TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2007/004

BETWEEN:

MALCOLM MADURO

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh Rawlins — Chief Justice
The Hon. Mde. Ola Mae Edwards — Justice of Appeal [Ag.]
The Hon. Mr. Errol Thomas — Justice of Appeal [Ag.]

Appearances:

Dr. J.S. Archibald, QC, with him Mr. Thomas Theobalds, for the Appellant
Mr. Terrence Williams, Director of Public Prosecutions, with him Mr. Myron Walwyn for the Respondent

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2008: January 28;
December 19.

Criminal Law – appeal against conviction –possession of a controlled drug –whether the judge erred in leaving the question of joint enterprise and intention in a joint enterprise to the jury – whether the judge erred in overruling the no case submission – whether the judge erred in her directions to the jury on possession – distinction between ownership and possession – whether physical control required to ground a charge of possession – whether the defence case was adequately put to the jury – blackmail – lucas direction – whether lies told after the commission of the offence were relevant and admissible evidence of guilt – whether the judge erred in failing to give a specific direction in relation to the police interview – whether the judge erred in failing to give a specific direction in relation to the Director of Public Prosecution's closing statement.

The appellant, Mr. Maduro, was charged with blackmail and possession of a controlled drug, namely cocaine. Cocaine was discovered on 28 October 2006 on an unmanned dinghy which was found floating in the Sir Francis Drake Channel by dive operators, Messrs Wise-Fone and Jenkins. They towed the dinghy to Cooper Island and contacted the police. The dinghy was later found to belong to the sailing vessel "No Grief" but attempts to trace the person(s) who had chartered the vessel proved unsuccessful as a

fictitious name had apparently been given. Messrs Wise-Fone and Jenkins testified that on 3rd November 2006, they were confronted by Mr. Maduro and an unknown man whilst at Cooper Island. The men requested that Messrs Wise-Fone and Jenkins return "their two bags of drugs" or pay for them. Messrs Wise-Fone and Jenkins denied any knowledge of the two bags of drugs. Mr. Maduro then told them that they could do it the easy way or the hard way. Mr. Maduro and the unknown man left when a customs boat approached the shore of Cooper Island.

The following day, Messrs Wise-Fone and Jenkins visited a restaurant in the building which housed their offices in Hodge's Creek. They observed Mr. Maduro sitting at the bar alone wearing dark sunglasses and drinking beer. They called the police who arrived shortly after the appellant left the bar. Mr. Maduro was apprehended two days later. Mr. Maduro, who owned 4 vessels which were used in his power boat rental business, denied having chartered the vessel, "No Grief". He also denied that he had approached Messrs Wise-Fone and Jenkins to demand the return of the drugs or payment. Mr. Maduro also sought to provide an innocent explanation for his presence at Hodge's Creek. He testified that his cousin had called that morning to request that he pick him up at 5:00 pm that day. When his cousin did not arrive, he left the bar. The prosecution adduced evidence at trial which showed that Mr. Maduro had received no phone call that morning by which this message could have been conveyed. Mr. Maduro was convicted by a jury on both counts. Mr. Maduro has appealed against these convictions.

Held: dismissing the appeal against conviction and affirming the sentence:

(1) On the charge and the evidence that was adduced during the trial, the case was simply one of possession. A direction on joint enterprise was therefore unnecessary. The direction, although superfluous, was not one which prejudiced the appellant in his trial, given the tenor of the direction and the fact that the focus of the summation by the judge related to blackmail and possession.

Villa Cay Marina Ltd. v Acland (1996) 52 WIR 238 and Romero and Macrado v R (1994) 46 WIR 151 considered.

(2) Where the case involves circumstantial evidence, the only concern of the judge is whether a reasonable jury could reach a conclusion of guilt on the evidence by drawing reasonable inferences from the evidence that is given at the trial. The question, then, is whether a reasonable jury may on one view of the evidence convict the accused. If so, even if another view of the circumstances thrown up on the evidence may be consistent with innocence, the judge should not withdraw the case from the jury. The evidence of Messrs Wise-Fone and Jenkins was evidence upon which the jury could properly have convicted Mr. Maduro if they believed it. The judge did not accordingly err in rejecting the no case submission.

Taibo (Ellis) v R (1996) 48 WIR 74 and R v Galbraith [1981] 73 Cr. App. R 124 applied. Ortiz v The Police (1993) 45 WIR 118 followed.

(3) A person is in possession of a controlled drug if that person has it in his custody or control with knowledge that the thing is in his custody or control. Although the person does not have the drug under his or her physical control, that person may still be in constructive possession of it. It was therefore open to the jury to believe that Mr. Maduro could have possessed the two bags of drugs without having physical custody of them or the boat from which they were recovered.

R v Pentecost English Court of Appeal (unreported) judgment 9703740/X5 (10th March 1998), applied.

(4) The judge, in directing the jury on possession, told them that even though Mr. Maduro might have held himself out as the owner of the drugs, they (the jury) still had to determine whether he had control of the drugs and knowledge that the drugs were under his control. The directions were accordingly proper and adequate in the circumstances of the case.

(5) It is not necessary for a trial judge to traverse all the evidence in the case or point out every possible weakness or discrepancy in the prosecution case. Mr. Maduro was not prejudiced by the fact that the judge did not specifically address minor details in the evidence.

R v Lawrence [1982] AC 510 and Byers v R (1996) 49 WIR 83 applied.

(6) It was permissible for the prosecution to adduce evidence of possible lies told by Mr. Maduro in relation to a telephone call to his cousin on 4th November 2006 to support the charges of the blackmail of the 3rd November 2006 and to support the charge of unlawful possession of cocaine on 28th October 2006, because that evidence was relevant and admissible circumstantial evidence.

Deolal Sukhram et al v The State (1993) 44 WIR 400 applied.

(7) Mr. Maduro suffered no prejudice in his trial on account of the judge's failure to give a specific direction in relation to the police interview as the judge's directions on the burden and standard of proof would have achieved the same effect.

R v McDonald (1965) 8 WIR 388 applied.

(8) The judge did not err in failing to give a specific burden of proof direction in relation to a statement of the Director of Public Prosecutions made at the end of his final address to the jury. In the context of the cross-examination, that statement merely asked the jury to determine whether they saw anything in the police treatment of this case which shows bias because of race. Mr. Maduro suffered no prejudice in his trial on account of the statement.

JUDGMENT

[1] RAWLINS, C.J: The appellant, Mr. Maduro, was charged with blackmail and possession of a controlled drug, namely cocaine. A jury convicted him of both offences on 15th June 2007. The trial judge sentenced him to 3 years imprisonment for blackmail to run concurrently with a 3 year sentence for possession of the controlled drug. On the latter conviction for possession, he was also ordered to pay a fine of $200,000.00 by 3rd January 2008, or in default, serve 2 years imprisonment. The judge ordered this 2 year sentence to run consecutively with the 2 concurrent 3 year terms of imprisonment for blackmail and possession. Mr. Maduro appealed against his conviction, but not the sentences. His appeal was argued on 11 grounds.

[2] The grounds upon which Mr. Maduro bases his appeal are:

1. The learned trial judge erred in rejecting the no case submission in relation to the charge of unlawful possession.
2. The judge misdirected the jury on the law of unlawful possession. This ground of appeal states that the learned judge misdirected the jury in law on the meaning of possession and on the application of the meaning to the evidence.
3. The judge erred in that he did not adequately put the case for the defence to the jury; assist the jury on the cross-examination of the main prosecution witnesses and how to evaluate that evidence.
4. The trial judge erred in failing to direct the jury that in reaching a verdict on the blackmail count they were not to consider lies told by the appellant in relation to telephone calls to his cousin on 4th November 2006 to support the charge of blackmail which allegedly occurred on 3rd November 2006.
5. The learned judge erred in failing properly to direct the jury in relation to the police interview of 6th November 2006 as to what happened at Cooper Island on 3rd November 2006 and in failing to give a specific burden of proof direction.
6. The judge erred in failing to address or inadequately addressed the prosecution witnesses' rivaling stories.
7. Grounds 7 and 8, which will be considered together, state that the judge was wrong in law in causing the jury to understand from her "Lucas Direction" that a possible lie told by the accused on 4th November 2006 could strengthen the prosecution's case on unlawful possession on or before 28th October 2006 and blackmail on 3rd November 2006.

8. Grounds 9 and 10 relate to issues concerning joint enterprise. In these grounds the appellant contends that the learned judge erred in inviting the jury to consider any joint enterprise and in giving directions on intention in joint enterprise on the charge of unlawful possession.
9. Ground 11 states that the judge erred in permitting the Prosecutor in his final address to the jury to allege that the defence had accused the prosecution witnesses, Messrs Wise-Fone and Jenkins of being involved in drug trafficking without bringing any proof of it and directing the jury to ignore the allegation.

[3] A brief factual background will facilitate the consideration of the issues which arise from these grounds of appeal.

The Facts

[4] On the morning of 28th October 2006, Messrs Thomas Wise-Fone and Ian Jenkins, accompanied by other persons, were travelling by boat from Hodge's Creek, where they operate a dive shop business, to Cooper Island. They saw an unmanned dinghy floating in the Sir Francis Drake Channel. They changed course towards the dinghy, secured it to their boat and towed it to Cooper Island. Upon arrival on Cooper Island, they inspected the dinghy and found that it contained sports bags filled with silver blocks. This aroused their suspicion. Mr. Jenkins telephoned the police who came and took the dinghy, the sports bags and their contents into custody. Tests confirmed that the blocks contained cocaine.

[5] At the trial Mr. Wise-Fone testified that on the morning of 3rd November 2006, Mr. Maduro and an unknown man approached him near his dive shop. He had seen Mr. Maduro a few times before. The unknown man came up to him (Wise-Fone) first, and told him, Wise-Fone, that he knew that he (Wise-Fone) was the person who found the dinghy. The unknown man also told him that there were 9 bags on the dinghy but he (Wise-Fone) had only given 7 to the police. He insisted that Wise-Fone had taken "their two bags of drugs". A few minutes later Mr. Maduro came up to him (Wise-Fone) and insisted that Wise-Fone took the other 2 bags of cocaine. Maduro and the unknown man demanded that Mr. Wise-Fone should either return the 2 bags to them or pay them for the drugs. Mr. Maduro and the

unknown man enquired as to the whereabouts of Mr. Jenkins and indicated that they would await his return.

[6] Mr. Jenkins returned to the dive shop at about 1:30 pm on 3rd November 2006. Mr. Wise-Fone was there. The unknown man and Mr. Maduro came and confronted them regarding the drugs repeating the allegations that they had made earlier that day. In his testimony, Mr. Jenkins said that both men kept repeating to them that they (Wise-Fone and Jenkins) had their 2 bags of cocaine, which they must either return to them or pay them for the 2 bags of drugs. Mr. Maduro and the unknown man became very agitated and paced around when Wise-Fone and Jenkins continually denied that they had the 2 bags of drugs.

[7] Mr. Maduro and the unknown man insisted that Wise-Fone and Jenkins should accompany them to their boat and show them where they put the 2 bags of cocaine. Messrs Wise-Fone and Jenkins continued to deny any knowledge of the 2 bags of drugs. Mr. Maduro then told them (Wise-Fone and Jenkins) that they could do it the easy way or the hard way. Mr. Maduro and the unknown man left after a customs boat came near to the shore of Cooper Island. Maduro and the unknown man however said that they would return and check Messrs Wise-Fone and Jenkins.

[8] Sometime after 4:00 pm on 4th November 2006, Messrs Wise-Fone and Jenkins went to a restaurant at Hodge's Creek in the building which housed their offices. They observed Mr. Maduro sitting at the bar alone wearing dark sunglasses drinking beer. Mr. Wise-Fone called the police who arrived shortly after the appellant left the bar.

[9] The police apprehended Mr. Maduro on 6th November 2006 at Cooper Island, took him into custody and interviewed him. In the interview the police told him that they were informed that on 3rd November 2006 he (the appellant) and another man approached a "white male" and told him (the white male) that they came for the "rest two bags" that were on the dinghy. They also questioned the appellant concerning the threats that he allegedly made to "the said white man" to do him

harm if he did not return the 2 bags to them. The police also asked him whether the other man had also threatened "the white man". Mr. Maduro denied the allegations. He was subsequently arrested and charged with blackmail and possession of a controlled drug: 174 kilograms of cocaine. A Gazetted Analyst had tested the silver blocks and confirmed that they contained cocaine.

[10] The police later found out that the dinghy belonged to the sailing vessel "No Grief" that was owned by Footloose Charters. Their attempts to trace the person or persons who had chartered the vessel up to 28th October were unsuccessful. The charterer had apparently given a fictitious name. The appellant, who owned 4 vessels which were used in his power boat rental business, denied having chartered the vessel.

Considering the grounds of appeal

[11] Some time was spent at the end of the hearing on arguments concerning the charge although this issue was not clearly foreshadowed in the appeal or the written submissions. This issue arose when the parties made submissions on grounds 9 and 10 of the appeal, which relate to joint enterprise. Since any issue which relates to the charge is at the base of the case, I think that it is necessary to consider these grounds first.

Grounds 9 and 10 - Joint Enterprise

[12] The learned judge gave the following directions on joint enterprise:

> "So the Prosecution are saying that as owner of the drugs, the Accused controlled the drugs and, therefore, he knew about it. The Prosecution says that it's obvious that the drugs in question were being moved around by people and that the accused was part of this joint enterprise. … The Prosecution are also saying that the Accused was part of an enterprise, that even though the cocaine was not found on him per se, that does not mean that he was not involved and that he did not have custody or control and that he did not have the required knowledge. The Prosecution is saying that this Accused played a part in this criminal enterprise. … The law is, Mr. Foreman and Members of the Jury, if you are sure that this Accused played a part in this criminal enterprise, he is just as guilty. If you are not sure, then it's your duty to acquit this man, to free this man. I

> need to tell you a little about criminal enterprise. The law is that where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The word "plan" or "agreement" does not mean that there has to be any formality about it. An agreement can be inferred from the behaviour of the accused. The essence of joint responsibility…is that each accused shares the intention to commit the offence, and took some part in it however great or small to achieve that aim. You must have heard me use the word "intention". You prove intention by looking at all the surrounding facts and circumstances. You look at what the accused did, if he did, or say anything before, if he did during or after the alleged incident. … If looking at the case of the Accused you are sure that with that intention he committed the offence or that he on his own or that he took part in committing it with others, he's guilty."[1]

[13] Dr. Archibald, QC, contended that the learned judge erred in leaving the question of joint enterprise and intention in joint enterprise to the jury. He argued that the question of joint enterprise was not a case that the appellant had come to court to meet. He insisted that the failure to put the allegation of joint enterprise to the appellant in cross-examination, whether on the charge of possession or blackmail, left it open to the jury to apply joint enterprise and intention in the context of joint enterprise to both counts. I think that it is clear that the learned judge gave these directions only in relation to possession and not in relation to blackmail.

[14] Learned senior counsel submitted, further, that the direction on joint enterprise was in error and that it was, additionally, in breach of the rule of procedural fairness stated by Lord Hoffman in Village Cay Marina Ltd v Acland.[2] He submitted that this procedural unfairness coupled with the learned judge's misdirection rendered the conviction unsafe and amounted to a serious miscarriage of justice.

[15] The learned Director of Public Prosecutions contended, on the other hand, that the judge did not err as the directions given related to important issues in the case,

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[1] Record of Appeal, Volume 2, Tab 3, page 32, lines 16-22; page 35, line 2 to page 36, line 14.
[2] (1996) 52 WIR 238, page 27d–(e.

and, applying the legal guidance in Romero and Macrado v R,[3] were proper and adequate.

[16] I have noted that Mr. Maduro was not charged as an accomplice pursuant to sections 19 or 20 of the Criminal Code, 1997, of the Virgin Islands. The particulars of the charges do not indicate that he was involved in a joint enterprise. The particulars of the statement of the offence of possession reads:

> "MALCOLM MADURO on a day or days unknown prior to the 28th October, 2006 unlawfully had in his possession a controlled Class A drug, namely one hundred and seventy four kilograms (174 kg) of cocaine."

[17] During the hearing before this court, the question arose whether it was necessary for the words "and others" to have been added to the charge in order to ground joint enterprise. Further submissions with authorities were sent to us by counsel for the parties after the hearing. This was all unnecessary and of no moment, in my view. There was no evidence that Mr. Maduro aided, abetted, procured, or counseled anyone to commit any of the offence or was part of a joint enterprise.

[18] There may have been some thought of the possible involvement by Mr. Maduro in a joint enterprise with the unknown man who allegedly visited the dive shop on Cooper Island on 3rd November 2006. This may have informed the Director of Public Prosecutions to touch on the issue in his opening, and the judge's decision to give what is a brief direction on joint enterprise. I think that the direction was unnecessary because the case was one of possession, simply, both on the charge and on the evidence that was adduced during the trial. However, in my view, this does not provide a ground for allowing the appeal. It was a superfluous direction, but not one which prejudiced the appellant in his trial, given the tenor of the direction and the fact that the focus of the summation by the judge related to blackmail and possession. I would accordingly dismiss the appeal on grounds 9 and 10.

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[3] (1994) 46 WIR 151.

Ground 1 – No case submission

[19] The basic principles on a submission of no case to answer are succinctly stated, for example, in the head-note of the judgment of the Privy Council in Taibo (Ellis) v R.[4] and in R. v Galbraith,[5] which case is the *locus classicus* on no case submissions. The head-note in Taibo (Ellis) states:

> "On a submission of no case to answer, the criterion to be applied by the judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed."

[20] In Galbraith, the basic principles were stated as follows:[6]

> "If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[21] Where the case involves circumstantial evidence, the only concern of the judge is whether a reasonable jury could reach a conclusion of guilt on the evidence by drawing reasonable inferences from the evidence that is given at the trial. The question, then, is whether a reasonable jury may on one view of the evidence convict the accused. If so, even if another view of the circumstances thrown up on the evidence may be consistent with innocence, the judge should not withdraw the case from the jury.[7]

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[4] (1996) 48 WIR 74.

[5] [1981] 73 Cr. App.R. 124; 2 All E.R. 1060; 1 WLR 1039.

[6] [1981] 73 Cr. App.R. 124, at page 127.

[7] See, for example, R. Jabber [2006] EWCA Crim 2694, particularly per Moses LJ, at para. 21.

[22] Mr. Maduro was indicted under section 7(1) of the Drugs (Prevention of Misuse) Act Cap 178 which provides:

> "Subject to any regulations under section 9 for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession."

This requires the prosecution to prove that an accused had the drug in his custody or control and that the accused knows that the thing was in his custody or control.[8]

[23] Dr. Archibald, QC, learned counsel for Mr. Maduro, submitted that the trial judge erred when she did not uphold the no case submission. This, he said, was because at the close of the prosecution case there was no evidence that the appellant had either custody or control of the drugs or any knowledge of such custody or control to satisfy the test of possession as laid down by the court in Ortiz v The Police[9]. In Ortiz, Floissac CJ stated:

> "…the Appellants could not properly have been convicted of those offences unless the prosecution had proved beyond reasonable doubt that the appellants had physical custody or control or assisted in the physical custody or control of the cocaine and that the appellants had knowledge of such custody or control."[10]

[24] The learned Director of Public Prosecutions, Mr. Williams, submitted that in applying Galbraith, the critical question was whether there was a *prima facie* case on the evidence so that a reasonable jury could interpret the words allegedly used by Mr. Maduro in the conversation with Mr. Wise-Fone that the drugs were "their two bags of cocaine" and that he wanted back his drugs to have been an admission of his having had possession.

[25] Dr. Archibald insisted that at its highest this was evidence of ownership and not evidence that Mr. Maduro was in possession of or in control of the drug, or that the drug was in his custody or that he had knowledge of it.

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[8] See, for example, per Lord Diplock in DPP v Brooks [1974] 21 WIR 412, at page 415; [1974] 2 All ER 840, at page 842; per Lord Clyde in R. v Lambert [2001] 3 All ER 577, para. 122 at page 615.
[9] (1993) 45 WIR 118.
[10] Ibid, page 121, paragraph g.

[26] With respect I do not agree with the submissions by Dr. Archibald on this issue. In my view the evidence relating to the actions and conversations which Mr. Maduro had with Messrs Wise-Fone and Jenkins on the morning and afternoon of 3rd November 2006 was evidence which the jury could have taken, if they believed it, to be an admission by Mr. Maduro that he had possession of the drug and knowledge of that possession "on a day or days unknown prior to the 28th day of October 2006", as the offence states.

[27] The evidence that Wise-Fone and Jenkins gave of their conversations on 3rd November 2006 with Mr. Maduro and the unknown man was evidence upon which the judge could and did properly over-rule the no case submission. It was evidence upon which the jury could have convicted Mr. Maduro if they believed it. It was open to them to conclude that Mr. Maduro was not merely stating that he owned the 2 bags of drugs, which were part of the bags of cocaine which Messrs Wise-Fone and Jenkins found in the open dinghy; that Mr. Maduro was in physical possession of those 2 bags of cocaine, and the other bags that were on the dinghy, at some point in time on or before 28th October 2006; lost physical possession of them; heard that Wise-Fone and/or Jenkins towed in the dinghy with the cocaine; turned some over to the police but kept 2 bags, Mr. Maduro wanted Messrs Wise-Fone and Jenkins to return the 2 bags of cocaine to him or pay him for them. At the least these were inferences that the jury could legitimately and properly draw from those conversations and the circumstances of the case. In the premises, I would dismiss the appeal on ground 1.

Ground 2 - Misdirection on Possession

[28] A person is in possession of a controlled drug if that person has it in his custody or control with knowledge that the thing is in his custody or control. Although the person does not have the drug under his or her physical control, that person may still be in constructive possession of it.

[29] Dr. Archibald, QC, submitted that the directions which the learned trial judge gave to the jury show that she misconceived the law of possession. This, he said, was

because the judge equated ownership, and the control derived from ownership, with physical custody and control required under the Drugs Act for the purpose of the offence of possession.

[30] The learned Director of Public Prosecutions contended, on the other hand, that it is perfectly possible in law for possession to exist without there being physical control. He cited as authority for that proposition the English Court of Appeal judgment in R. v Pentecost.[11] The learned Director argued, further, that the law of joint enterprise was relevant to the possession charge. He submitted that in recognizing the various modes of participation in crime in Romero and Macrado,[12] this court ruled that a case of joint possession could be made out even where a party did not have physical control or custody so long as that party aided, abetted, procured, or counseled the principal offender or was part of a joint enterprise that contemplated, as a possibility, the drugs physical custody or control by the principal.[13] The learned Director submitted that on these principles the learned trial judge's directions on possession were correct.

[31] In order to appreciate these submissions and to consider them in the context of the appeal on this ground, I think that it will be necessary to set out fully the directions which the learned judge gave on possession. She stated:[14]

> "The Prosecution says to you that … you must bear in mind this important question, that why would these two men tell such a lie on this Accused that on the 3rd of November, 2006, this Accused with another unknown man came and demanded the two missing bags of cocaine and said words to the effect that they wanted their cocaine back. If indeed the Accused said that he wanted his cocaine back, then he would have held himself out to be the owner of the drugs of the cocaine. It is nevertheless still a matter for you to determine whether as owner of the drugs or the cocaine he had physical control of it. You will bear in mind, Members of the Jury, that the indictment reads on a day or days prior to 28th of October, 2006, that this Accused was in possession of the drugs. That is what the Prosecution is alleging.

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[11] English Court of Appeal (unreported) judgment 9703740/X (10th March 1998).
[12] Op. cit, at note 3 of this judgment.
[13] Respondent's Skeleton Arguments, page 4.
[14] Record of Appeal, Volume 2, Tab 3, pages 33 line 19 to page 35 line 1.

> The second element as I said involved knowledge that the drugs was under his control. The law says that an accused need not know what its nature is, but so long as he knows that the drug or thing is under his control, it is in his possession. So, Mr. Foreman and Members of the jury, you will have to look at all the surrounding facts and circumstances in order to infer knowledge and control. After analyzing the evidence if you believe what Mr. Wise Fone said about the Accused coming up to them and saying that he wants his cocaine back or words to that effect, you, Members of the Jury, when I come to Mr. Wise Fone's evidence in particular I'll give you the exact words, but words to the effect that "I want back my cocaine", if you find that he had control and knowledge of the drugs, then the two elements that make up possession would have been satisfied."

[32] R v Pentecost is helpful to the extent that it reflects the trite principle that a person may be in possession of a controlled drug without having physical possession of it. The relevant question on this before the English Court of Appeal in that case was whether the appellant, Mrs. Pentecost, was properly convicted on the evidence for possessing heroin with intent to supply. Heroin, cash and mobile phones were found in the possession of the Smiths who were arrested outside the house which Mrs. Pentecost was subletting to them. When the house was searched, a home made press used for processing heroin was found in a cupboard and heroin was found in a chest of drawers in a bedroom. Mrs. Pentecost and her husband were at the house when the police arrested the Smiths and searched the house. The prosecution case was that Mrs. Pentecost was in joint possession with the Smiths as they all knew of the heroin in the drawer and exercised control over it. The prosecution argued that the Smiths continued to possess the drugs even when they left them at the house and had no physical control of them. The Smiths were said to have brought the drugs to the flat and left them there so that they could call for them later.

[33] It was argued in Pentecost, that insofar as there was evidence that Mrs. Pentecost intended to allow the Smiths access to the house for the purpose of retaking the heroin, the intention to supply had been proved. The Smiths had pleaded guilty to possession of the drugs. The prosecution had asserted that they continued to possess the drugs in the drawer even when they were not there. The

Court of Appeal held that the fact of possession by the Smiths could not preclude a finding of possession by Mrs. Pentecost with intent to supply. This, the English court said, was because it is perfectly possible in law for possession to exist without physical custody. In my view this latter statement throws light on the present case in the sense that it was open to the jury to believe that Mr. Maduro could have possessed the 2 bags of drugs without having physical custody of them or of the boat from which they were recovered. In other words, by constructive possession.

[34] With respect, however, the question on this ground of appeal was simply whether the trial judge erred in her directions to the jury on possession. The trial judge was required to direct the jury that in order to convict the appellant they needed to determine whether the appellant had the cocaine under his control or in his custody with knowledge that he had the thing. In my view this was what the learned judge did when the whole of her directions are considered. It is particularly important to note that she told the jury that even though Mr. Maduro might have held himself out as the owner of the drugs, they (the jury) still had to determine whether he had physical control of it. The judge then instructed the jury that they also had to determine whether Mr. Maduro had knowledge that the thing was under his control. Additionally, the directions reproduced at paragraph 31 of this judgment show that the learned judge reasonably related the evidence to the legal principles to assist the jury. I do not think that her directions on possession were misconceived. I would therefore dismiss the appeal on ground 2.

Ground 3 - Defence case not adequately put to the jury

[35] Dr. Archibald argued that the trial judge erred in not adequately putting the defence case to the jury. He contended that whilst the judge directed the jury that as fact finders they were to determine issues of credibility on the totality of the evidence as tested by cross-examination, she failed to direct them on how to deal

with certain discrepancies and gaps in the evidence.[15] Dr. Archibald referred to the following matters which the judge did not discuss in her summation to the jury:

(i) Mr. Ian Jenkins did not disclose to the police that the appellant's name was Malcolm until 12th November 2006 although he had learnt the appellant's name from Nigel, a Cooper Island workman, on the afternoon of the 3rd November;

(ii) During the interview the detective referred to the appellant as having done something to "a white male" or "white man" at Cooper Island on the 3rd November and not to two persons;

(iii) Mr. Wise-Fone described the unknown man as having sideburns while Mr. Jenkins described him as having a beard;

(iv) Messrs Wise-Fone and Jenkins had failed to describe how the appellant was dressed when he confronted them at Cooper Island on 3rd November;

(v) Mr. Wise-Fone testified that the two men had alleged that there were nine bags in the dinghy and only seven reached the police whilst Mr. Jenkins testified that the unknown man had alleged that there were eleven bags in the dingy and only nine were recovered by the police; and

(vi) Messrs Wise-Fone and Jenkins never alleged that the men asked them for any specific or approximate sum of money for the two bags of cocaine.

[36] The learned Director of Public Prosecutions submitted that it was not necessary for a trial judge to traverse all the evidence in the case or to point out every possible weakness or discrepancy in the prosecution case. He referred to R v Lawrence (Stephen)[16] and Byers v R[17] as authority that it was sufficient for the judge to give a summary of the facts and issues. The learned Director correctly observed that the trial judge referred to discrepancies that were highlighted in

[15] Appellant's Skeleton Arguments, paragraphs 12 – 13.
[16] [1981] 1 All ER 974; [1982] AC 510.
[17] (1996) 49 WIR 83.

cross-examination, juxtaposed the defence version with each explanation of the Crown's evidence to prove a charge, summarized the appellant's evidence and read extensively from his interview with the police and addressed issues of credibility. He submitted that the judge's summation was balanced and adequate.

[37] The summation may not have been a classical one in some respects. However, the judge interspersed her directions on the principles with reference to some of the evidence. She opted to discuss the facts in fuller measure at the end of the summation. This was out of an expressed realization that the decision of the jury depended on which version of the evidence they believed, because they needed to determine whether credibility resided in Wise-Fone and Jenkins, or, on the other hand, with Mr. Maduro who gave evidence on oath. In that scenario she summarized the case for both the prosecution and the defence and highlighted the discrepancies in the evidence. I do not think that the matters raised in this ground of appeal materially impacted the charges. They were minor details in the evidence. That she did not specifically address these matters separately in her summation, did not, in my view, prejudice Mr. Maduro in his trial. I would therefore dismiss ground 3 of the appeal.

Grounds 4 – the telephone call to Leonard

[38] During his testimony at the trial, Mr. Maduro sought to provide an innocent explanation for his presence at the restaurant in Hodge's Creek on 4th November 2006. He stated that he received a telephone call in the morning from his cousin, James Leonard, who requested that he pick him up at Hodge's Creek at 5:00 pm that day. He said that he waited for some time at the restaurant. When his cousin did not arrive, he left.

[39] The prosecution sought to prove that Mr. Maduro was lying. This was done by adducing evidence which showed that he received no phone call that morning by which this message could have been conveyed. The evidence led by the prosecution was that the only call he received was for a duration of 3 seconds. The prosecution argued at trial that the appellant was present at the restaurant

only for the purpose of intimidating Messrs Wise-Fone and Jenkins. The prosecution asked the jury to find that the explanation which he gave for his presence at the restaurant was a deliberate lie told with a consciousness of guilt.[18]

[40] Dr. Archibald contended that the trial judge should have directed the jury that in reaching a verdict on the blackmail count they were not to consider lies told by the appellant in relation to any telephone call to his cousin on 4th November 2006 to support the charges of blackmail. This, he insisted, was because the blackmail allegedly occurred on 3rd November 2006, prior to the telephone call.

[41] In directing the jury on the issue the learned judge stated:

> "… you have heard from Mr. Lewis and that phone call emanating from Virgin Gorda and what was said. And the Prosecution is saying to you that … what the Accused has told you about the phone call is a deliberate lie and you must treat it as such. But I'll tell you the law as it relates to that, to lying. First of all you must decide whether the Accused deliberately lied with respect to that phone call. As I said, you have heard the rebuttal evidence and it's a matter for you to decide who is telling the truth and who is lying. If you are not sure, ignore this all together. But if you are sure that it was a lie or the Accused told a lie, you go further to consider why did the Accused lie. Because the mere fact … that he tells a lie is not in itself evidence of guilt. An accused person may lie for many reasons. He might still be innocent, but still lie to you. So you will have to decide whether they were innocent in the sense that if they were not innocent they do not connote guilt. For example, he may have lied to bolster up a true defence or to protect somebody or he might lie also to conceal something, to hide something disgraceful. But if you think, …that what he told you amounts to a lie, then, and that it was not made innocently, then you could use that evidence as evidence supporting the Prosecution's case. If at the end of the day … you reject everything that Mr. Maduro has told you, you must fall back on the Prosecution's case. You can't automatically convict him…you look to see whether the Prosecution has satisfied you so that you feel sure to the extent that you feel sure of the guilt of this man."[19]

[42] Dr. Archibald submitted that the judge was wrong in law to give a Lucas Direction in relation to blackmail. He contended that nothing that Mr. Maduro said in relation to the telephone conversation of the 4th November could strengthen the

[18] Record of Appeal, Volume 2, Tab 2, pages 153 – 156; Respondent's Skeleton Arguments, page 9.
[19] Record of Appeal, Volume 2, Tab 3, page 67, line 4 to page 68, line 17.

prosecution's blackmail allegations of the 3rd November. The particulars of offence on the blackmail charge read:

> "MALCOLM MADURO on the 3rd November, 2006 at Cooper Island in the Territory of the Virgin Islands with a view to gain for himself and to cause loss to another, made an unwarranted demand of two bags of cocaine or its money equivalent of Thomas Wise-Fone and Ian Jenkins with menaces."

[43] The learned Director of Public Prosecutions argued that a criminal case cannot be tried in a factual vacuum. He contended that where acts after the commission of an offence assist in appreciating the defendant's actions and intent they are relevant and admissible. As such, he insisted that the events of 4th November 2006 and the explanation offered by Mr. Maduro were relevant and admissible circumstantial evidence in relation to the events of 3rd November and the learned judge's directions were proper in the circumstances. He relied in support of this contention on the statement of Bernard CJ in Deolal Sukhram et al v The State[20] that:

> "…it was perfectly permissible for the prosecution to call evidence of any act or conduct on the part of any or all of the appellants that was antecedent to, contemporaneous with or subsequent to and going to show his connection with the *actus reus* itself…"

[44] This, in my view, answers ground 4 of the appeal, which accordingly fails. I would therefore dismiss this ground of the appeal.

Grounds 7 and 8 – Lies and the Lucas Direction

[45] In relation to ground 7 of the appeal, Dr. Archibald submitted that the learned trial judge was wrong in law to direct the jury to understand from her Lucas Direction that a possible lie told by Mr. Maduro in evidence at the trial about his cousin's phone call to him (Maduro) on 4th November 2006 could strengthen the Prosecution's case on blackmail on 3rd November 2006 and on unlawful possession of drugs on a date before 28th October 2006.

[20] (1993) 44 WIR 400.

[46] In my view, the statement of Bernard CJ in Deolal Sukhram[21] also provides a total answer to grounds 7 and 8 of the appeal, which also fail. Accordingly, I would also dismiss these grounds of the appeal.

Ground 5 - Police interview

[47] Dr. Archibald submitted that the trial judge erred in failing to direct the jury that if they believed the appellant's interview statements given to the police on 6th November 2006 as to what happened on Cooper Island on 3rd November 2006, or this left them in reasonable doubt as to the truthfulness of the statements, they were to resolve the issue of credibility between Wise-Fone and Jenkins, on the one hand, and Maduro, on the other, in favour of Maduro and acquit him on both counts. Senior counsel relied on R v McDonald[22] to support this contention.

[48] In McDonald, Waddington JA stated:

> "…if there was room for any other inference consistent with innocence, then an unfavourable inference ought not to be drawn against the appellant."[23]

[49] The learned Director of Public Prosecutions submitted, however, that Mr. Maduro suffered no prejudice in his trial on account of the learned judge's failure to give a specific direction in relation to the interview. This, he said, was because Her Ladyship's directions on the burden and standard of proof would have achieved the same effect. I agree with this submission. Accordingly, I would dismiss ground 5 of the appeal.

Ground 11 - Specific burden of proof direction

[50] Learned counsel for the appellant submitted that the learned judge erred in not giving a specific burden of proof direction to counter the prosecutor's argument of unfounded suggestions made in the cross-examination of crown witnesses. He

[21] Reproduced in paragraph 43 of this judgment.
[22] (1965) 8 WIR 388, Court of Appeal of Jamaica.
[23] At page 392C.

contended in particular that the learned Director of Public Prosecutions was unjustified when he stated as follows in address to the jury:

> "I would like to close with a little discussion on the last question put to Mr. John in his evidence. That is white people, do you believe white people can do drugs too…,an insinuation that the police were bias because Mr. Jenkins and Mr. Wise-Fone are white people.
> There was a time and a place where race played an issue in criminal trials. I don't believe this country for the past hundred years was ever that place. I believe we in the Caribbean, we in this Territory, always give fair justice. And I think it is too easy for people to turn to race…So I ask you if you disbelieve Mr. Jenkins and Mr. Wise-Fone, disbelieve them, if you do on the evidence, on the case but race plays no part in it or ought not to and ask yourselves this question. Do you see anything in the police treatment of this case which shows any bias because of race?"[24]

[51] Dr. Archibald contended that by highlighting the question of race in his final address to the jury the learned prosecutor may have tipped the scales against the accused.[25] This statement, he contended, required the specific burden of proof direction from the judge.

[52] The learned Director of Public Prosecutions submitted, on the other hand, that the defence adopted an approach of insinuating that the virtual complainants were themselves involved in the illicit trafficking of drugs. This came as a suggestion during cross-examination of Mr. Wise-Fone. There were also suggestions that he deliberately "avoided the police" when they were investigating the case; that he "took refuge" in a police officer who was friendly with him, and as a result of telling lies "played it well" in deflecting questioning from himself. The learned Director further pointed out that the final question asked in cross-examination of the investigating officer was whether "White people don't smuggle drugs?" Mr. Williams insisted that the comments that are complained of in this ground of appeal were proper because this line of cross-examination by the defence led to unfounded insinuations for which no good faith was claimed. He further submitted, on the authority of Rondel v Worsley,[26] Henry v The State[27] and Gonzales

[24] Record of Appeal, Volume 2, Tab 2, pages 176 – 177.
[25] Appellant's Skeleton Arguments, paragraph 26.
[26] [1969] 1 AC 191, at page 227G.

(Franklyn) v The State[28], that where in cross-examination defence counsel makes such insinuations or unsupported allegations on a witness without a sufficient basis on the evidence, strong comment was warranted from the prosecution. He insisted that it was quite proper in the circumstances for the prosecution to seek to disabuse the jury's mind of any consideration of the unfounded defence allegation. A burden of proof direction, he contended, was not therefore necessary in those circumstances.

[53] In my view, there was nothing in the statement by the learned Director of Public Prosecutions that required a specific burden of proof direction in relation to the statement. In the context of the line of cross-examination, the statement merely asked the jury whether they saw anything in the police treatment of this case which shows any bias because of race. There was nothing in the statement that was prejudicial to Mr. Maduro. I would therefore dismiss this ground of appeal.

[54] In the foregoing premises, I would dismiss the appeal against conviction on all grounds. Mr. Maduro quite wisely did not appeal against the sentences.

Order

[55] On the basis of the foregoing, the order that I would make is that the appeal against conviction is dismissed and the conviction and sentence of the appellant, Mr. Maduro, are affirmed.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Errol Thomas
Justice of Appeal [Ag.]

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[27] (1986) 40 WIR 312.
[28] (1994) 47 WIR 355.