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

SAINT LUCIA

CLAIM NO. SLUHCRD 2009/1108-1125

BETWEEN:

THE QUEEN

AND

1. ALFREDO RODRIGUEZ
2. JUAN SALAZAR
3. LOPEZ JOSE
4. ROMEL SALAZAR
5. HERMER MARCANO
6. CARLOS SALAZAR

Defendants

Appearances:

Mr. L. Theophilus for the Defendants
Mr. S. Cenac Crown Counsel for the Prosecution

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2011: May 24th and 25th

....

RULING

[1]. **BENJAMIN, J.:** Each of the six (6) defendants is on trial on three counts in the Indictment. The counts are for the offences of possession of cocaine, possession of cocaine with intent to supply to another and importation of cocaine contrary to sections 8(2), 8(3) and 5 (3) respectively of the Drug (Prevention of Misuse) Act, Cap. 3:02.

[2]. At the close of the case for the Crown, Defence Counsel submitted on behalf of all the defendants that there is no case to answer and the defendants ought not to be called upon to lead a defence . The Defence's submission is that the Crown has failed to provide proof of the actus reus of possession and that, in its present state, the evidence is not sufficient for a reasonable jury properly directed to arrive at a verdict without speculation. It was urged that, of the inferences that the jury could be invited to draw, a verdict of guilt could not be reached on the basis of proper directions.

[3]. It was argued that there was no nexus between the defendants and the controlled drugs recovered by the Police, since the said drugs were not found in the vessel 'LICOR SECO', nor in the physical possession of any of the defendants; but rather the parcels containing the drugs were recovered six (6) hours later in an area said to be the approximate area where the vessel was first seen stationary in the water. It was also pointed out that another vessel was encountered in the area subsequent to the first four (4) defendants, being apprehended and at the time when the next two (2) defendants were found on Maria Islet and the parcels recovered; a difference of approximately six (6) hours. Counsel asserted that the sighting of a white parcel for a period of ten (10) seconds floating five (5) feet in front of the bow of the vessel did nothing to assist the Prosecution's case as there were no details offered as to what the parcel was or its size or any other feature to assist in its specific identification.

[4]. The Crown submitted that there was sufficient evidence of a circumstantial nature to support a finding of constructive possession of the drugs by the defendants. It was urged that the jury could be invited to find that the white parcel seen by Police Constable Henry for ten (10) seconds was the same parcel found in the general area six (6) hours later. Further, from the evidence, it could be concluded that upon the approach of the Police Patrol Boat, the defendants jettisoned the drugs and abandoned the vessel with a view to secreting themselves on Maria Islet. The Court was pointed to the circumstances revealed by the evidence: Six (6) persons at night aboard a 42 foot vessel with 6 75 hp engines and 22 drums some filled with gasoline; the circumstance of the six (6) persons being seen jumping overboard and swimming away from the vessel; in addition, the circumstance of the parcels of drugs being found weighted by a bag of sand.

[5]. The guiding principles for the treatment of submissions of no case to answer are set out in R v Galbraith [1981] 73 Cr. App. Rep. P. 124 at p. 127:

> " (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on 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 the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury" (per Lord Lane C.J. at p. 127).

The principles were distilled by the Privy Council in Taibo (Ellis) vs R. (1996) 48 WIR 74 where it was stated that test for the judge is whether there is evidence on which a jury could, without irrationality, be satisfied of guilt and if such evidence is available, the judge must allow the case to be decided by the jury. Rawlins CJ in Malcolm Maduro v R. Criminal Appeal No. 4 of 2007 (BVI) helpfully restated the position specific to circumstantial evidence, as in the present case. His Lordship said (at paragraph 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."

[6]. It is an essential ingredient of the offences embodied in all three counts on the Indictment that the defendants were in possession of the drugs, that is to say, the actus reus or a part of the actus reus of the offences. Following the dictum of Lord Diplock in DPP v Brooks (1974) 21 WIR 411 at p. 415, the Crown must prove that the defendants had the drugs in their physical custody or under their control and that they had knowledge of such custody or control. Having regard to the learning in Malcolm Maduro (supra), a defendant need not

be found in physical custody or control of the drugs, he may be found to be in constructive possession of the drugs. The learned Chief Justice approved the decision of the English Court of Appeal in R v Pentecost (unreported) as authority for the proposition that it is possible to be in possession without having physical control.

[7]. In the present case, in the hour of darkness, a Police patrol boat encountered a vessel at a standstill in the water in a reef area in the vicinity of Maria Islet. Four (4) persons (now defendants) were seen jumping off the vessel and attempting to swim towards Maria Islet. In the beam of the search light one Officer briefly saw a white parcel floating in the water five (5) feet to the front of the vessel but that parcel was not then recovered. The four (4) men were apprehended. Two other men were seen on the Islet. The four (4) men and the stalled vessel were taken back to the Marine Base at Vieux-Fort. The vessel had 6 75-hp outboard engines and was 42 feet in length; however, apart from twenty-two (22) drums of which were filled with fuel, nothing else was found on board the vessel – "LICOR SECO CPNO." One engine of the vessel was eventually started, suggesting prior engine trouble. At first light, the Police patrol vessel returned to the general area and the two (2) men were taken from Maria Islet and the crew recovered two bags containing blocks of cocaine attached by a rope to a bag of sand. Investigations reveal that the defendants only spoke Spanish and did not understand English.

[8]. The jury would be directed as to the legal requirements to establish possession and as to circumstantial evidence vis-à-vis constructive possession. Such jury can conclude that the Crown has not met its burden by virtue of the evidence being insufficient to provide proof beyond reasonable doubt; this conclusion could be arrived at, for example, on the basis

that the defendants may have been attempting to land on Saint Lucia illegally with no connection to the drugs. Equally, as I see it, the jury can take the view that the proximity of the white parcel to the vessel and the parcel of drugs being recovered in that general vicinity coupled with the behaviour of non-Saint Lucian occupants of a vessel not registered in Saint Lucia were circumstances, inter alia, sufficient to ground guilt. The latter conclusion could not be considered irrational or based on speculation.

[9]. Accordingly, I reject the submission that there is insufficient or no evidence as to the actus reus of possession common to all the charges.

[10]. Defence Counsel further submitted that no evidence was led as to the extent of the territorial waters of Saint Lucia. This triggered an invitation by the Court to Counsel for submissions on the issue of jurisdiction.

[11]. The evidence before the Court comes from the Police witnesses. Police Constable Henry stated that the Police patrol boat PO3 proceeded to the south east of Vieux-Fort off the Moule-a-Chique lighthouse then to the Maria Islands, where a pirogue was seen maneuvering between Maria Minor and Maria Major. He did not make any note of the specific area. Cpl Raymond Alexander was the coxswain of the Police patrol boat when it intercepted the vessel coming around the north of Maria Islet at about 8:30 p.m. He marked the position where the vessel was found; he gave precise bearings of latitude 13° 43.5 north and longitude 060° 56' west approximately 50 feet from Maria Islet. He went on to say that the parcels were found about 40 feet from Maria Islet. The Court was informed that the whole island is surrounded by reefs.

[12]. The Defence contended that the Crown has failed to lead evidence as to the parcels being found in the territorial waters of Saint Lucia. Further, by S. 28 of the Maritime Areas, Act, Cap. 1:16, the Crown ought to have tendered a certificate from the Attorney General and having failed to do so are precluded from re-opening their case to cure this omission.

[13]. Crown Counsel relied upon S. 22 of the Maritime Areas Act, Cap. 1:16 and on the authority of the decision of Court of Appeal of Barbados in Mason v R (1999) 57 WIR 45. It was urged that on the present state of the evidence, the jury ought to be invited to apply local knowledge to conclude that since Maria Islet is known to be proximate to Vieux-Fort the offence took place within the territorial waters of Saint Lucia.

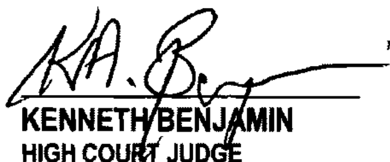
[14]. It should at once be pointed out that the jurisdiction over the territorial waters of Barbados is specifically conferred by S. 10 (1) of the Barbados Territorial Waters Act and it is upon this statutory provision that the case turned in Mason.

[15]. The jurisdiction of the High Court in criminal matters is conferred by the composite effect of section 9 of the Supreme Court Order, Cap 2:01 and sections 6 and 10 of the Eastern Caribbean Supreme Court (Saint Lucia) Act, Cap. 2.01. The Interpretation Act, Cap. 1:06 provides in section 41 that the 'State' or 'Saint Lucia' means Saint Lucia and the adjacent Islets and the territorial sea. Section 3 of the Maritime Areas Act enacts that the territorial sea of Saint Lucia comprises those areas 12 nautical miles from the coast of Saint Lucia.

[16]. It must not escape the Court's attention that the particulars in each of the three counts in the Indictment alleged that the offences were committed. "About one nautical mile off the coast of Moule-a-Chique, near the quarter of Vieux-Fort, within the Second Judicial District of this state, and within the territorial waters of Saint Lucia." This signaled what the Crown intended to prove but when Acting Corporal Alexander was asked by Prosecuting Counsel his response was that he did not know the distance of Maria Islet from the coastline of Vieux-Fort.

[17]. The only evidence that substantially assists is that of the co-ordinates of where the vessel located as given by Acting Corporal Alexander. These co-ordinates fix the position of the vessel as being within the territorial sea of Saint Lucia. This fact the jury can be instructed to treat as being within their local knowledge. It has been urged also that Jurors would be aware of the existence of Maria Islet as being part of Saint Lucia and visible from Vieux-Fort. The Court is prepared to accept this to be within the Jurors' knowledge of local conditions and the appropriate direction can be rendered.

[18]. In the premises, the submissions are overruled and the defendants are called upon to lead a defence.



KENNETH BENJAMIN
HIGH COURT JUDGE