets in the two rooms of the house. When questioned by the police about the ganja, Smith told them that it belonged to Latty who was contacted by the police. In the presence of the police and (now) Latty, Smith repeated his allegations

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[10] (1988) 25 JLR 119 (CA)

that the ganja was Latty's. Latty did not respond. Both men were then individually cautioned by the police; again Smith said that the ganja was Latty's and again Latty said nothing.

[33] The dictum of Campbell JA in **R v Latty and Smith**[11] is particularly apt:

> "It is made abundantly clear in *Donald Parkes v. R.* (supra) that the only circumstances in which mere silence can give rise to the inference of an admission of the truth of a charge, is where the accuser, and the accused are so circumstanced that no police officer or other person in authority charged with the investigation of the crime, is, to the knowledge of either of the parties, present, or within hearing distance and the accusation is spontaneous, that is to say, not made for and on behalf, and on the promptings of a police officer or other person in authority aforesaid.
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> In the present case the accusation made by Smith was in the presence of police officers who were actively engaged in investigating the likely drug charges. On the principle in *Dennis Hall v. R.* (supra) as further developed by the dicta of Lord Diplock in *Donald Parkes v. R.* (supra) no adverse inference can be drawn from the silence of Latty."

[34] The learned judge was therefore plainly wrong in her assessment that the appellant was on even terms with his accuser and that she could draw an adverse inference from the silence of the appellant under those circumstances. Crown Counsel appropriately conceded on this point.

[35] However, there are certain circumstances where silence of a defendant who is not on even terms, can be used to strengthen an inference of possession if other additional facts are present from which to draw adverse inferences. The cases of

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[11] At page 123

Daniel Connell and **Monica Williams** relied on by Crown Counsel are illustrative of this point. Both these cases were concerned with appellants occupying premises where drugs were found.

[36] In **Monica Williams**, police officers, pursuant to a search warrant, found ganga in various places in a dwelling house occupied by the appellant. As each discovery was made she was shown the matter found and told it was ganja. On each occasion, she remained silent. The court reiterated that mere occupation without "something more" is not sufficient for a finding of possession of ganja: however, there was material from which something more could be inferred. This included the falsity of her alibi, the quantity of the ganja found, the obvious position of two crocus bags with ganja in the fowl pen, in the carton box in the bathroom and the circumstance that some of the ganja had been parcelled. This was also within the context that she was the only adult present at the house at the time of the visit by the police. Importantly, the court also held that the consistent failure of the appellant to say anything when she was shown the ganja was another factor which strengthened the inference of possession.

[37] In **Daniel Connell**, the appellant was in joint occupation with his wife of the premises where ganja was found. Both were present at the time. When it was pointed out to the appellant by the police that ganja was found, he said nothing. The court found that the prosecution had established eight other facts, including his silence, apart from occupation, which were "too imperative to admit of any real doubt" that he was in joint possession with his wife.

[38] Crown Counsel has sought to argue that the conviction of the appellant in the present case could be upheld on the basis of the above-mentioned authorities as the trial judge found that the traces of cocaine in the appellant's vehicle were an additional factor that she considered to come to a conclusion of guilt. Indeed, the learned judge did state, as set out at paragraph [16] of this judgment, that the silence of the appellant, coupled with his presence in the van as well as the traces of cocaine, were the factors that led her to a verdict of guilty.

[39] However, there would have to be cogent evidence of other facts which could provide a basis for an adverse inference to be drawn against the appellant in the face of his silence and even his presence in the Guardsman van. The said motor vehicle was not controlled by him; he was a mere passenger. The only additional piece of evidence would be the traces of cocaine found in the motor vehicle belonging to the appellant which he had been driving on the night of the incident. Whether this was of sufficient cogency to provide the additional inference necessary to prove joint possession will be considered below.

GROUND 3: The learned Parish Court Judge erred in her reliance on evidence of traces of cocaine found in the interior of the appellant's car as establishing his possession of cocaine found in the Guardsman van, thirteen days after it having been wholly in police custody.

Submissions on behalf of the appellant

[40] Mr Harrison, in making his submissions, recounted the appellant's contention that on the evening of Saturday 20 April 2013, he secured a puncture while driving his

motor vehicle on his way to Montego Bay and that he got a ride on the Waterworks Road, in Westmoreland, from the driver of the Guardsman van.

[41] Queen's Counsel reiterated that the appellant's motor vehicle was removed from Waterworks Road where the puncture occurred. However, Mr Harrison highlighted that, when questioned by the learned judge as to the movement of the appellant's motor vehicle on the night of 20 April 2013, the investigating officer, Inspector Pinnock was unable to speak to:

i. How the appellant's motor vehicle came to be on the scene where the police were, that is on the Mount Carey Road;

ii. Who drove the motor vehicle to Mount Carey; or

iii. How the motor vehicle was secured that night.

[42] Queen's Counsel pointed out that no admissible evidence on these legitimate concerns harboured by the learned judge was adduced. Further, it was not until 5 May 2013, some 15 days later, that the appellant's motor vehicle was forensically examined by the expert, Ms Dunbar and traces of cocaine were found in the interior.

[43] In support of this ground of appeal, a tripartite attack was launched by Mr Harrison. In his opening salvo, he submitted that at the trial there was no evidence that any, or any part of, the four bags of cocaine had been in the appellant's motor vehicle. He stated that this was detrimental to the Crown's case, bearing in mind that cocaine,

no matter its quantity, is not a substance like blood which is readily identifiable and so distinguishable by types.

[44] Further, he submitted that the learned judge plainly misconceived that the "chain of custody" of these traces of cocaine was the issue being canvassed by the appellant. The judge's reliance on the case of **Chris Brooks v R**[12], which is concerned with the issue of whether very small quantities (traces) of a contraband drug might be sufficient to ground an offence, is beside the point. The true issue was whether the traces of cocaine found in the appellant's motor vehicle constituted small quantities of the very same cocaine that had been found in the Guardsman van.

[45] Secondly, it was submitted that there was no evidence to properly sustain any inescapable, reasonable inference that the traces of cocaine came from the bags in the Guardsman van because, some 15 days previously, the appellant was driving the motor vehicle. Mr Harrison posed the following questions: how long – previously - were those traces in that motor vehicle? Was the appellant the only driver at such a time – previously? Is any significance to be attached to the fact that there was no evidence as to the movement of the motor vehicle and its security, on or after the night of 20 April 2013 or at any time subsequent? It was submitted that these are all issues which fairly called for proof from the prosecution.

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[12] [2012] JMCA Crim 5

[46] Third and finally, it was submitted that the learned judge erroneously sought to establish some nexus between the substance found in the Guardsman van and the traces of the same type of substance found in the appellant's motor vehicle. This nexus, Queen's Counsel contended, resulted in the learned judge wrongly convicting the appellant in the absence of direct or proper inferential evidence, by reliance on speculation.

[47] Mr Harrison directed the court's attention to paragraph 86 of the judge's reason and finding of facts, wherein it was stated:

> "It was never suggested to the police witnesses that the police planted traces of the drug in Mr. Brown's car, and I have found no evidence of that and see no reason why these senior officers (Superintendent Clunis, Inspector Pinnock, Sergeant Miller and Sergeant Williams) would resort to such conduct."

In response to this finding, it was submitted that it would have been "hugely improper" for the defence to suggest in cross-examination of any police witness, junior or senior, that he or she had acted with some impropriety in the execution of their duty, unless it proposed to prove such a breach.

Submissions on behalf of the Crown

[48] Crown counsel's position in relation to this ground was that the learned judge, in treating with the facts, had the applicable law in mind, including the standard and burden of proof and assessed the evidence using a clear and reasoned process.

[49] It was submitted that the learned judge, in assessing the integrity of the substance found in the appellant's motor vehicle addressed her mind to the case of **Chris Brooks v R** which cited **Damian Hodge v R**[13] wherein it was held:

> "The underlying purpose of testimony relating to 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. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. There is no specific requirement, neither is it necessary, that every person who may have possession during the chain of transfer be called to give evidence of the handling of the sample while it was in their possession."

[50] In coming to the decision about the integrity of the traces of cocaine found in the appellant's motor vehicle the learned judge took into account the fact that:

(a) someone from MOCA drove the motor vehicle to the scene at Mount Carey which was identified by the appellant as his;

(b) the documents were checked and they confirmed ownership by the appellant; and

(c) the appellant spoke to Inspector Pinnock about owning the motor vehicle.

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[13] (unreported), Court of Appeal, Territory of the Virgin Islands, HCRAP 2009/001, judgment delivered 10 November 2010

[51] It was submitted that the learned judge acknowledged that there was a lacuna in the evidence in terms of the movement of the motor vehicle and went further to satisfy herself that there was no cross-contamination of the car by examining the evidence of Inspector Pinnock and Sergeant Miller regarding the handling of the prohibited substance and their interaction with the motor vehicle. Additionally, the evidence of Inspector Tracy regarding the said officers' contact with the prohibited substance was also taken into account. Accordingly, the learned judge concluded, based on the evidence, not speculation, that she was satisfied that neither Inspector Pinnock nor Sergeant Miller, had contact with the appellant's car on 20 April 2013 and that Inspector Pinnock, seemingly, was the only one who handled the exhibits.

[52] It was contended that the learned judge conducted further assessment using Inspector Pinnock's explanation about his reason for not including the appellant's motor vehicle in his statement. Having satisfied herself of the usefulness of this explanation, the learned judge concluded that the motor vehicle was not handled or detained by Inspector Pinnock and reiterated that since he did not possess first-hand knowledge about the motor vehicle, a witness statement should have been taken from the officer at MOCA (which based on the evidence would have been Sergeant Mark Williams) who handed him the keys.

[53] Crown Counsel agreed that there was insufficient information from the evidence to properly trace the motor vehicle from its original point to the scene (Mount Carey) and its removal from the scene. However, it was submitted that the motor vehicle was moved by wrecker to the police station on the same night and Inspector Pinnock had

subsequently received the keys. The motor vehicle was locked when it was taken to the station and prior to the examination by Ms Dunbar.

[54] Whilst there is no evidence of a fully unbroken chain of custody as it related to the motor vehicle, it was submitted that a sufficient evidentiary link was made between the motor vehicle and the appellant. Reliance was placed on the case of **Grazette v R**[14], a decision of the Caribbean Court of Justice.

[55] Lastly, it was submitted that having found that there was no contamination it was proper for the judge to find that the evidence showed "past and previous" possession by the appellant. Reference was made to **R v Boyesen**[15].

Discussion and analysis

[56] It was apparent to the court that there were a number of gaps in the prosecution's case as a result of what appeared to be poor investigation. No explanation was provided as to why there could be no account as to the handling of the appellant's motor vehicle. Seemingly, in an attempt to close some of these gaps, the learned judge asked a number of questions of the witnesses. However, it is the Crown who must bring the requisite evidence to prove its case.

[57] In our view, it was not necessary for the defence to suggest that the cocaine was planted by the police. Such a contemplation by the learned judge would seem to rule out the fact that there are other possible explanations for how traces of cocaine

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[14] [2009] CCJ 2 (AJ)
[15] [1982] 2 All ER 161

may have come to be in the appellant's car. For instance, there is the possibility of contamination. The officers from MOCA, who handled the motor vehicle and from whom no evidence was forthcoming, could have been on a different raid and thus had previous contact with cocaine.

[58] Further, we find the case of **Grazette v R** to be quite distinguishable from the instant case, as the court in **Grazette** was assessing the evidence of chain of custody in relation to samples of blood. We would agree with the submission of Queen's Counsel that cocaine is not a substance like blood which is readily identifiable and so distinguishable by types. Also, and most importantly, the issue of the chain of custody would extend to the vehicle in which traces of cocaine were found. This would include the time that the car came into the possession of the police up to the time it was secured at the site where it was examined; also whether anyone else had access to the keys between 20 April and 5 May 2013.

[59] The Crown, therefore, did not provide sufficient evidence that could have properly satisfied the learned trial judge beyond a reasonable doubt that the traces of cocaine that were found in the appellant's vehicle were left there due only to the appellant's handling of cocaine relevant to that vehicle. While the learned judge would have been correct that reliance can be placed on traces to show past or previous possession of a substance, she erred in concluding that she was satisfied that the evidence as presented showed past or previous possession of cocaine by the appellant. Also, even if there was cogent evidence that showed past or previous possession, the appellant was not charged for being in possession of cocaine at any time other than the

date alleged in the information on which he was charged and in respect of the quantity of cocaine found in the Guardsman van. It was in relation to that cocaine that he was charged. The traces in his motor car must be proved to be connected to that cocaine for which he was charged. Past or previous possession simpliciter could only have been viewed as an adverse fact, if there were other cogent adverse facts from which the presence of traces of cocaine in his motor car could lead reasonably and inescapably to the inference that he was in possession of the cocaine found in the Guardsman van. There were significant gaps in the evidence that would have had to be dealt with by the Crown before the learned trial judge could have arrived at any such conclusion. We therefore found that this ground of appeal was meritorious.

Conclusion

[60] It has been more than a decade since Panton JA (as he then was)[16] thought it appropriate to remind trial judges that the silence of an accused person, in circumstances where he is not on equal terms with his accuser, is inviolable and that this right must not be whittled down. We would conclude with the same reminder.

[61] Based on the reasons as set out above, the conviction of the appellant could not be sustained as the evidence relied on by the learned judge was not sufficient so as to entitle her to find that the charges against the appellant were made out. The court therefore had no choice but to quash the convictions and enter judgments and verdicts of acquittal.

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[16] See: paragraph 6 of **Christopher Belnavis v R**