EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCRAP2015/0005

BETWEEN:

FITZROY FARRELL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. John Carrington, QC	Justice of Appeal [Ag.]

Appearances:

Mr. David Brandt for the Appellant
Mr. Oris Sullivan, Director of Public Prosecutions, for the Respondent

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2016: October 25;
2017: October 3.

Criminal appeal – Drug trafficking – Whether the learned judge erred in failing to uphold the no case submission – Whether the learned trial judge failed to put the defence's case fairly and adequately to the jury – Whether the learned trial judge failed to properly address and direct the jury on the issue of possession – Whether the learned trial judge failed to properly direct the jury on the issue of intent to supply

Mr. Fitzroy Farrell ("the appellant"), his mother, Florestina Farrell ("Ms. Farrell") and his daughter, Keneshia Farrell ("Keneshia") who was 14 years old at the time, resided in a two-storey house at Woodlands in Montserrat. On 23rd September 2014, the appellant

was arrested by the police in relation to another matter and kept in custody. While in custody, his personal belongings including the keys for his home were placed in a safe. From about 11:00 p.m. until approximately 9:00 - 10:00 a.m. the following day, police kept the appellant's residence under surveillance. During that period, no one entered or left the premises other than the police search party accompanied by the appellant. The police having obtained a search warrant to search the appellant's residence, took the appellant to his residence at about 6:15 a.m. the following morning, 24th September 2014, so that he could witness the search. On arrival at the appellant's residence Sergeant Antoine, one of the officers executing the search warrant, enquired of the appellant which of the keys would open the front door. The appellant told him there was no need for a key since his daughter was inside the house. Keneshia had returned to Montserrat three days earlier having left on 5th July 2014. The appellant called her and she opened the kitchen door.

On entering the house, the police informed the appellant they would commence the search in the kitchen and the appellant was required to witness the search. The appellant went and sat in the sitting room which is an area opposite the kitchen. Sergeant Antoine testified that from where the appellant was seated he could have observed what was happening in the kitchen. While searching the kitchen, one of the police officers used a step ladder to search a cupboard above the refrigerator and inside that cupboard he found a quantity of vegetable matter which appeared to be and smelt like cannabis. Sergeant Antoine showed the vegetable matter to the appellant and told him he believed it was cannabis. He asked the appellant to account for it and cautioned him. The appellant made no reply. He subsequently told Inspector Rodney that it was the Police who planted the drugs at his residence. The appellant was arrested and taken to the Police Station where he refused to be interviewed by the police. The vegetable matter was weighed in the appellant's presence and it weighed 119.7 grams. It was subsequently analysed by the Government Chemist who certified it to be cannabis. The appellant was charged with possession with intent to supply cannabis contrary to section 7(3) and possession of cannabis contrary to section 7(2) of the Drug Prevention and Misuse Act.

At the time of the search Ms. Farrell was not at the residence. She had left Montserrat on 5th July 2014 and returned on 14th October 2014. On her return, she was informed of the search, arrested and also charged with possession with intent to supply cannabis and with possession of cannabis. Ms. Farrell stated that she did not know anything about the cannabis.

At the end of the prosecution's case, defence counsel made a no case submission on behalf of the appellant and Ms. Farrell on the ground that there was insufficient evidence of possession of the cannabis by the appellant and Ms. Farrell. The learned Director of Public Prosecutions conceded that there was no case to answer in relation to Ms. Farrell and she was discharged. The submission in relation to the appellant was dismissed.

The appellant was convicted by a jury of the offences of possession of cannabis with intent to supply and possession of cannabis. He was sentenced to four years' imprisonment to run concurrently with a previous sentence. Aggrieved by the decision of the learned trial judge the appellant appealed on the grounds that the learned judge failed to properly direct the jury on the issues of possession and intent to supply and that the learned judge erred in law by rejecting the submission of the defence that there was no case to answer on any of the charges.

Held: dismissing the appeal and affirming the conviction and sentence, that:

1. On a charge of possession of drugs the prosecution has a duty to prove that the appellant has knowledge of the presence of drugs. Whether an appellant has knowledge is fact intensive and depends on the circumstances in each case. Mere presence in the house where the drugs are found may not be sufficient in some cases of multiple occupancy or single occupancy. In the case at bar, the evidence that the prosecution relied on to prove the appellant's knowledge included the fact that he resided at the house and had keys for the house; the fact that the two other occupants were off the island for a few months prior to the search, one of whom was still off the island and the other who had returned just 3 days before the search; the large quantum of drugs; the location of the drugs inside the home and the fact that while the appellant was in custody and his daughter was at home, the house was being guarded by police officers. Having regard to the evidence of the prosecution, the learned judge was justified in not upholding the no case submission and in concluding that a reasonable jury might find the case proved beyond a reasonable doubt and convict the appellant. It was open to the jury to accept the prosecution's evidence and reject the explanation given by the appellant when shown the drugs after it was found, that it was the police who planted the drugs at his residence.

   The Queen v Galbraith [1981] 1 WLR 1039 applied; **The Queen v Selena Varlack** [2008] UKPC 56 applied; **John Hutchinson Bath v HM Advocate** 1995] S.C.C.R. 323 considered; **White v HM Advocate** [1991] S.C.C.R. 555 considered.

2. In summing up the case to the jury a judge is not required to follow a rigid formula.

Rather he is required to explain to the jury in clear and simple language the law applicable to the offence(s) charged, the evidence on which the prosecution relies to prove the offence(s), the standard of proof which the prosecution must meet, any defence(s) which was raised by the accused, or on the evidence as a whole and the evidence in relation to the defence(s). In the present case, the learned judge in directing the jury made clear to the jury the two elements of possession. He identified the evidence of the prosecution relating to the issue of possession, and the evidence of the defence which was capable of casting doubt on the prosecution's case. He gave the jury clear directions on the burden and standard of proof. The learned judge's directions on this issue cannot be faulted.

3. Where a person is charged with the offence of possession of a controlled drug with intent to supply, the onus is on the prosecution to prove beyond a reasonable doubt that (a) the accused was in possession of the controlled drug; and (b) that he intended to supply the drugs to another. In proving that the accused was in possession, the prosecution must prove beyond a reasonable doubt that the accused had physical control of the drug, being that the drug was in his custody or under his control and the mental element, being that the accused had knowledge that the drugs were in his possession. In relation to intent to supply, in the absence of an admission or confession, the prosecution is required to lead evidence from which the inference could be drawn that the accused intended to supply the drugs to another. An accused person could have an intent to supply even where the quantity of drugs is less than 15 grams. Where the quantity of the drugs exceeds 15 grams there is a presumption that the accused intended to supply. In the absence of evidence to the contrary, it would be open to the jury to find that he did possess such an intention.

   Regulation 23 of the **Drugs (Prevention of Misuse) Regulations**, 1989 applied; Sections 7(3), 7(4), 30(2) of the **Drugs (Prevention of Misuse) Act**, Cap 4.07, Revised Laws of Montserrat, 2002, applied; **Thomson: Misuse of Drugs and Drug Trafficking Offences**, Rudy Fortson, QC (5th edn., Sweet and Maxwell 2005), pp. 206-207 considered.

4. A judge's summation must relate to the evidence and the issues which arise from the evidence. In this case, where the defence to a charge of possession with intent to supply was one of a complete denial of possession of the drugs and there was no evidence of a contrary intention, it was unnecessary for the learned judge to direct the jury on the burden and standard of proof of a contrary intention. The learned judge was simply required to direct the jury that the prosecution had to prove beyond a reasonable doubt both elements of the offence being possession

and intent to supply and he did in fact so direct. In relation to the element of intent to supply, the learned judge reminded the jury of the evidence presented in relation to the quantity of the drugs and the evidence of the presence of plastic bags which are normally used for packaging of marijuana for sale. It was open to the jury to accept this evidence and to find that the appellant had the intent to supply.

Regulation 23 of the **Drugs (Prevention of Misuse) Regulations**, 1989 applied; Sections 7(3), 7(4), 30(2) of the **Drugs (Prevention of Misuse) Act**, Cap 4.07, Revised Laws of Montserrat, 2002, applied; **Thomson: Misuse of Drugs and Drug Trafficking Offences**, Rudy Fortson, QC (5th edn., Sweet and Maxwell 2005), pp. 206-207 considered.

JUDGMENT

[1] **THOM JA**: Mr. Fitzroy Farrell ("the appellant") was convicted by a jury of two offences under the **Drugs (Prevention of Misuse) Act**[1] ("the Act"). The offences are possession of cannabis with intent to supply contrary to section 7(3), and possession of cannabis contrary to section 7(2) of the Act. He was sentenced to four years' imprisonment to run concurrently with a previous sentence.

[2] The appellant appealed his conviction. There is no appeal against sentence.

[3] The case for the prosecution at the trial was that the appellant, his mother, Florestina Farrell ("Ms. Farrell") and his daughter, Keneshia Farrell ("Keneshia") who was 14 years old at the time resided at Woodlands in a two-storey house. Around the exterior of the house was electrical lights and also security cameras.

[4] On 23rd September 2014, the appellant was arrested by the police in relation to another matter and kept in custody. While in custody, his personal belongings including the keys for his home were placed in a safe. From about 11:00 p.m.

[1] Cap 4.07, Revised Laws of Montserrat, 2002.

Police Officers Darroux, Brade and Stewart kept the appellant's residence under surveillance. Officers Darroux and Brade testified that they kept surveillance at the residence until about 9:00 - 10:00 a.m. the following day. During that period, no one entered or left the premises other than the police search party accompanied by the appellant.

[5] The police having obtained a search warrant to search the appellant's residence, took the appellant to his residence at about 6:15 a.m. the following morning, 24th September 2014, so that he could witness the search of his residence. The police officers who went to the residence to execute the search warrant were Inspector Rodney, Sergeant Antoine, and Police Constables Desmond Washington, Allen and Charles. On arrival at the appellant's residence Sergeant Antoine enquired of the appellant which of the keys would open the front door. The appellant told him there was no need for a key since his daughter was inside the house. Keneshia had returned to Montserrat three days earlier having left on 5th July 2014. The appellant called his daughter and she opened the kitchen door.

[6] Sergeant Antoine testified that on entering the house he informed the appellant they would commence the search in the kitchen and the appellant was required to witness the search. The appellant replied "me nah watch all yuh, take all the time all yuh want and search." The appellant went and sat in the sitting room which is an area opposite the kitchen. Keneshia was also seated in the sitting room. Sergeant Antoine testified that from where the appellant was seated he could have observed what was happening in the kitchen. They commenced the search by searching the kitchen cupboards. While searching the kitchen, Officer Washington used a step ladder to search a cupboard above the refrigerator and inside that cupboard he found a quantity of vegetable matter which appeared to be and smelt like cannabis in a sealed transparent plastic bag which was in a silver bowl, which

was inside a white bowl which was inside another silver bowl. Sergeant Antoine showed the vegetable matter to the appellant and told him he believed it was cannabis. He asked the appellant to account for it and cautioned him. The appellant made no reply. The vegetable matter was shown to Keneshia and she was told that it appeared to be cannabis and she was cautioned. She replied that she did not know about that. The appellant then instructed his daughter to get ready for school but Inspector Rodney intervened and told the appellant he needed to explain the situation, at which point the appellant interrupted Inspector Rodney and said "ah all you put um dey, ah you had me keys so ah you come last night and put um dey."

[7] The police also took possession of a number of other articles found in the home such as cell phones, sim cards and small clear plastic bags. The appellant and Keneshia were arrested and taken to the Police Station. The appellant refused to be interviewed by the police. The vegetable matter was weighed in the presence of the appellant and it weighed 119.7 grams. The vegetable matter was analysed by the Government Chemist, Dr. Malverne Spencer, who certified it to be cannabis. His certificate was admitted into evidence. They were both charged with possession with intent to supply cannabis and possession of cannabis. The charges against Keneshia were subsequently withdrawn.

[8] At the time of the search Ms. Farrell was not at the residence. She had left Montserrat on 5th July 2014 and returned on 14th October 2014. On her return, she was arrested and informed of the search and the items taken from the residence. She accounted for some of the articles and they were returned to her. In relation to the cannabis she stated that she did not know anything about it. In relation to the quantity of small plastic bags, she stated that she puts money in them. Ms. Farrell was also charged with possession with intent to supply cannabis

and with possession of cannabis contrary to the Act.

[9] At the end of the prosecution's case Mr. Brandt made a no case submission on behalf of the appellant and Ms. Farrell on the ground that there was insufficient evidence of possession of the cannabis by the appellant and Ms. Farrell. The learned Director of Public Prosecutions conceded that there was no case to answer in relation to Ms. Farrell and she was discharged. The submission in relation to the appellant was dismissed.

[10] In his defence, the appellant opted to give an unsworn statement from the dock.[2] His statement being very brief, I will outline it in full. The appellant testified as follows:

> "My name is Fitzroy Farrell. I live at Woodlands. I am an innocent person with the drugs they say they find at the residence. I don't know anything about it at all, at all, at all. I do not go on any ladder. I don't go on any heights. I have a hip problem for years. Even going to court on the other side the Police use to help me and I hold on to the bar. I was sitting in the front room and I could see them by the stove but where the fridge be I could not see them."

Grounds of Appeal

[11] The appellant appealed his conviction on three grounds, being:

(1) The learned judge failed to properly direct the jury on the issue of possession.

(2) The learned judge erred in law in rejecting the defence's submission that there was no case to answer on any of the charges.

(3) The learned judge failed to properly direct the jury on the issue of intent to supply.

[2] Section 67(1) of the Criminal Procedure Code permits an accused person to give an unsworn statement from the dock in his defence.

[12] I will deal with ground 2 first since if the appellant succeeds on this ground the other two grounds would become otiose.

Ground 2: No Case Submission

[13] The basic principles that are applicable on a submission of no case to answer are succinctly outlined in the judgment of Lord Lane CJ in the case of **The Queen v Galbraith**[3] and was restated by the Privy Council in the case of **The Queen v Selena Varlack**[4] as follows:

> "The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on the evidence find the charge in question proved beyond reasonable doubt."

[14] Mr. Brandt contended that the learned judge erred when he did not uphold the no case submission. He submitted that it was the duty of the prosecution to prove that the appellant had knowledge of the presence of the drugs in the cupboard. Further, since there were multiple occupants of the house and they had access to the area where the drugs were found, the mere fact that the appellant resided at the house was not sufficient evidence to prove knowledge. The prosecution was required to adduce some other evidence that the appellant had knowledge of the presence of the drugs. Mr. Brandt relied on the cases of **John Hutchinson Bath v HM Advocate**[5] and **White v HM Advocate**.[6]

[15] In the **Bath** case drugs were found under the bonnet of a car that was stored in a garage to be repaired by the appellant. Both the appellant and his father had access to the garage. There was no evidence that the appellant had done any

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[3] [1981] 1 WLR 1039.
[4] [2008] UKPC 56.
[5] [1995] S.C.C.R. 323.
[6] [1991] S.C.C.R. 555.

work on the car or when he was due to commence work on the car. The court found that in those circumstances it was not possible for a jury to determine which of the two had put the drugs there and knew the drugs were there. Therefore, the submission of no case to answer should have been upheld.

[16] In **White**, the appellant was the owner of the apartment where the drugs were found but other members of her family had access to the apartment. The cannabis was found in a bag among kitchen crockery in a cupboard in the kitchen. There was evidence that she had moved to her parents' house about 2 years prior to the date of the search and only stayed overnight at her apartment on a couple of occasions. On the day when the drugs were found, the appellant was present at the apartment she having slept there the night after returning from a party during which time her youngest child and the babysitter stayed at the apartment. The Crown conceded that absent an admission there was insufficient evidence to convict the appellant.

[17] The cases of **Bath** and **White** do no more than illustrate the well-established proposition of law outlined in the cases of **Warner v Metropolitan Police Commissioner**,[7] **R v McNamara**[8] and **R v Lambert**,[9] that the prosecution must prove the appellant had knowledge of the presence of the drugs. Whether an appellant has knowledge is fact intensive. It depends on the circumstances in each case. Mere presence in the house where the drugs are found may not be sufficient in some cases of multiple occupancy or single occupancy.

[18] The evidence relied on by the prosecution to prove knowledge was:

(a) The appellant resided at the house and he had the keys for the house.

[7] [1969] 2 AC 256.
[8] (1988) 87 Cr App Rep 246.
[9] [2001] UKHL 37.

(b) The house is a secured house with outdoor perimeter lights and with security cameras.

(c) The house had two other occupants being the appellant's mother and daughter, but both of them were off the island for a few months prior to the search. His daughter who was 14 years at the time had returned just 3 days prior to the search, while his mother was still off island.

(d) The drugs were found in a kitchen cupboard with other kitchen utensils. While the cupboard had to be accessed with a step ladder, and it was accepted by the prosecution that the appellant had some hip ailment, there was no evidence that the appellant could not access the cupboard.

(e) The large quantum of drugs.

(f) During the period that the appellant was in police custody and his daughter was at the home, the house was being guarded by police officers.

[19] When the principle as stated in **Galbraith** and **Varlack** is applied in this case, having regard to the evidence of the prosecution, in my opinion the learned judge was justified in concluding that a reasonable jury might find the case proved beyond a reasonable doubt and convict the appellant. It was open to the jury to accept the prosecution's evidence and reject the explanation given by the appellant when shown the drugs after it was found, that it was the police who planted the drugs at his residence. Consequently, this ground of appeal fails.

Ground 1: Possession of Cannabis

[20] The appellant complains that the learned judge failed to properly direct the jury on the issue of possession. He submitted that the learned judge was required to direct the jury along the lines of the following passage in the judgment of Lord Wilberforce in **Warner v Metropolitan Police Commissioner**:[10]

> "The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances – to use again the words of Pollock & Wright [Possession in the Common Law, p. 119] **–** the "modes or events" by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."

[21] Mr. Brandt also referred to the following passages in the summation and submitted that the effect of the judge's direction was to lead the jury to believe that the mere fact that the appellant resided in the house and he had the keys to the house was sufficient to find that he had knowledge of the existence of the drugs. The passages read as follows:

> "Now what is possession? Possession is a very simple concept and it is not difficult to understand. It means that in order to be in possession of a thing one must have knowledge where that thing is and have control of that thing. You do not have to have it on your person or in your hand to

[10] [1969] 2 AC 256, pp. 310-311.

be in possession. As you sit there all the things in your house you are in possession of them because you know they're there and you have control over them. That is the concept of possession."

And pages 53 and 54:

> "… the evidence is that he had the keys to the house. The drugs were found in his house if you accept that."

[22] Mr. Brandt also submitted that since the evidence showed that there were other occupants of the house, and because the drugs were found concealed in a cupboard, the learned judge was required to direct the jury that some other evidence was required to prove knowledge other than the drugs were found at the appellant's residence.

[23] The learned Director of Public Prosecutions in response submitted that the learned judge did not err in directing the jury. His directions were in keeping with the guidance given in cases such as **DPP v Brooks**;[11] **R v Boyesen**;[12] and the decision of this Court in **Malcolm Maduro v The Queen**.[13]

Discussion

[24] In summing up the case to the jury the learned judge is not required to follow a rigid formula. Rather the learned judge is required to explain to the jury in clear and simple language the law applicable to the offence(s) charged, the evidence on which the prosecution relies to prove the offence(s), the standard of proof which the prosecution must meet, any defence(s) which was raised by the accused, or on the evidence as a whole and the evidence in relation to the defence(s).

[25] In his summation, in addition to the passages referred to by Mr. Brandt, the

[11] [1974] 21 WIR 411, p. 415.
[12] [1982] 2 All ER 161.
[13] BVIHCRAP2007/0004 (delivered 28th January 2008, unreported).

learned judge directed the jury as follows on the issue of possession:

> "So your task, members of the jury, is to find that the accused Fitzroy Farrell was in possession of the cannabis sativa which the police said they found in a cupboard over the refrigerator at his home. You will have to decide if he knew and that is important as Mr. Brandt said if he knew that the drug was there, did he know that the marijuana was above the refrigerator and had control over the marijuana. You and you alone can decide this very important fact."

And at page 53:

> "Now the evidence is, if you accept it, is that he had the keys for the house. The police took away the keys from him the night before they went to the house. The defence is saying that the police planted the drugs there. There is no evidence that the police did so but it is a proposition put forward by the defence for your consideration so you will consider that proposition whether in truth and in fact the police planted the drugs there."

And further at page 56:

> "Possession means that he must have knowledge that the drug is in his house at Woodlands and he must have control over that drug to be in possession of it. You Mr. Foreman, members of the jury have to make a determination as to whether the accused had in his possession having regard to what I've just told you. The prosecution is saying at the time his mother was away from the house for some time, his 14-year-old daughter was in the house, he had the keys to the house, the police took away the keys from him the night before. When he went to the house the following morning they asked him which key opened the door. He said don't bother my daughter is inside and he called the daughter and she opened the door. Again, if you accept all this evidence you are asked to find whether or not he was in possession of the drugs that was found at his house, the cannabis sativa."

[26] The learned judge then proceeded to remind the jury of the evidence of the prosecution and the statement of the appellant from the dock. The learned judge also reminded the jury that the appellant did not have to prove anything.

[27] In my view, the learned judge in directing the jury made clear to the jury the two

elements of possession. The learned judge identified the evidence of the prosecution relating to the issue of possession, and the evidence of the defence which was capable of casting doubt on the prosecution's case. He gave them clear directions on the burden and standard of proof. I can find no fault in the directions given by the learned judge on this issue. This ground of appeal therefore fails.

Ground 3: The Presumption

[28] Mr. Brandt contended that the learned judge failed to direct the jury on the effect of the presumption of intent to supply. He submitted that while there is a presumption of intent to supply where a person is found in excess of a certain quantity of drugs, where in this case the appellant denied knowledge of the drugs, he is also denying that he had an intent to supply. In such circumstances, it is incumbent on the trial judge to direct the jury on the evidential burden that is placed on the appellant and the standard of proof. He further submitted that the learned judge was required to tell the jury that if they found that the appellant was in possession of an amount which would lead to the presumption of intent to supply, that would not amount to proof of guilt. The prosecution still had to prove beyond reasonable doubt that the appellant was in possession of the drugs with intent to supply. To discharge this burden, the prosecution was required to lead other evidence. He referred to the text **Thomson: Misuse of Drugs and Drug Trafficking Offences**[14] and submitted that the nature of the evidence should be: evidence that the appellant does not use drugs; that the appellant's income from legitimate sources is inconsistent with his expenditure; paraphernalia of a dealer; how the drugs were packaged; costs of the drugs; evidence of lifestyle; where the drugs were found; documents – so called "dealer lists/details"; CCTV footage, frequency of visits by third parties to an address that is occupied or used by the

[14] Rudy Fortson, QC (5th edn., Sweet and Maxwell 2005), pp. 206-207.

defendant.

[29] The learned DPP in response submitted that the mere denial of knowledge was not sufficient to rebut the presumption. There had to be evidence of a contrary intent. There being no such evidence the learned judge did not err when he omitted to direct the jury on the issue of a contrary intent.

[30] The learned DPP submitted alternatively that if the court was of the view that the learned judge was required to give such a direction as posited by Mr. Brandt, the omission was not fatal to the conviction since having regard to the evidence the jury would have inevitably convicted the appellant. He referred to the case of Max Tido v The Queen[15] and urged the court to apply the proviso and uphold the conviction.

Discussion

[31] The relevant provisions of the Act are sections 7(3), 7(4), 30(2) and Regulation 23.[16]

[32] Section 7(3) of the Act which creates the offence of possession with intent to supply reads:

> "Subject to section 30, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 6(1)."

Section 6(1) is not relevant for this discussion.

[15] [2011] UKPC 16.

[16] Drugs (Prevention of Misuse) Regulations, 1989.

Section 7(4) reads:

> "Subject to subsection (1), a person found in possession of a controlled drug in quantities that may be specified by regulation made by the Governor in Council shall be deemed to be in possession of such controlled drug for the purpose of supplying it to another or for drug trafficking unless the contrary is proved the burden of proof being on the accused."

Section 30(2) reads as follows:

> "Subject to subsection (3), in any proceedings for an offence to which this section applies it shall be a defence for the person charged to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

Regulation 23 reads as follows:

> "The quantities of drugs specified for the purpose of section 7(4) of the Drugs (Prevention of Misuse) Act are -
> …
> (e) cannabis - fifteen grams and above
> (f) cannabis resin - fifteen grams and above."

[33] The effect of the above-mentioned provisions is that when a person is charged with the offence of possession of a controlled drug with intent to supply, the onus is on the prosecution to prove beyond a reasonable doubt that (a) the accused was in possession of the controlled drug; and (b) that he intended to supply the drugs to another. In proving that the accused was in possession, the prosecution must prove both elements beyond a reasonable doubt: (i) that the accused had physical control of the drug, being that the drug was in his custody or under his control and (ii) the mental element, being that the accused had knowledge that the drugs were in his possession. In relation to intent to supply, in the absence of an admission/confession, the prosecution is required to lead evidence from which the inference could be drawn that the accused intended to supply the drugs to

another. An accused person could have an intent to supply even where the quantity of drugs is less than 15 grams. Where the quantity of the drugs exceeds 15 grams there is a presumption that the accused intended to supply. In the absence of evidence to the contrary, it would be open to the jury to find that he did.

[34] It is not disputed that the quantum of the drugs in this case exceeded fifteen grams. I agree with Mr. Brandt that the appellant had an evidential burden and the standard of proof was on a balance of probabilities. Generally, an accused who wishes to dispute that he had an intention to supply must raise the issue. It does not necessarily mean that the accused is required to give sworn testimony. Evidence of a contrary intention could be elicited during cross-examination of witnesses for the prosecution or on the prosecution's evidence. An analogy could be drawn with the defence of provocation or self-defence, where the accused is required to simply adduce evidence to raise the issue of provocation or self-defence, (again the issue of provocation or self-defence in some circumstances arises during cross-examination or on the prosecution's case) once this is done the onus is on the prosecution to prove beyond a reasonable doubt that the accused was not provoked or he was not acting in self-defence.

[35] When the issue is raised, the learned judge in summing up the case to the jury is required to direct the jury to the evidence which raises the issue, to direct them that it is for the prosecution to prove the case beyond a reasonable doubt and to point the jury to the evidence relied on by the prosecution to do so.

[36] The learned judge directed the jury as follows:

> "You should bear in mind what the accused told you from the dock. I shall remind you what he told you later on. On the first count the prosecution must also prove to your satisfaction so that you feel sure that the accused

had the intention to supply the cannabis sativa to some other person. Now, again intention is a state of mind and no one can prove positively one's intentions but you members of the jury you are entitled to infer from the evidence what one's intention is having regard to all the surrounding circumstances.

…

With intention to supply again a quantity of bags were found in the house. Sergeant Antoine told you that from his experience these bags are used for packaging cannabis. Do you accept that or do you reject that? If you accept that they are used in packaging cannabis intention is not capable of positive proof but you look at all the surrounding circumstances in order to determine what his intentions are. In addition, the law says so far as his intention to supply he must show and this is on a balance of probabilities that he did not intend to supply. There is no such evidence. Mr. Brandt said in his address to you there could be no evidence because of his defence he does not have that but if you were to find as a fact that he had possession of those drugs then look at the quantity. That is another circumstance that you must take into consideration, quantity. Did he have it for his own consumption or did he have it to supply to others? All of these things you will look at in order to determine whether or not he had intention to supply.

The law says he is deemed once he has a quantity over 15 grams of drugs he is deemed to have it to supply. That is what the law says, once he has over 15 grams. In this case it's 119 grams of marijuana. So, if you accept that he had 119 grams of marijuana the law says he's deemed once it is over 15 grams to have it for the purpose of supplying to another unless the contrary is proved. Well that puts the contrary proof on him. He would have to prove that he did not have it with intention to supply another. In this case, there is no evidence as to the contrary intention. Again, I remind you once you find as a fact that he was in possession the drugs then he would have put forward no contrary intention to supply."

[37] In this case the defence was one of a complete denial of possession of the drugs, and it is not disputed that there was no evidence of a contrary intention. Therefore, in my view it was unnecessary for the learned judge to direct the jury on the burden and standard of proof required to show that the appellant did not have an intent to supply. A judge's summation must relate to the evidence and the

issues which arise from the evidence. The learned judge was simply required to direct the jury that the prosecution was required to prove beyond a reasonable doubt both elements of the offence being possession and intent to supply, and he did so. The learned judge directed the jury to the evidence relating to both elements of the offence. In relation to the element of intent to supply, the learned judge reminded the jury of the evidence of Sergeant Antoine of the quantity of the drugs and the evidence of the presence of plastic bags which are normally used for packaging of marijuana for sale. While the prosecution did not lead evidence of the nature referred to in **Thomson: Misuse of Drugs**, it was not fatal to the prosecution's case. The matters referred to in the text do not constitute an exhaustive list. Intent to supply could be proved by other evidence. In my view, it was open to the jury to accept the evidence of Sergeant Antoine and to find that the appellant had the intent to supply. Consequently, this ground of appeal fails.

[38] In conclusion, the appellant having failed on all three grounds of appeal, the appeal is accordingly dismissed and the conviction and sentence affirmed.

I concur.
Mario Michel
Justice of Appeal

I concur.
John Carrington, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar