[2021] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 3/2018

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MISS JUSTICE SIMMONS JA

ALLAN NEIL GARDNER v R

Melford Brown and Christos Brown instructed by Mel Brown & Co for the appellant

Miss Kathy-Ann Pyke and Okeeto DaSilva for the Crown

3 November 2020 and 7 May 2021

SIMMONS JA

[1] On 27 March 2017 following a trial which had commenced on 15 February 2016, and lasted a total of five days, Allan Neil Gardner ('the appellant') was convicted in the Parish Court for the parish of Clarendon of the following offences under the Dangerous Drugs Act ('the Act'):

(i) possession of ganja contrary to section 7C of the Act;

(ii) dealing in ganja contrary to section 7B(a) of the Act

(iii) trafficking in ganja contrary to section 7(B)(c); and

(iv) taking steps preparatory to export ganja contrary to section 7(A)(1).

[2] On 10 May 2017 he was sentenced as follows:

(i) possession of ganja – $15,000.00 or 30 days' imprisonment;

(ii) dealing in ganja – $500,000.00 or 30 days' imprisonment;

(iii) trafficking in ganja – admonished and discharged; and

(iv) taking steps preparatory to export ganja – admonished and discharged.

[3] The appellant, aggrieved by the outcome of the trial, gave verbal notice of his intention to appeal and filed a notice of appeal dated 23 May 2017.

[4] On 3 November 2020, this court heard the submissions of both sides in the appeal and reserved its decision.

Background

[5] On 14 February 2012, the appellant, who was driving a Toyota Hiace bus ('the vehicle') along the Bustamante Highway ('the highway') in the parish of Clarendon, was stopped by the police. Upon inspection, it was observed that there were several white knitted bags ('the knitted bags') in the vehicle with what appeared to be ganja, based on the odour emanating from them.

[6] The appellant and the vehicle were taken to the May Pen Police Station ('the station') in the parish where the vehicle and its contents were handed over, in his presence, to police officers assigned to the Narcotics Division. The knitted bags, numbering 30, were found to contain compressed vegetable matter resembling ganja.

The said bags were packaged, labelled and sealed by the police in the presence of the appellant. When charged, the appellant stated that his mother was sick and he was trying to make some money to assist her and that he was not a wrong doer.

The prosecution's evidence at trial

[7] At trial, the Crown relied on the evidence of six witnesses being: Corporal Neil Simpson, Corporal Dean Mark Farquharson, Corporal Eugene Mitchell, Sergeant Robert Barrett, Inspector Lawson Naughty and Nichola Brown Baxter. The evidence of five of these witnesses has been summarized below.

Corporal Neil Simpson (Corporal Simpson)

[8] Corporal Simpson stated that on 14 February 2012 at about 12:20 am he was carrying out mobile patrol duties along with Corporal Dean Mark Farquharson and Constable Lewin. They were travelling along the highway in the vicinity of the Mineral Heights roundabout when he received certain information. As a result, they proceeded towards Glenmuir Road, May Pen in the parish of Clarendon. Corporal Simpson was the driver of the service vehicle.

[9] Upon approaching Baba's junk yard, Corporal Simpson stated that he saw the vehicle making a U-Turn in the middle of the highway before proceeding along Glenmuir Road at a high speed. Other police units in the area were notified of this development.

[10] The vehicle, which was marked "Chill Out" on the front windscreen, was intercepted by another police unit at the intersection of Anderson Drive and Glenmuir Road. On arrival at the scene, Corporal Simpson exited the service vehicle and gave

instructions to the appellant, who was the driver and sole occupant of the vehicle. He was able to see the appellant's face as the location was not dark due to the presence of streetlights.

[11] Corporal Simpson instructed the appellant to step out of the vehicle and switch off the engine. The appellant complied. When Corporal Simpson told the appellant that he was aware that he was conveying illicit drugs, he responded "A just a little weed me a hustle and me a beg you a chance". He then told the appellant he needed to search the vehicle and proceeded to do same. He observed that there were several knitted bags and detected the strong aroma of marijuana. The knitted bags were located in the trunk of the vehicle and were stacked from the area behind the driver to the trunk. Corporal Simpson stated that he never touched or removed the knitted bags from the vehicle but made his observations from outside of the vehicle.

[12] The appellant was cautioned and advised of the offences of possession, dealing and trafficking in ganja. The appellant did not respond. A wrecker was called and the vehicle was taken to the station. The appellant was transported in the marked service unit to the station. At all times Corporal Simpson and the appellant had sight of the wrecker and the vehicle whilst it made its way to the station.

[13] Upon arrival at the station, the vehicle and the items therein were handed over to Detective Sergeant Barrett of the Narcotics Division who was present along with other members of the Narcotics Division. Corporal Dean Mark Farquharson gave evidence which largely supported the evidence of Corporal Simpson.

[14] At trial when shown a set of bags Corporal Simpson identified them as being the knitted bags he had seen in the vehicle on the night in question. He described them as being white in colour with logos which indicated that they were Nutramix and HiPro animal feed bags and Miracle White Rice bags. When counsel for the Crown sought to have the knitted bags admitted into evidence, Mr Melford Brown who was one of the attorneys appeared for the appellant at the trial, objected on the basis that the witness did not examine and identify each of the knitted bags. He also stated that not all of the said bags were white knitted bags as there were plastic bags and one brown sugar bag among them. 29 knitted bags were marked for identity.

[15] In cross examination, the officer could not say how many knitted bags were in the vehicle as he had not counted them. Regarding the response attributed to the appellant after he told the appellant that he was aware that the appellant was conveying illicit drugs, he rejected the suggestion that the appellant "had no such words with" him. Corporal Farquharson was however not challenged on his evidence that the appellant had used those words.

Corporal Eugene Mitchell

[16] Corporal Eugene Mitchell stated that he was attached to the Milk River Police Station in the parish of Clarendon. In 2012 he was attached to Area 3 Scene of Crime Section where his main duties included crime scene investigation and photography. On 14 February 2012 at about 2:30 am, whilst on reserve duty at the Scene of Crime office at the station, he was requested to process the vehicle by taking photographs of inside and outside the vehicle. He used a digital camera to take these photographs.

[17] During the process he removed the knitted bags and numbered them 1-30. When he removed the parcels in each knitted bag and cut them, he observed that they contained vegetable matter resembling ganja. He took photographs of the parcels. Under cross-examination he said this was done in the presence of the appellant.

[18] When he returned to his office he removed the flash card from the digital camera and copied the photographs onto three compact discs using the West Point copy station. The compact discs were then labelled to reflect the case to which they related and the witness' name.

[19] In cross-examination the officer indicated that the appellant and Corporal Powell were present when the photographs were being taken.

Sergeant Robert Barrett (Sergeant Barrett)

[20] The officer gave evidence that in February 2012, he was assigned to the Transnational Narcotics Division for the parish of Manchester. On 14 February 2012 after receiving certain information he went to the station where he spoke with Corporal Simpson who advised him of what had transpired with the appellant. The keys for the vehicle were handed over to him by Corporal Simpson.

[21] When the officer asked the appellant what was inside the vehicle, he said "Boss some weed me a carry to Saint Thomas for a man name Biggs". The appellant told him that he had picked up the vehicle from Biggs close to the school in Burnt Savannah, Saint Elizabeth.

[22] Sergeant Barrett indicated that when he opened the vehicle in the appellant's presence he was met with the aroma of ganja. He observed that there were a number of knitted bags inside. When he opened one of the knitted bags he saw parcels wrapped in brown masking tape. He then opened one of the parcels and saw vegetable matter resembling compressed ganja.

[23] The officer stated that he then cautioned the appellant whose response was that his mother was sick with cancer and that he was trying to make some money. He also indicated that personnel from Technical Services Division came to the station and took pictures of the inside and outside of the vehicle. The knitted bags were photographed and cut open in the presence of the appellant. His evidence was that there were 30 knitted bags inside the vehicle from which 189 parcels wrapped in brown masking tape were removed.

[24] The parcels were then returned to the knitted bags which were placed in labelled plastic bags. They were then sealed and returned to the vehicle in the presence of the appellant. At the trial these 30 knitted bags were admitted into evidence as exhibits 1 to 30 along with the 189 brown parcels.

[25] Sergeant Barrett arrested the appellant for breaches of the Act. On 14 February 2012 the vehicle was taken to the Narcotics Division in Kingston and the knitted bags handed over to Inspector Naughty who was the Exhibit Storekeeper.

[26] The officer later obtained a forensic certificate in the matter and upon examination of same observed that the name of the appellant was spelt incorrectly. He returned the

original forensic certificate to the Government Forensic Laboratory ('the Forensic Laboratory') and the certificate was reissued with the name of the appellant spelt correctly.

Inspector Lawson Naughty (Inspector Naughty)

[27] Inspector Naughty indicated that he had been attached to the Narcotics Division located at 230 Spanish Town Road, Kingston since 1990. In February 2012 he was the Assistant Storekeeper. He stated that, on 14 February 2012, he was assigned to the Narcotics Division's Armoury and Stores ('the stores'). He said that on that day, Sergeant Barrett attended the stores with 30 transparent plastic bags. Each of them contained knitted bags which appeared to have contents therein. They were all sealed and labelled. The bags were secured in the storeroom.

[28] On 21 February 2012, Mrs Brown Baxter ('the forensic analyst') of the Forensic Laboratory, a team from the said laboratory and Corporal Avril Smith of the Narcotics Division attended the stores. The bags were handed over to Corporal Avril Smith based on instructions he had received from Sergeant Barrett.

[29] Inspector Naughty said he then observed the forensic analyst taking samples from each knitted bag and writing a forensic number FL 560/2012 on each bag. Upon completion, all 30 knitted bags were sealed, secured and returned to him, at which time he returned them to the store.

[30] At trial it was noted that several of the knitted bags were in a state of disarray with some not being in clear protective plastic bags. In many instances the plastic bags

were badly torn, and the brown parcels had fallen out of the knitted bags and were both in the knitted bags and the plastic bags. In other cases, the knitted bags were in more than one plastic bag which was explained as being necessary to protect the integrity of the exhibit in cases where the original plastic bag was damaged.

Nichola Brown Baxter (the forensic analyst)

[31] Mrs Brown Baxter stated that she is a forensic analyst attached to the Chemistry Department at the Forensic Laboratory. On 21 February 2012 she attended the Narcotics Division on Spanish Town Road along with two Forensic Officers to carry out sampling of vegetable matter resembling ganja. Corporal Avril Smith and Inspector Naughty were both present during that exercise.

[32] The forensic analyst indicated that she received 30 sealed knitted bags containing 189 parcels to be sampled. Each of the 30 knitted bags were opened one at a time and the parcels therein removed, weighed and numbered. She also made a note describing the material from which the parcels were made. Her evidence was that all the parcels contained vegetable matter resembling ganja and samples were taken from each parcel. A forensic lab number was assigned and written on each knitted bag.

[33] The total weight of the parcels amounted to 732 kilograms which was equivalent to 1613 pounds and 11.1 ounces. The parcels were then repackaged in the knitted bags, sealed with red seal tape which was signed and dated by herself and Corporal Avril Smith. The exhibits were signed for and a receipt was handed to Corporal Avril Smith. Mrs

Brown Baxter said she then transported the samples she had taken from the bags to the Forensic Laboratory for storage until analysis.

[34] On 6 June 2012 she requested the samples from storage and conducted tests on each of them. The examinations and tests, revealed that parts of the plant cannabis sativa from which the resin was not extracted were found in the samples. She therefore concluded that the vegetable matter was ganja.

[35] In cross-examination, she stated that ganja is the flowering top of the plant.

The appellant's case at trial

[36] A submission of no case to answer was made on behalf of the appellant by Mr Melford Brown. Counsel argued that the Crown did not have sufficient evidence to prove beyond a reasonable doubt that the appellant had committed the offences with which he was charged.

[37] The issues raised by counsel for the appellant in his no case submission largely mirror those raised in his grounds of appeal. Of particular note are the following:

> (i) "The assertion that the forensic analyst in cross examination gave evidence that the resin in ganja is stored in the fruiting top or bud, and that she did not see any fruiting tops or buds in the ganja she tested;
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> (ii) the submission that it was incumbent on the forensic analyst to not only test the samples taken from the white knitted bags but the ganja in its entirety as this was the intention of the legislators of the Act. The forensic analyst it was posited could not properly test a sample and then conclude that what remained in the bag was ganja,

(iii) issues arising with the integrity of the exhibits and the chain of custody; and

(iv) The submission that the appellant was being tried for charges that are no longer relevant due to amendment of the Act."

It was submitted that when the issues are considered cumulatively, the evidence adduced by the Crown was so manifestly unreliable that no reasonable tribunal could safely convict on it.

[38] After hearing the response from Miss Tamara Merchant, who appeared for the Crown, the learned Judge of the Parish Court ruled that there was a case for the appellant to answer.

[39] The appellant made an unsworn statement from the dock in which he stated that he received a phone call from a man named "Biggs" to do a "work" and that whilst on the road he was intercepted by the police. No witnesses were called on his behalf.

The appeal

[40] In his notice of appeal dated 23 May 2017, the appellant indicated that he intended to appeal both conviction and sentence. 21 grounds of appeal were filed. However, at the hearing of the appeal, Mr Brown, in his submissions, focused on grounds 8, 12, 13, 14, 17, 18, 19 and 20 although he did not expressly abandon the other grounds of appeal. For completeness all 21 grounds have been summarized below:

1. That the learned Judge of the Parish Court for the parish of Clarendon, Her Honour Ms Stephany Orr, erred in her verdict delivered on 10 May 2017.

2. That the integrity of the exhibits was not protected as there was no evidence of who had custody of the exhibit from 2013 to 2016.

3. That the chain of custody of the exhibit was not only broken but smashed.

4. That there is no evidence of who had custody of the exhibits after Inspector Naughty left.

5. That the officer who took the exhibits from the accused was not the person who delivered same to the custodial officer from the forensic department.

6. That the officer that delivered the exhibits to the analyst was not called as a witness by the prosecution.

7. That Inspector Lawson Naughty who tendered the exhibits in evidence was not present when the exhibit was taken from the appellant.

8. That the vegetable matter resembling ganja was never tendered or admitted as an exhibit.

9. That the identity of the various parcels was further compromised by the absence of proper labelling of same.

10. That the blue tape labels placed on all the individual parcels by the forensic officer were absent. The markings 1-30 were not visible on all the parcels.

11. The identity of the person who placed markings 1-30 on the parcels is unknown.

12. The integrity of the testing of the vegetable matter resembling ganja is questionable as only samples were tested which was contrary to the law.

13. The analyst in cross-examination stated that the resin from ganja is in the fruiting top or bud and that she did not see any buds or fruiting tops on the plants she examined.

14. The definition of ganja given by the analyst is different from that in the Act which states that it includes all parts of the plant cannabis sativa from which the resin has not been extracted.

15. The analyst was granted leave to read from a document, which was not seen by the court or the defence or tendered as an exhibit.

16. The defence observed that after the analyst gave her evidence the sheets from which she read were placed in her folder and she exited the court with same.

17. That the evidence spoke of two sets of certificates, one of which had mistakes and was taken or sent back for correction. However, the nature of the mistakes or corrections were not revealed.

18. That the documents served on the defence speak of one Allan Gardener in the certificate and one Allan Neil Gardner. There is no proof that the person named in the certificate is one and the same named in the information.

19. That the appellant was tried on charges that are no longer relevant as it is no longer illegal to have and deal in ganja. The proper charge would have been for not having a license for same.

20. The weight of the ganja for which the appellant was tried, convicted and sentenced was inaccurate as it should have been the weight of the flowering tops or buds which are deemed in law to be ganja.

21. As established in **Dailey v R**[1], the evidence adduced by the prosecution is so manifestly unreliable that no reasonable tribunal could safely convict on it.

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[1] No reference was provided to the court.

Submissions

Ground Eight: That the vegetable matter resembling ganja was never tendered or admitted as an exhibit.

For the appellant

[41] Mr Brown submitted that the learned Judge of the Parish Court erred in permitting the prosecution to rely on the evidence that the knitted bags contained ganja in circumstances where they were not presented to the court and admitted into evidence. It was posited that the appellant had the right to have the knitted bags inspected by the court.

For the respondent

[42] Counsel for the Crown, Miss Kathy-Ann Pyke, submitted that based on **R v Francis and Norma Jadusingh** (**Jadusingh**) (1963) 6 WIR 362, it was not absolutely necessary for the knitted bags to be presented at the trial and as such their absence was not fatal. In **Jadusingh**, the appellants who were a husband and wife, were charged with being in possession of ganja. A search of their home revealed vegetable matter, which when analysed was certified to be ganja. The appellants also admitted to the vegetable matter being ganja. The vegetable matter was sealed in the presence of the appellants and taken to the narcotics store. At the trial, it was observed that the seals on the exhibits had been tampered with and the ganja replaced by grass. The complaint at trial was that the product exhibited affected the safety of the conviction. The learned trial judge found that there was sufficient evidence to uphold a conviction notwithstanding the absence of the physical ganja before the court.

[43] On appeal the male appellant submitted that the Crown's failure to produce the original contents vitiated the trial. This was so because the appellant would have been deprived of the opportunity to have the exhibit inspected by the learned trial judge or to call for another analysis by either a chemist of his own choosing or the chemist called by the prosecution. Lewis JA at pages 365H-367A found that:

> "This court was not saying in Harper's case that it is always necessary that an exhibit should be produced in court. Indeed, in the peculiar appeal the court held that its production in the appeal court was not essential. There may be circumstances in which an issue is raised in connection with an exhibit which may make it necessary, in the opinion of the trial judge, that he should see an exhibit. Its non-production in such a case would go to the weight which he would attach to the evidence before him…There was before the learned resident magistrate the evidence of the constables who had seized the vegetable matter, that on their telling the accused persons that it was ganja, that they admitted that it was ganja. There was also the clear and detailed evidence of the way in which these parcels had been taken to the analyst with all due precautions, and the evidence of the analyst himself as to his findings. All this was evidence for the consideration of the resident magistrate who had to determine whether the vegetable matter which was in fact seized was satisfactorily proved to be ganja. The fact that there was some rascality, the relevant portion of the exhibit being spirited away, would not preclude the resident magistrate, unless there was some strong reason for doing so, from finding on the facts that the vegetable matter seized was in fact ganja…In the instant case it was impossible for the contents of these parcels to be produced because of the events that had supervened. In the opinion of this court, there was clear convincing evidence on which the learned magistrate was entitled to find that the vegetable matter seized was in fact ganja."

[44] It was submitted that in the present case as in **Jadusingh**, the learned Judge of the Parish Court had sufficient evidence to rely on and as such the production of the

exhibit at the trial was not a necessity. It was further submitted that the evidence was sufficient to prove beyond a reasonable doubt that the appellant was (i) in possession of the knitted bags; (ii) that the knitted bags contained ganja and (iii) there was no break in the chain of custody of the ganja.

Discussion and analysis

[45] It is unclear at what point the knitted bags were admitted into evidence. However, whilst Sergeant Barrett was giving evidence they were referred to as exhibits and numbered. The bags were clearly present based on the discourse between the learned Judge of the Parish Court and Mr Brown. The learned Judge of the Parish Court, in her findings of fact at page 81, stated that the exhibits were tendered into evidence after Sergeant Barrett gave evidence.

[46] These grounds raise two issues. They are:

(i) Whether the production of the knitted bags was required in order to prove the offences; and

(ii) Whether in the absence of the knitted bags, the evidence given by the forensic analyst was sufficient to prove that they contained ganja.

Whether the production of the knitted bags was required in order to prove the offences?

[47] It has been accepted by this court, that the absence of exhibits which are relevant to the case is not fatal. This is especially so where the evidence presented by the

prosecution is sufficient to establish the elements of the offence to the requisite standard. Additionally, where an issue arises in connection with the exhibit which would necessitate its production, the absence of the exhibit would still not be fatal. In those circumstances, the trial judge would have to determine the weight which should be attached to the evidence (see **Jadusingh**).

[48] A similar approach was taken in **Salesman v R** [2010] JMCA 31 (**Salesman**). In that case, the applicant, Charles Salesman was convicted for the offences of illegal possession of a firearm and shooting with intent. In seeking leave to appeal his conviction and sentence, he complained that the photographs taken at the scene of the crime were not produced at the trial. Notwithstanding, the court found that there was sufficient evidence upon which the judge could have acted without the photographs.

[49] At paragraph [57] McIntosh JA (Ag), as she then was, stated:

> "It seemed that without those photographs and the spent shells, counsel was of the view that the complainant ought not to have been believed that anyone was shot at and that there was any damaged vehicle. However, we did not find this argument to be sound. In addition to the viva voce evidence of the complainant, the learned judge had for his consideration the evidence of Detective Malcolm who spoke of seeing the vehicle that night and observing what as a police officer, seemed to him to be bullet holes and an indentation at the top of the car also apparently caused by a bullet. This was consistent with what the complainant had said and [he] was never challenged. Therefore, the absence of the photographs still left the trial judge with material upon which he could act."

[50] The decision of this court in **Kevon Black v R** [2014] JMCA Crim 36 is also instructive. In that case, the appellant, Kevon Black, was convicted in the Resident

Magistrates' Court for breaches of the Dangerous Drugs Act, for unlawfully dealing with cocaine and possession of cocaine. The Crown's evidence came from its sole eyewitness, Detective Corporal Owen Taylor who said he had stopped and interviewed the appellant at the Sangster International Airport. Subsequently, a urine sample from the appellant produced a positive test for cocaine. The officer then left the room for about 15 minutes and upon his return, was greeted with an unpleasant smell. A search of the room revealed blood and faeces on the appellant's pants and underwear. He also saw 22 plastic packages covered with blood and faeces under a table in the room. On opening the packages, he saw a substance which appeared to be cocaine.

[51] Sealed envelopes containing the packages, the pants and underwear of the appellant were taken by Detective Corporal Taylor to the Forensic Laboratory for testing. The tests confirmed that the packages contained cocaine and that the DNA profile obtained from the packages could have originated from a source similar to the DNA profile found on the appellant's clothes. The forensic certificates were admitted in evidence.

[52] The appellant denied that he had excreted the packages containing cocaine and it was submitted on his behalf that there was no evidence which proved that the blood and faeces were his. The appellant also complained that there was a lack of evidence with regard to the taking of the swabs from his clothes and whether they were sealed at the time of delivery to the forensic analyst.

[53] H Harris JA, who delivered the judgment of the court, stated:

> "[30] It is perfectly true, as Mr Green contended, that the appellant's clothes taken by the police were not tendered into evidence as exhibits. **But the question is whether although the appellant's clothes were submitted for forensic analysis and were not exhibited at the trial, this would have precluded the learned magistrate from relying on the results of the forensic certificate. We think not.**
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> [31] The production of the clothes at the trial would have been desirable as they were capable of being used in the proceedings. However, their absence would not have prevented the learned magistrate from making a proper finding on the DNA evidence. **In R v Jadusingh and Jadusingh**, the appellants were charged with possession of ganja. Vegetable matter, which was found by the police at the home of the appellants, was analysed and certified to be ganja. Prior to the trial the ganja was replaced by grass, which had been exhibited. The complaint at trial was that the product exhibited affected the safety of the conviction. The court found that this went to the weight of the evidence and held that there was clear and convincing evidence on which a finding on the facts could be established that the vegetable matter was ganja.
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> [33] It is clear that, the learned magistrate could have accepted the DNA evidence notwithstanding the absence of the appellant's clothes at the trial. The verdict of guilty was dependent upon the acceptance of Corporal Taylor as a reliable witness as well as upon the DNA evidence. It is clear that the learned magistrate accepted both. Clearly, the DNA evidence and the direct evidence from Corporal Taylor were capable of proving the charge and would have had the capacity in law of supporting a conviction. In any event, in the absence of the DNA evidence, there was ample material by way of Corporal Taylor's evidence, upon which the learned magistrate could have relied. Even if the DNA evidence were to be disregarded, as Mr Duncan righty submitted, there was cogent evidence from Corporal Taylor to show that the burden of proof placed on the prosecution was discharged and the requisite standard of proof was met."

[54] The principle which can be gleaned from the above cases is that whilst it is desirable for the relevant exhibits to be produced at the trial, their absence is not

necessarily determinative of the issue in the accused's favour. The court is entitled to consider the other evidence which has been presented and make a determination of whether the prosecution has proved its case to the requisite standard.

[55] There was no dispute that the appellant was the sole occupant of the vehicle. The learned Judge of the Parish Court in arriving at her verdict considered the following evidence:

i. The unchallenged evidence of Corporals Simpson and Farquharson, who detained the appellant. that they saw several knitted bags in the motor vehicle that was being driven by him and smelt the aroma of ganja. Additionally, the appellant confessed to the two police officers, "a just a little weed me a hustle me a beg you a chance".

ii. The unchallenged evidence that the appellant said to Sergeant Barrett, "Boss some weed me a carry to Saint Thomas for a man name [sic] Biggs".

[56] In order to establish possession there must be actual possession and knowledge that that which is in the appellant's custody or control is ganja. In **Heron Plunkett v R** [2015] JMCA Crim 32, Phillips JA stated:

> [36] The elements of the offence of possession of ganja under section 7C of the Dangerous Drugs Act were stated by the Judicial Committee of the Privy Council in **Bernal (Brian) and Moore (Christopher) v R** where Sir Brian Neill, in delivering the advice of the Board at page 249, said:

> '...The actus reus required to constitute an offence under section 7C of the Dangerous Drugs Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The mens rea which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof of this knowledge will depend on the circumstances of the case and on the evidence and any inferences which can be drawn from the evidence. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases. It will be for the tribunal of fact to investigate these circumstances to decide whether or not the accused had knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance.'

[37] This statement has been endorsed in a number of cases before this court such as **Patricia Henry v R** [2011] JMCA Crim 16 where Morrison JA (as he then was) on behalf of the court, cited Sir Brian Neill's quotation, stated above, and correctly summarized it at paragraph [41] of the judgment as follows:

> 'The key elements of the offence of possession of ganja are therefore (i) physical custody or control of the drug and (ii) knowledge that the substance which is in the defendant's custody or under his control is ganja…'

[38] McDonald-Bishop JA (Ag) (as she then was), with whom the other judges agreed, in **Courtney Thompson v R**, in examining the elements necessary to prove the offence of possession of ganja, at paragraph [40] of the judgment, said:

> 'The authorities have made it clear that once there was physical custody or control of the ganja by the offender which was, in fact so in the case of the appellant, then, the court, in determining whether he had knowledge that he had the illicit substance in his possession,

> should have regard to all the surrounding circumstances of the case…'
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> [39] It seems therefore that physical custody or control and proof of knowledge that the appellant was in custody or control of ganja are essential requirements in proving the offence of possession of ganja. Knowledge can be gleaned from the particular circumstances of each case and is a fact that can be inferred by a fact finding tribunal."

[57] Phillips JA also discussed the importance of the chain of custody in establishing possession. She stated:

> "[41] The first element in proving possession of ganja is that the accused has physical control or custody of the drug and so, there should be no doubt as to the identity of the exhibits taken from the trunk of the appellant's car. In order to eliminate any questions surrounding the integrity of the exhibits there must be some evidence accounting for: (i) when, where and how the items were recovered; (ii) the condition they were recovered in; (iii) how they were stored; (iv) whether there were any changes to the condition of the items; (v) what, if anything, may explain those changes; and (vi) how particular exhibits can be differentiated from others, since there is nothing particularly unique about ganja. The leading authority on the issue is **R v Hodge** where an appellant who had been convicted for attempted robbery, aggravated burglary and assault occasioning actual bodily harm by the use of DNA evidence, questioned, inter alia, the integrity and accuracy of the DNA results obtained due to gaps in the chain of custody of buccal swabs taken from the appellant. This ground of appeal failed since it was held that the integrity of the chain of custody had not been disturbed. Baptiste JA in delivering the judgment of the court at paragraph [12] said:
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> > '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 is in their possession...'
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> [42] The Singapore Court of Appeal also expressed the same views in **Nguyen Tuong Van v Public Prosecutor** [2005] 1SLR 103; [2005] 5 LRC 140 where an Australian national was convicted and sentenced to death for attempting to board a plane with 396.2 grams of diamorphine that had been strapped to his lower back with tape, contrary to section 7 of the Misuse of Drugs Act. The appellant appealed his conviction and sentence on the basis that, inter alia, the integrity of the drug exhibits had been compromised. It was held that the integrity and identity of the drug exhibits had not been compromised at any stage. Lai Kew Chai J in delivering the judgment of the court at paragraph 36 said:
>
> > 'The principles relating to the chain of custody of exhibits in evidence are settled. The Prosecution bears the burden of proving beyond reasonable doubt that the drug exhibits analysed by Dr Lee Tong Kooi of the HSA were the same as those seized from the appellant's back and haversack. Where there is a break in the chain of custody and a reasonable doubt arises as to the identity of the drug exhibits, then the Prosecution has not discharged its burden, and has failed to make out a prima facie case against the accused...'."

[58] In this case the learned Judge of the Parish Court having referred to **R v Larson** (2001) BCSC 597, **Grazette v R** (2009) CCJ 2 (AJ), delivered 3 April 2009, **Hodges v R** HCRAP 2009/001, delivered 10 November 2010 and **Plunkett v R**, examined the testimony of the witnesses and stated:

> "At the risk of being repetitive, I will summarize the evidence before me in explaining how I arrived at my decision on possession. I have on one hand the unpleasant state of affairs that is the exhibits. And Counsel's submissions and challenges to various aspects of the evidence.
>
> On the other hand, I have the unchallenged evidence of the officers who detained Mr. Gardner, Corporal's (sic) Farquharson and Simpson who speak to seeing the white knitted bags and the presence of the aroma of ganja when they looked inside the Hiace bus. Of Mr. Gardner telling the officers that 'a just a little weed me a hustle me a beg you a chance'.
>
> Of the officers transporting the Hiace bus with the bags undisturbed to the May Pen Police Station, and at all times the Hiace bus and its contents being in Mr Gardener's sight. Of the delivering the bus and its contents undisturbed to Sergeant Barrett.
>
> The unchallenged evidence of Sergeant Barrett that when introduced to Mr Gardener at the May Pen police station, he said 'Boss some weed me a carry to Saint Thomas for a man name [sic] Biggs'."

[59] Based on the evidence presented and the applicable legal principles, the production of the knitted bags was not required to prove the offences.

Whether in the absence of the knitted bags, the evidence given by the forensic analyst was sufficient to prove that they contained ganja?

[60] The issue of whether the knitted bags contained ganja is linked to the chain of custody of the knitted bags and the methodology utilised in the testing of the contents of the knitted bags.

[61] The evidence pertaining to the chain of custody which was considered by the learned Judge of the Parish Court is as follows:

(i) The unchallenged evidence of Corporals Simpson and Farquharson that they saw the knitted bags in the vehicle.

(ii) The vehicle with the knitted bags was transported to the police station in the full view of the appellant.

(iii) Upon arrival at the police station, the vehicle and the knitted bags were delivered to Sergeant Barrett undisturbed and in the presence of the appellant.

(iv) Sergeant Barrett, in the presence of the appellant, opened the knitted bags and informed the appellant that he saw vegetable matter resembling ganja. Thereafter, he counted, sealed and labelled the knitted bags in the presence of the appellant.

(v) Corporal Eugene Mitchell opened the knitted bags and the parcels contained inside and took photographs of them in the presence of the appellant.

(vi) The unchallenged evidence that Sergeant Barrett delivered the knitted bags to Inspector Naughty at the stores.

(vii) Inspector Naughty handed the knitted bags over to Corporal Avril Smith and the forensic analyst at the stores. That in Inspector Naughty's presence a sample was taken from each parcel and a forensic number was assigned and placed on each white knitted

bag. That upon completion the parcels were returned to the white knitted bags which were then sealed and returned to the stores.

(viii) The evidence of the forensic analyst that she received the knitted bags and that they were labelled. That samples were taken from each parcel and placed in single clear plastic bags for testing. That at the time of testing she made notes of the results. Finally, that chemical testing and a microscope were used to conclude that the vegetable matter in the parcels was ganja.

(ix) The absence of any evidence led by the appellant to show possible tampering or interfering with the knitted bags or that they could not be easily distinguishable from others.

[62] The knitted bags, based on what was said by the learned Judge of the Parish Court in her findings of fact, were admitted into evidence. The learned Judge of the Parish Court also had the benefit of the evidence of the forensic analyst who stated that her test of the samples obtained from the knitted bags indicated that the contents of the knitted bags was ganja. The learned Judge of the Parish Court found that there was no question as to any break in the chain of custody and that possession of ganja by the appellant, was proved beyond a reasonable doubt.

[63] The learned Judge of the Parish Court had sufficient evidence as itemized above to find that the appellant was in possession of ganja. It is to be noted that the appellant

did not deny being in possession of the knitted bags. He also did not deny knowing what was contained in the said bags. In his unsworn statement he merely stated:

> "I'm from Burnt Savannah. I received a phone call from Biggs to do a work. Going on the road I met upon the police."

[64] Physical custody of the knitted bags was not denied. In addition, the chain of custody having not been broken, there was sufficient evidence that the samples tested by the forensic analyst were obtained from the knitted bags. The learned Judge of the Parish Court could not be faulted, based on **Salesman**, for relying on the forensic analyst's evidence. This ground of appeal is therefore without merit. In addition, based on the above analysis, grounds 2-7 which challenge the chain of custody are also without merit.

Ground 12: The integrity of the testing of vegetable matter resembling ganja is questionable as only samples were tested and not the entire contents of the bag.

Ground 13: The analyst in cross-examination stated that the resin from ganja is in the fruiting top or bud and that she did not see any buds or fruiting tops on the plants she examined.

Ground 14: The definition of ganja given by the analyst is different from that in the Act which states that it includes all parts of the plant cannabis sativa from which the resin has not been extracted.

Ground 20: The weight of the ganja for which the appellant was tried, convicted and sentenced was inaccurate as it should have been the weight of the flowering tops or buds which are deemed in law to be ganja.

[65] The issues raised in these grounds can be treated with simultaneously as they concern the definition of ganja, the means by which the forensic analyst concluded that the knitted bags contained ganja and the weight attributed to same.

For the appellant

[66] Mr Brown submitted that the testing of samples taken from the knitted bags was insufficient to establish the nature of their contents. He stated that it was his understanding that the Act required the testing of the entire contents in order to make that determination. He stated that in this case, the weight of the samples was six pounds yet the appellant was tried and convicted for having 1613 pounds of ganja in his possession.

[67] It was also submitted that, based on the evidence of the forensic analyst in cross examination that ganja is found in the fruiting top or buds of the ganja plant and that there were no fruiting tops or buds in the exhibits, her finding is questionable.

For the respondent

[68] It was however submitted by the Crown that the forensic analyst was not required to test the entire contents in the knitted bags to conclude that they contained ganja. It was argued that it was sufficient for the forensic analyst to take samples from the said bags and test those samples in order to determine whether the vegetable matter was ganja. Miss Pyke stated that it was also impractical for the forensic analyst to test the entire contents of the knitted bags. Reference was made to the case of **R v Nord Rerrie** (unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 38/1987, judgment delivered 24 February 1988 (**Nord Rerrie**) in support of that submission.

[69] It was also submitted by the Crown that based on **Allan Cole v R** [2010] JMCA Crim 67 (**Allan Cole**), the methodology employed by the forensic analyst was sufficient to support her finding that the vegetable matter in the white knitted bags was ganja.

Discussion and analysis

Manner of testing

[70] The Act does not set out any standard/manner of testing which ought to be carried out by the government chemist or forensic analyst. The forensic certificate was not admitted in evidence but the forensic analyst was called as a witness. Mrs Brown Baxter explained how she arrived at the conclusion that the vegetable matter in the knitted bags was cannabis sativa or ganja. She explained that she took samples from each parcel which was contained in the knitted bags and that the testing included the use of a microscope and chemical testing. Her evidence in respect of this issue is as follows:

> "My examinations and test [sic] carried out on the vegetable matter in exhibits 1-30 revealed parts of the plant cannabis sativa and that the resin was not extracted. The vegetable matter is therefore ganja…Resin is the active ingredient/component of the plant that give the user the desired effects of the cannabis sativa, ganja. It is abbreviated as THC (resin)."

[71] As pointed out by counsel for the Crown, there is no provision in the Act as to the methodology which is to be employed by the forensic analyst when called upon to determine whether the vegetable matter in question is ganja.

[72] The learned Judge of the Parish Court also noted that there was no legal requirement for the forensic analyst to test the exhibit in its entirety. Reference was made

to the cases of **Nord Rerrie**, **R v Glassington Ottar and Morris Ottar** (unreported), Court of Appeal, Resident Magistrates Criminal Appeal No 28/1987, judgment delivered on 31 July 1987 and **Allan Cole**. In her notes of evidence, she stated that:

> "In **R v Nord Rerrie** RMCA 38/87 24.2.88 the Court of Appeal held that the testing of samples was an appropriate method of testing the bulk of the vegetable matter as it would be absurd to ask an Analyst to test every leaf of a large quantity of vegetable matter…This must be so because as I noted earlier, from the Analyst's evidence testing involves the manual testing of the vegetable matter ganja, this would place an unnecessary burden on the Forensic Lab and greatly delay the trial of many cases."

[73] The learned Judge of the Parish Court also recounted the evidence of the forensic analyst as being:

> "…She went on to describe the process of taking samples from each of the 189 parcels and parcelling these samples, resealing the 30 bags with Forensic lab red seal tape…After conducting testing of the samples to include both microscoping and chemical testing of the samples she found that the samples contained part of the plant cannabis sativa, the resin was not extracted as is therefore ganja."

[74] Counsel for the appellant had taken issue with the fact that the findings of the forensic analyst were based on the testing of samples from each parcel and not the entire contents of the knitted bags. His argument was that the legislators did not intend for samples to be tested.

[75] The position of this court as to the testing of illicit drugs has been consistent as set out in the cases of **Nord Rerrie** and **Allan Cole**. Briefly, in **Allan Cole** the appellant similarly to the appellant herein, was convicted of several offences under the Act, namely,

possession of ganja, storage of ganja on his premises and taking steps preparatory to export ganja. The findings of the forensic analyst were based on the testing of samples obtained from the parcels which were seized. On appeal, one of the grounds advanced by the appellant was that the learned Resident Magistrate erred in law in finding that the vegetable matter was ganja as defined in the Act, as there was no competent evidence presented to the court that it was cannabis sativa and that it contained cannabis resin.

[76] This ground was summarily dismissed by this court which at paragraph [52] found that:

> "[52] The ground can be disposed of quite briefly. There was sufficient evidence from which the learned Resident Magistrate could have and did find that the substance in question was ganja. Evidence in proof came from Ms Marcia Dunbar, who at page 29 of the notes of evidence stated:
>
> > 'Samples were removed from each parcel by me and assistants. Examination and tests were performed on the vegetable matter that was removed from each parcel [which] revealed parts of the plant cannibis sativa and the resin was not extracted. Concluded that the vegetable matter contained the ganja. I performed the test with the assistance of a Forensic Officer.'
>
> Ground 5 therefore fails."

[77] The Act is silent as to the methodology that is to be used to ascertain whether vegetable matter is in fact ganja. That is a matter within the purview of the forensic analyst whose certificate by virtue of section 27 of the Act is "sufficient evidence of all the facts stated therein". It is conclusive.

[78] In the present case, the method of testing was similar to that which was approved by this court in **Allan Cole**. There is no basis on which this method of testing can be faulted. This court has accepted this manner of testing in the past and as such the learned Judge of the Parish Court's acceptance of the evidence of the forensic analyst that the vegetable matter in the knitted bags was ganja, cannot be impugned.

Definition of ganja

[79] Section 2 of the Act - states that ganja, "includes all parts of the plant known as *cannabis sativa* from which the resin has not been extracted and includes any resin obtained from that plant". Counsel for the appellant has made heavy weather of the following portion of Mrs Brown Baxter's evidence in cross-examination:

> "Q What is ganja?
>
> A Ganja is the flowering top of the plant and it is a term used for the different specie of the…
>
> Q What [do] you mean by flowering parts?
>
> A the tree grows five to fifteen feet and the buds that you would see at the top that's what you would call the flowering top."

Counsel then suggested to her that she did conduct any tests. She disagreed with that suggestion.

[80] However, it is noted that the forensic analyst in dealing with her findings stated:

> "My examinations and test carried out on the vegetable matter in exhibits 1-30 revealed parts of the plant cannabis sativa and that the resin was not extracted. The vegetable matter is therefore ganja. It is abbreviated as THC resin."

[81] The learned Judge of the Parish Court dealt with this issue in the following way:

> "Mrs Brown Baxter did not say that resin from ganja is the fruiting top or bud. Her evidence was that Ganja is the flowering top of the plant and is the name given to the different species (of the plant) she was not able to complete her sentence as Counsel cut her off. She gave no evidence that she tested the flowering tops or buds of any plant. Her evidence was that she tested the vegetable matter taken from the samples and the test revealed 'parts of the plant cannabis sativa and that the resin was not extracted'. It was on that basis that she concluded that the substance she tested was ganja."

In the determination of this issue it is unnecessary to traverse any misconception about ganja being in the flowering top or bud of the plant. The definition of ganja in the Act is clear. The findings of the forensic analyst are equally clear. There is therefore no merit in these grounds and as such they cannot succeed.

Ground 15: The analyst was granted leave to read from a document, which was not seen by the court or the defence or tendered as an exhibit.

Ground 16: The sheets from which the analyst read whilst giving evidence were not tendered as exhibits.

For the appellant

[82] Counsel for the appellant submitted that it was improper for the learned Judge of the Parish Court to allow the forensic analyst to refresh her memory from a document, which was neither seen by the court nor tendered into evidence.

For the respondent

[83] In response it was submitted by the Crown that: (i) it is well accepted that an expert at trial can refresh his memory from notes taken contemporaneously where so

requested by the witness, (ii) there is no requirement for such notes to be provided to the court and disclosed to the appellant, (iii) counsel for the appellant at no time requested to have sight of the notes and (iv) as the forensic analyst was the maker of the forensic certificate she was capable of speaking about what was done and how she was able to provide the information detailed in the said certificate.

Discussion and analysis

[84] It is the accepted that a witness in the course of giving evidence may be permitted to refresh his memory from a document that was made or verified by himself at the time of the event with which it is concerned occurred, or a time when his memory was clear[2]. This is a matter for the discretion of the judge.[3] The document from which the witness refreshes his memory whilst testifying, need not be tendered in evidence unless cross-examination goes beyond the parts of the document used by him to refresh his memory[4].

[85] As to the production of the document, the case of **R v Britton** (1987) 85 Cr. App. R. 14 is instructive. Briefly, in that case, the appellant was convicted of two counts of assault against police officers at a demonstration. He was sentenced to two months' imprisonment on each count. The appellant on appeal challenged his conviction and sought to rely on a note he typed out of the events of that night as he recollected, titled 'List of events and reminders'. At trial, counsel for the appellant invited the witness to

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[2] Archbold: Criminal Pleading, Evidence and Practice - (2004) 168 JPN 56.
[3] McAfee [2006] EWCA Crim 2914.
[4] R v Britton (1987) 85 Cr App R.

refresh his memory as to the circumstances of the arrest from that note. The judge declined to allow the note to be made an exhibit and declined to allow the jury to see it.

[86] Lord Lane CJ at page 17 stated:

> "There appears to be a long-standing **rule** of the common law regulating the admissibility of the aide-memoire in these circumstances. That **rule** is as follows: cross-examining counsel is entitled to inspect the note in order to check its contents. He can do so without making the document evidence. Indeed he may go further and cross-examine on it. If he does so and succeeds in confining his cross-examination to those parts of it which have already been used by the witness to refresh his memory, he does not make it evidence. If on the other hand he strays beyond that part of the note which has been so used, the party calling him, in this case the defendant represented by counsel, may insist on it being treated as evidence in the case, and it will thereupon become an exhibit." (Emphasis supplied).

[87] He continued at page 18:

> "It is to be observed that in *Cross on Evidence* (6th ed., 1985) at pp. 254 – 355 the following passage appears:
>
> "There is an old general rule, inadequately explored in the modern authorities, that, if a party calls for and inspects a document held by the other party, he is bound to put it in evidence if required to do so. But, … if therefore a witness refreshes his memory concerning a date or an address by referring to a diary, he may be cross-examined about the terms or form of the entries used to refresh his memory without there being any question of the right of the party calling him to insist that the diary should become evidence in the case. On the other hand, if the witness is cross-examined about other parts of the diary, the party calling him may insist on its being treated as evidence in the case."

[88] The court, in applying the principle as stated in Cross on Evidence, found that counsel for the Crown in his cross-examination went outside those parts of the note which had been used by the witness in chief to refresh his memory. Consequently, the document became evidence and should, on the application of counsel for the defence, have been admitted in evidence.

[89] In the instant case, the forensic analyst, in order to refresh her memory, sought to refer to her report which contained her findings. That report was prepared by her from a worksheet which was also prepared by her. That worksheet was prepared whilst she was testing the samples. Permission was granted for her to refer to the said report based on her assertion that she was unable to speak to her findings without referring to that document.

[90] The learned Judge of the Parish Court in her extensive findings of fact stated that:

> "Indeed Mrs Brown Baxter gave evidence that while she was testing the samples which were taken from the white knitted bags that she contemporaneously made notes. She also requested and was granted permission to refresh her memory from the notes which she had made. She said "The analysis was completed and a certificate was produced of my findings. When I was doing my testing the results were recorded on a worksheet which I have here. I prepared a document from my testing. That document would contain my findings. I can't speak to these findings without my report. I have a copy of that report with me."

[91] In Blackstone's Criminal Practice 2007 at paragraph F6.10, the learned authors stated as follows:

> "A witness who has used a document in court to refresh his memory must produce it for the inspection of the opposing party, who may wish to cross-examine on its contents (*Beech v Jones* (1848) 5 CB 696; *Sekhon* (1987) 85 Cr App R 19). In the majority of cases, the fact that such cross-examination takes place will not make the record evidence in the case, nor will it be necessary for the jury to inspect the document, and it will be inappropriate for the record to become an exhibit (*Sekhon* at p. 22)"

[92] Based on the examination of the authorities it is clear that counsel for the appellant at trial would have been entitled at a minimum to inspect the document relied upon by the forensic analyst. There is however nothing before this court which shows that any such request was made by counsel and refused. There is nothing in the notes of evidence which indicated that he raised any question about the document from which she refreshed her memory nor did he cross-examine on it. It is therefore quite late in the day for this issue to be raised, where counsel for the appellant did not take advantage of the opportunity to inspect the document and cross-examine the witness at trial.

[93] In addition, the analyst having refreshed her memory from the certificate whilst giving *viva voce* evidence, the admission of the certificate into evidence would have been in breach of the rule against self-corroboration and inappropriate.

[94] In the circumstances, this ground is without merit.

Ground 17: That the evidence spoke of two sets of certificates, one of which had mistakes and was taken or sent back for correction. However, the nature of the mistakes or corrections were not revealed.

Ground 18: That the documents served on the defence speak of three persons being charged, one Allan Neil Gardener in the indictment, one Allan Gardener in the Certificate and one Allan Gardner in the judge's notes. There is no evidence that they are one and the same person.

For the appellant

[95] Counsel for the appellant raised an issue with the difference in name on the forensic certificate being **"Allan Gardener"** as compared to that on the information noted as **"Allan Neil Gardner"**. This error it was submitted was not clarified at the trial and it was therefore left unclear as to whether the appellant was properly identified and that it was the correct person who was before the court.

For the respondent

[96] It was submitted by counsel for the Crown that any issue as to identification was properly clarified at trial and an explanation was given as to the name on the forensic certificate by Sergeant Barrett. At trial he gave evidence that upon receiving the certificate from the Forensic Laboratory, he saw an error in the name of the appellant. That it was written as **"Allen"** instead of **"Allan"**. That upon seeing this error he returned to the Forensic Laboratory where he was issued a new certificate with the correct spelling **"Allan"**. This certificate was presented to the court and disclosed to counsel for the appellant. It was never tendered into evidence through the forensic analyst as she gave *viva voce* evidence where she explained that she prepared the forensic certificate after carrying out the required testing.

[97] Moreover, counsel for the Crown noted that counsel for the appellant did not question the forensic analyst as to this error. There was no challenge that the appellant was not one and the same as the person who was the driver of the vehicle containing the knitted bags on 14 February 2012. It was the evidence of the forensic analyst that

the knitted bags from the vehicle were the same bags handed over to him by the stores, collected by Inspector Naughty and whose contents were tested by the forensic analyst.

[98] It was further submitted that this issue of the names did not disqualify the document where: (i) the appellant confirmed the spelling of the name and took no issue with the error of "Gardener" instead of "Gardner" and (ii) the certificate of the forensic analyst was never tendered into evidence.

[99] It was noted that, the learned Judge of the Parish Court found that:

> "Where Counsel submits that there are different names on the Information and on the Forensic Certificate, recall that the latter document was never tendered in evidence. I cannot therefore consider the contents of that document which are not before me. I can only refer to the evidence of Mrs Brown-Baxter in relation to the Forensic testing. Her evidence was that the labels on the sealed transparent bags which she received read:
>
> 'Regina v Allan Neil Gardner for the offences of Possession of Ganja, Dealing in Ganja, Trafficking in Ganja, taking steps preparatory for exporting ganja and Conspiracy to export ganja…'
>
> Both the information and the labels on which Sergeant Robert Barrett placed on the exhibits would have had the same name. Those bags would have been the bags delivered to the Analyst as per her evidence for testing."

Discussion and analysis

[100] From an examination of the notes of evidence and the learned Judge of the Parish Court's findings of fact, it is clear that the identification of the appellant was not an issue at trial. As submitted by the Crown, the appellant at trial did not challenge the evidence of the witnesses for the Crown that he was the driver of the vehicle containing the knitted

bags of ganja. In his unsworn statement his only evidence was "I'm from Brunt Savannah. I received a phone call from Biggs to do a work, going on the road I met upon police".

[101] The learned Judge of the Parish Court noted that:

> "Through his unsworn statement, Mr Gardner placed himself at the scene. This was his opportunity to deny the Crown's case and the evidence against him. At no time did he deny being the driver of the Toyota Hiace van which was seen by Corporals Farquharson and Simpson on the Bustamante Highway. He did not deny making a sudden U-turn on the Bustamante Highway after encountering the police service vehicle and speeding away. There was no denial of his being pursued along the highway or trying to evade the police by leaving the open highway and entering the town of May Pen. He did not deny being intercepted by other police officers from the Parish and asking for leniency or being subsequently taken into custody along with thirty knitted bags containing ganja. He never denied telling Sergeant Barrett that he was carrying some weed for Biggs. He has not denied any aspect of the Crown's case."

[102] This finding by the learned Judge of the Parish Court was reasonable when the appellant's statement that he was hired by "Biggs" was juxtaposed with the unchallenged evidence of Corporals Simpson and Farquharson which put the appellant at the scene of the crime. The officers identified the appellant as being the same person who was in the dock at trial. It would therefore be difficult to support any argument that the appellant was not properly identified.

[103] It would also appear that the differences of name in the forensic certificate and the Information is also moot. This is so as the said certificate was not tendered into evidence and need not have been, in light of section 27 of the Act. The forensic analyst's evidence was quite sufficient. This ground of appeal also fails.

Ground 19: That the defendant is being tried on charges that are no longer relevant as it's no longer illegal to have and deal in ganja. The proper charge would have been for not having a license for same.

For the appellant

[104] Counsel for the appellant submitted that the Crown sought to charge the appellant for conduct which was no longer an offence. It was his position that in light of the amendment in 2015 to section 7C of the 2012 Act it was no longer a criminal offence for the appellant to be in possession of ganja and that the proper charge would have been for being in possession of ganja without a licence.

For the respondent

[105] In response, counsel for Crown asserted that any amendment to the Act subsequent to the appellant being charged was irrelevant as the Act does not apply retroactively. Counsel submitted that it was still an offence to be in possession of ganja and deal in same, as the amendment only modifies the offence of possession to the extent that it is no longer an offence to be in possession of two ounces of ganja or less. The amendment, it was argued, did not assist the appellant who was found to be in possession of over 1000 pounds of ganja.

Discussion and analysis

[106] Section 7C of the 2012 Act originally provided that, "Every person who has in his possession any ganja shall be guilty of an offence…". That section 7C was amended in 2015, those words were deleted and now reads as follows:

> "(1) Subject to subsection (2), a person who is in possession of any ganja in excess of the quantity specified in section 7F commits an offence;
>
> (2) Subsection (1) shall not apply to the possession of ganja for any of the following purposes-
>
> (a) religious purposes as a sacrament in adherence to the Rastafarian faith;
>
> (b) medical or therapeutic purposes as prescribed or recommended in writing by-
>
> (i) a registered medical practitioner; or
>
> (ii) other health practitioner, or class or practitioners, approved for that purpose by the Minister responsible for health by order published in the Gazette;
>
> (c) the purposes of scientific research-
>
> (i) conducted by a duly accredited tertiary institution; or
>
> (ii) otherwise approved by the Scientific Research Council or such other body as may be prescribed by the Minister."

And section 7F provides as follows:

> "(1) Subject to subsection (2), a person who is in possession of ganja of a quantity which in total does not exceed the prescribed amount contravenes this subsection.
>
> (2) …
>
> (3) In this section, "the prescribed amount: means two ounces or such other amount as may be specified by the Minister by order subject to affirmative resolution."

[107] Counsel for the appellant has argued that by virtue of this amendment it is no longer a criminal offence to be in possession of ganja. He has also submitted that the only proper charge would be for possession without a licence. As amended, it still remains

an offence to be in possession of any ganja in excess of the quantity specified in section 7F which is presently is two ounces. Section 7D(1) of the Act speaks to the handling of ganja for "medical, therapeutic or scientific purposes in accordance with a license, permit or other authorisation issued under.." the Act or any other Act. With respect, the amendment does not assist the appellant who had over 1000 pounds of ganja in his possession and at no time asserted that it was for such purposes.

[108] In addition, the offences for which the appellant was convicted and sentenced occurred in 2012. The amendment to the Act was in 2015. It is a rule of statutory interpretation that legislation does not apply retroactively in the absence of clear words to that effect) see **Yew Bon Tew et al v Kenderaan Bas Mara** [1983] AC 553). Briefly, in that case a bus belonging to the defendants, a public authority, driven by one of their servants collided with a motorcycle ridden by the plaintiffs. The plaintiffs were injured. At the date of the accident the Public Authorities Protection Ordinance 1948 provided that an action against a public authority in respect of any neglect or default in the carrying out of its public duties had to be brought within 12 months. The plaintiffs did not bring the action until this time period expired and sought to rely on an amendment to the Ordinance which came out subsequent to the accident.

[109] It was the defendant's position that the claim was statute barred by virtue of the 1948 Ordinance. On appeal, the court agreed with the defendant and found that the Ordinance was not to be construed retrospectively so as to deprive the defendant of his

defence unless such a construction was unavoidable on the language used. It was concluded that such an interpretation could not be construed in favour of the appellant.

[110] In addressing the issue of whether or not she had the jurisdiction to embark on trial of appellant, the learned Judge of the Parish Court considered the effect of the 2015 amendment of the act. She stated:

> "For clarity, the amendment legalizes possession of a small quantity of ganja, a mere two ounces as per sections 7(f)(1) & (3); and the smoking of ganja for religious sacrament in adherence to the Rastafarian faith, medical or therapeutic purposes…
>
> Importantly the amendment only seeks to modify the penalties for possession of small quantities of ganja. It does not remove the offences created in the Act of 1948, and by extension the offences for which Mr. Gardner has been charged.
>
> Additionally, the Act is not retroactive; such that even if the amendment had indeed removed these offences, Mr. Gardner who was charged in 2012 could not benefit from the amendments of 2015.
>
> I am also guided by the fact that since the passing of the Amendments on March 20, 2015, the Court of Appeal has continued to hear and determine appeals from the lower courts in relation to these charges. To date that Court has not overturned any of the decisions of the lower Courts on the basis that the offences of Possession, Dealing, trafficking in and Taking Steps to Export Ganja have been repealed by the amendments to the Dangerous Drugs Act of 2015".

[111] Her reasoning cannot be faulted. There is nothing in the Act which could reasonably allow for the interpretation put forward by counsel for the appellant. Accordingly, there is no merit in this ground.

Ground 1: That the learned trial judge erred in her verdict delivered on 10 May 2017.

Ground 21: The evidence adduced by the prosecution is so manifestly unreliable that no reasonable tribunal could safely convict on it.

[112] These grounds are a general statement attacking the reasoning of the learned Judge of the Parish Court and the quality of the evidence presented by the Crown.

[113] It is a well-established principle that an appellate court will not interfere with a guilty verdict where a question of fact is involved, unless it is shown that the judge was palpably wrong. In **Joseph Lao v R** (1973) 12 JLR 1238, this principle was accurately set out in the headnote which states:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the [respondent] and the [appellant], or the matters which fell for and against him are carefully and minutely examined and set out against each other, it may be said that there is some balance in his favour. **He must show that the verdict is so against the evidence as to be unreasonable and insupportable**." (Emphasis supplied)

[114] It cannot be said that the learned Judge of the Parish Court was plainly wrong in her analysis and conclusion. The weight of the evidence was against the appellant. It was clear that the appellant was in possession of the knitted bags and his challenge to the findings of the analyst that they contained ganja was unsuccessful. The evidence adduced by the Crown was by no means unreliable. We are therefore, not satisfied that there is any good reason for interfering with the appellant's conviction. The verdict was neither unsafe nor unreasonable.

Sentence

[115] Counsel for the appellant did not pursue the issue of sentence with much vigour. He did however state that the appellant was wrongly convicted and sentenced for being in possession of 1613 pounds of ganja when only six pounds were tested by the forensic analyst (see paragraph [68] above).

[116] The Crown submitted that the learned Judge of the Parish Court in arriving at the sentence, considered the appellant's social enquiry report, his antecedents, time spent in custody and other relevant factors and pronounced sentence in accordance with the Act.

Discussion and analysis

[117] The appellant was sentenced as follows:

(1) Possession of ganja - $15,000.00 or 30 days' imprisonment

(2) Dealing in ganja - $500,000.00 or 30 days' imprisonment

(3) Taking steps preparatory to export ganja - Admonished and discharged

(4) Trafficking in ganja - Admonished and discharged

[118] With respect to the possession of ganja, section 7C(1)(b) of the Act provided for a fine of $100.00 per ounce and a maximum fine of $15,000.00 and/or imprisonment of up to three years. Based on the amount of ganja which the appellant had in his possession, the imposition of the maximum fine was appropriate.

[119] Where the offence of dealing in ganja is concerned, section 7B(e) states that a person convicted of dealing in ganja shall be liable:

> "on summary conviction before a Resident Magistrate, notwithstanding section 44 of the Interpretation Act, shall be liable-
>
> (i) to a fine which shall not be less than one hundred dollars, nor more than two hundred dollars, for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so, however, that any such fine shall not exceed five hundred thousand dollars; or
>
> (ii) to imprisonment for a term not exceeding three years; or
>
> (iii) to both such fine and imprisonment."

[120] One thousand, six hundred and thirteen pounds of ganja is approximately 25,808 ounces. Even if the fine was calculated using the mandatory minimum of $100.00 per ounce, the fine would exceed the maximum fine of $500,000.00[5].

[121] The learned Judge of the Parish Court in sentencing the appellant, bore in mind the principles of sentencing, identified a starting point and made adjustments for the aggravating and mitigating factors. Her approach cannot be faulted and the sentences cannot be described as being manifestly excessive.

[122] Therefore, there is no merit in the appellant's challenge to the sentences imposed.

Conclusion

[123] This was a case in which the evidence that the appellant's possession of the knitted bags containing vegetable matter which was confirmed by the forensic analyst to be

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[5] $2,580,800.00

ganja, was not challenged. The appellant's contention was that the evidence of the forensic analyst was not to be accepted, as she gave the wrong definition of ganja in her evidence and had only tested samples from the knitted bags and not their entire contents. Counsel for the appellant also sought to convince this court that it was no longer an offence to be in possession of ganja. That was not an accurate statement of the law. The learned Judge of the Parish Court in her analysis of the evidence demonstrated that she had a clear grasp of the evidence before her. She also demonstrated that she had a clear understanding of the law and applied the law to her findings of fact. As such, her reasoning and application of the law cannot be faulted. There is therefore no basis on which this court could properly interfere with her verdict.

[124] The sentences imposed were in accordance with the law and were by no means excessive.

[125] Accordingly, it is ordered as follows:

> The appeal against conviction and sentence is dismissed and the conviction and sentences affirmed.