The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2018

B E T W E E N:

SABIAN HAYWARD

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Smellie, JA

Appearances: Susan Mulligan, Christopher's Barristers & Attorneys Ltd., for the Appellant
Larissa Burgess, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing:

Date of Judgment:

JUDGMENT

SMELLIE, JA

Introduction

1. The Appellant appeals against his conviction on 9 March 2018 after trial by judge and jury, for the offence of possession of cocaine with intent to supply and possession of cannabis with intent to supply. He was indicted jointly with

Daymon Simmons ("Simmons") for those offences but prior to trial Simmons pleaded guilty and so the trial proceeded against the Appellant alone.

2. Having been convicted after trial, the Appellant was sentenced to 2 years' imprisonment in respect of the cocaine offence and 18 months' imprisonment in respect of the cannabis offence. Neither he nor the Crown appeals against sentence.

3. While the circumstances of the case are all too commonplace and are now on appeal largely agreed as between the Appellant and the Crown, they give rise peculiarly here to the question at what moment in time does a person who handles a controlled drug become fixed with having come into possession of it for the purposes of the criminal law.

The circumstances of the case.

4. On Wednesday 27 August 2014, the Bermuda Police Service ("the BPS") launched a Drug Sting Operation in response to information that there was to be an illicit drug transaction at the inoperative Somerset Bridge Ferry Dock and Wharf. Uniformed and plain clothes officers of the BPS were strategically dispatched to various locations in the environs of the Ferry Dock.

5. At around 5:40 p.m., one of the officers, Det. Sgt. Brian Cook, was in position hidden in bushes along Wharf Drive which leads to the Ferry Dock shelter and immediately across from the shelter. Other officers, including Det. Cons. Thomas, were also then waitng nearby in BPS vehicles.

6. Moments later the Appellant arrived at the scene riding alone on a motor bike. He was observed by Det. Sgt. Cook as he parked the bike next to the shelter and remained seated on it. When the Appellant arrived the only other person in sight was a woman, rod in hand, fishing off the end of the Dock. The Appellant acknowleged her presence by shouting "how is the fishing?"

7. Shortly after the Appellant's arrival, Simmons was observed riding alone on his motor bike as he arrived at the scene at 5:52 p.m. The Appellant was heard by Det. Sgt. Cook to greet Simmons by his alias "hey Critter!", as Simmons stopped his bike next to the Appellant's. The two conversed momentarily before walking together to the shelter where they went inside. Det. Sgt. Cook could not hear what they were saying.

8. As they walked along, Det. Sgt. Cook noticed that Simmons was the lighter complexioned of the two and that unlike the Appellant's, Simmons's arms were covered in tattoos.

9. As they remained inside the shelter, Det. Sgt Cook (despite having a direct line of sight into the shelter through the open doorway the men had entered) could see only the manual gestures and exchanges taking place between them across the doorway. Both their frames were largely blocked from sight by the walls on either side of the doorway they had entered. Nor was Det. Sgt. Cook able to hear what if anything was being said. He was however, able to observe the lighter skinned and tattooed arm of Simmons outstretched with what appeared to be a white plastic packet with some white substance in it. As that happened, he saw the darker arm of the Appellant as it reached out and took the white plastic packet from Simmons.

10. Moments after, Det. Sgt. Cook observed the Appellant hand the packet back to Simmons; and again only moments after Simmons's arm was again seen handing what appeared to be the same packet back to the Appellant who then retained it and sat on a bench, located along the back wall of the shelter.

11. This last was however itself to be only a momentary retention of the packet by the Appellant. On seeing this last exchange, Det. Sgt. Cook radioed to his colleagues to "close in" and within only a matter of seconds they were rushing towards the shelter in BPS vehicles.

12. As his colleagues rushed towards the shelter, Det. Sgt. Cook observed the Appellant as he stood and looked toward the oncoming vehicles and then regained his seat. As he sat in that position, directly behind him and to his left, there were window openings. Simmons was standing out of Det. Sgt. Cook's sight behind the shelter wall, off to the Appellant's right as the Appellant sat facing the shelter entrance doorway, seeming to ponder his next move, with the white packet in hand.

13. Cons. Alson Thomas was the first of the officers to arrive. As he entered the shelter, he unavoidably blocked Det. Sgt. Cook's line of sight but made observations of his own. He saw the Appellant throw from his right hand a white packet through the window opening located directly to the Appellant's left. Cons. Thomas saw nothing else thrown by either the Appellant or Simmons, the latter's presence in the shelter having also been noticed by Cons. Thomas upon his arrival.

14. Cons. Thomas quickly detained the Appellant on suspicion of offences under the Misuse of Drugs Act and cautioned him. The Appellant then remained silent.

15. Cons. Thomas looked out the window through which the Appellant had thrown the white packet and saw what appeared to be that packet and two other packets wrapped in clear plastic with brown substances inside, laying on the ground under a tree and amidst the undergrowth. They appeared to him to be four to five feet away from the outside of the wall of the shelter and within inches of each other[1]. Cons. Thomas alerted his colleagues and the three packets were retrieved by Cons. Swainson and brought into the shelter.

15. When shown the packets the Appellant said "those are not mine".

[1] As gleaned from pages 56-57 of the transcript of summation. It appears at page 60 however, that Cons Swainson's testimony was not consistent with Cons Thomas' evidence on this point. He testified that the packets were found six to seven feet from the shelter, two of the packets from the rocks and one (it isn't clear which), was recovered from the water at the shoreline.

16. He and Simmons were arrested and searched. On Simmons's person, tucked into his waistband, was found a clear plastic bag containing seven foil wrappings with brown rock-like substances similar to the contents of the other two packets recovered from outside the shelter.

17. Simmons, when asked what was in the packet taken from his waistband, replied "hash".

18. When searched at the scene, the Appellant was found to have money on his person, BMD 619.15 and USD 123.

19. Simmons and the Appellant were then and there arrested on suspicion of possession of controlled drugs with intent to supply. When cautioned Simmons replied "all right man". The Appellant when cautioned remained silent. Both men were conveyed to the Hamilton Police Station where they were booked into custody, processed and detained. They were later bailed pending the investigation and thereafter remained on bail pending trial.

20. The contents of the two packets with brown rock-like substances recovered from the ground outside the shelter along with that taken from Simmons' person, when analyzed proved to contain cannabis resin, weighing altogether 63.25 grams. The white package was found to contain cocaine hydrochloride weighing 56.03 grams.

21. Uncontested evidence was given at the trial that the cocaine hydrochloride had a maximum street value of BMD 16,875 and the cannabis resin, a maximum street value of BMD 6,329.

22. Further uncontested evidence was that the quantities of both types of drugs indicated that they were intended for sale and not for personal consumption[2].

[2] See also footnote 6 below.

Once possession was proven, the irresistible inference would be therefore, that the drugs were intended for sale as alleged in the indictment.

23. As mentioned above, the Appellant was convicted as charged jointly with Simmons on two of the counts on the indictment, respectively for the possession of cocaine and cannabis resin, with intent to supply.

The Grounds of Appeal

24. While Ms Mulligan referred in her submissions to a history of what she termed "unreasonable delay" in the disposition of the case, no formal ground of appeal is based on that complaint.

25. The formal grounds of appeal are as follows:

(i) The learned trial judge erred in not accepting the submissions of counsel that there was no case to answer on any of the counts, there being insufficient evidence upon which the jury could find in law, that the Appellant was in possession of the illegal substances (ie: either the cocaine or the cannabis resin).

(ii) The learned trial judge erred in ruling, notwithstanding that the Appellant had been charged with a co-defendant (Daymon Simmons) with the joint possession of all of the drugs and the Court had earlier accepted the guilty pleas of the co-defendant to possessing all of these same drugs with the intent to supply them, the jury was not required to find that they jointly possessed the drugs, but rather could convict on the basis that the Appellant alone possessed the drugs.

(iii) The learned trial judge erred in failing to instruct the jury that if they found the Appellant's intention was to dispose of the drugs rather than possess them, they must find him not guilty and only exacerbated this failing by suggesting instead to the jury that that they could find the disposal of the

drugs was evidence of his guilty knowledge and intention to possess the drugs.

(iv) Both the learned trial Judge and the Prosecutor invited the jury to speculate in the absence of evidence in a way that was prejudicial and unfair to the Appellant's fair trial rights.

(v) The learned trial Judge erred by instructing the jury that they may find, in the absence of any evidence that the Appellant knew about, had possession of, or threw two bags of cannabis resin, that the Appellant was in possession of two bags of cannabis resin solely because of their proximity to a bag of cocaine located by the officers.

26. While these grounds of appeal each complain in different ways that there was insufficient evidence to justify the Appellant's conviction, that in essence, is what they are all about. We therefore do not see the need in considering them, to traverse each ground seriatim. It will suffice if we address the central issue which is whether the evidence adduced at trial gave a sufficient basis for the conviction of the Appellant on the two counts on the indictment, including as to the constituent elements of possession and intention alleged. And we will of course examine the central issue of the sufficiency of the evidence as it related separately to each count of the indictment, that related the cannabis resin as distinct from that relating to the cocaine, and most conveniently, in that order.

The Cannabis Resin

27. No witness testified to having seen the Appellant in possession of any of the packets containing cannabis resin at any point in time. Det Sgt Cook made no mention of seeing any packet besides that which he described passing hands back and forth between Simmons and the Appellant and that which he last saw the Appellant handling just before Cons. Thomas entered the shelter. It became common ground upon the appeal before us that that packet was the white packet containing cocaine hydrochloride.

28. Cons. Thomas testified to seeing the Appellant throw only a single packet. He is reported at page 52 of the transcript by the learned trial Judge as having said that "he saw Hayward throw a white object from his hand, his right hand, through the window he was close by."

29. That having been the state of the evidence, there simply therefore was no basis for the proposition which was put to the jury that the Appellant must have thrown the three packets with a single throw, and which they must have accepted in convicting the Appellant in relation to the cannabis. This appears at page 57 of the transcript of summation in these terms:

> *"And the objects were within inches of each other. And the Crown is relying on that to suggest one throw. I think they are relying on that to say Listen, -- they're entitled to, or were entitled to consider, Look, a fellow is in the bush from 25 feet, and people passing packages that are not that or that is not that large, really, how well he can tell if it is brownish? You see those packages in those bags? You're entitled to look at them again –or whitish, or what. Might it not have appeared whitish? Even if it is brownish or not, it might not have appeared, might appear whitish too, because you have to take into account things like light and reflection and plastic, and all kinds of stuff. I mean, I told you, bring your experiences and common sene to the case.*
>
> *Same thing when it is going through the window. If it is going through there, "flash." Lots of people in your view might say it look—I saw a white flash. You see a black flash? Or a brown flash? It's a matter for you. Bring your experiences of life to this case. But do not speculate."*

30. Regrettably, speculate was exactly what the jury must have done in order to convict the Appellant in respect of the cannabis resin on the state of the evidence as it stood.

31. The Appellant was seen with only a single white packet by Sgt Cook and seen by Cons. Thomas to "throw a white object from his hand".

32. As reported at pages 51 to 52 of the transcript of summation, Sgt Cook, "the man in the bushes", had confirmed under cross-examination that if Simmons had passed more than one packet to the Appellant, he would, given the size of the opening of the door way, have seen it.

33. There simply was no basis for speculating that the Appellant might also have thrown, and so must have come into possession of, the packets containing the brown rock-like substances. There was no basis for excluding the reasonable possibility that those packets were thrown through the shelter window by Simmons, who admitted and pled guilty to his possession of them and notwithstanding that (on only one version of the evidence[3]), the packets were found close together.

34. The conviction of the Appellant on the count for possession of cannabis resin with intent to supply is manifestly unsafe and unsatisfactory and must be set aside.

The cocaine hydrochloride

35. As already mentioned, the Appellant no longer disputes that the packet with which he was seen by Det. Sgt. Cook and seen by Cons. Thomas to throw through the shelter window, was that containing 56.03 grams of cocaine hydrochloride. The Appellant by his appeal disputes that the evidence adduced at trial was sufficient to establish that he had come into possession within the meaning of the law, of the packet of cocaine and further that he had done so with intent to supply it on to others.

36. This packet when opened by the BPS, was actually found to have been divided into two smaller packets, a factor which arises for consideration when seeking to

[3] Cons Swainson differing from Cons Thomas on this issue.

discern what might have been the intention both of Simmons and the Appellant in the context of their apparent bartering over the contents of the packet.

37. The Crown's case as presented to the jury was not clear. It was that Simmons and the Appellant possessed the cocaine with the intention to supply it to others, even if not exactly at the same point in time. This was reflected in the two being jointly charged in the respective counts of the indictment.

38. And so, even while accepting that the ownership of the drugs vested in Simmons, the Crown argued that in the absence of the arrival of the BPS (and in the absence of an explanation from the Appellant who gave no evidence at the trial), possession of the cocaine within the meaning of the law had become vested in the Appellant and would have remained with the Appellant.

39. We note in passing that the jury's deliberations would no doubt have been better served had Simmons been charged in a separate count specifying the moment in time when the Crown asserted his possession of the packet came to an end and the Appellant in another count, specifying the moment in time when it was asserted possession became vested in him.

40. But the question now is whether the conclusion that the Appellant did come into possession of the packet was safely arrived at in the circumstances of the case.

41. Despite the Crown's contention for joint possession, the conclusion of possession in the Appellant with intent to supply to others at which the jury must have arrived, could only have been reached by inferring that Simmons's possession had come to an end for having been transferred to the Appellant. There was no basis for a conclusion that the cocaine was in their joint possession. All the circumstances pointed to the event being intended as a drug transaction, with Simmons the seller and the Appellant the intended purchaser.

42. Simmons pleaded guilty to the indictment on 3 July 2017 and was sentenced on 6 July 2017. Accordingly, the jury would not have been charged with ascertaining what was his state of mind.

43. The intervention of the BPS having prevented the consummation of the transaction, the Crown nonetheless contends that the Appellant's physical and momentary handling of the packet of drugs was sufficient to fix him with possession of it within the meaning of the law.

44. The Misuse of Drugs Act 1971 ("the Act") under which the Appellant was indicted, does not provide a statutory definition for the concept of possession, leaving room for the application of the common law meaning, which itself has been expressed in different ways. In the context of the statutory prohibition of possession of a controlled drug, the widely cited meaning of possession is the physical control of the prohibited drug with knowledge of what it is and the intention to exercise control over it.

45. But while this common law meaning is well known and widely applied, its application will depend on the cirmstances of the case and the particular circumstances of the present case are illustrative of its sometime difficulty of application.

46. The difficulty of application was recognised and discussed by Lord Wilberforce in his lead judgment on behalf of the House of Lords in *Regina v Warner*[4] when dealing with the United Kingdom counterpart to the Act:

> *"The Act refers to possession, a concept which is both central in many areas of our legal system, and also*

[4] (1969) 2 A.C 256,309, followed and applied by this Court as long ago as 1985, in Berkley and Robinson v Regina, Crim Apps 34 and 35 of 1985 (Bda CA) in the context of a case where, among other things, the question was whether the accused should be presumed to have possession of narcotics contained in an opaque container found within a room which he rented and occupied. The applicability of the presumption prescribed by section 32 (1) of the Act is rendered moot in the circumstances of this case where that subsection provides: "Where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed until the contrary is proved, that such person was in possession of such drug". The Crown quite properly did not contend otherwise.

lacking in definition. As Earl Jowitt has said of it, "the English law has never worked out a completely logical and exhaustive definition of possession" (United States of America and Republic of France v Dollfus Mieg Et Cie S.A. and Bank of England (1952) A.C. 582, 605). In relation to it we find English law as so often, working by description rather than by definition. Ideally, a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities: he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others. But these elements are seldom all present in situations with which the courts have to deal, and where one or more of them is lacking, or incompletely present, it has to be decided whether the given approximation is such that possession may be held sufficiently established to satisfy the relevant rule of law. As it is put by Pollock and Wright, possession is defined by modes or events in which it commences or ceases and by the legal incidents attached to it (Possession in the Common Law (1888), p. 119- per R.S. Wright) (emphasis added).

47. And further[5]:

"What is prohibited is possession – a term which is inconclusive as to the final shades of mental intention needed leaving these to be fixed in relation to the legal context in which the term is used. How should the determination be made? If room is to be found, as in my opinion it should, in legislation of this degree of severity, for acquittal of persons in whose case there is not present a minimum of the mental element, a line must be drawn which juries can distinguish. The question, to which an answer is required, and in the end the 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 of Pollock and Wright (Possession in the Common Law, p. 119) – the "modes or events" by which 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

[5] Op cit, at pp 310-311.

> *manner and circumstances in which the substance, or something which contains it , has been received, what knowledge or means of 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 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" (emphasis added).*

48. Here the concern is not whether the Appellant knew that the packet he handled contained cocaine. The only reasonable inference from all the circumstances, not least its outward appearance and feel and the clandestine manner and context of his meeting with Simmons, was that he did know what the packet contained.

49. Here the concern is over the Appellant's control of the packet - whether his control was such that it could with the certainty required by the criminal law, be found that he had received it from Simmons with Simmons' intention to confer possession of it and had himself the intention to possess it exclusively of others (here again Simmons).

50. Here the closest the Crown's case came, seeking to identify the "given approximation (by which) possession may be held to have been established", was the inference that the negotiations between Simmons and the Appellant over a sale (most likely only for some but not all of the cocaine given the relatively small sums of money found on the Appellant) had not yet concluded. That while the cocaine had on the second occasion appeared perhaps more conclusively to have changed hands, no money had yet been seen by Det. Sgt. Cook to change hands.

51. Nor was the Appellant's retention of the packet despite having seen the onrush of the BPS vehicles, any more conclusive of his possession of it. That further

momentary retention could equally have been the result of not having yet agreed with Simmons how best to dispose of the packet while still hoping to retrieve it if the BPS surveillance were successfully evaded.

52. When viewed at its highest, the circumstances show no more than that the illicit drug transaction was interrupted before it was completed. Yet it was that completion which would have imputed to the Appellant the possession within the meaning of the law needed to give rise to the further inference of his intention to supply the cocaine on to others.

53. The conviction for possession of cocaine with intent to supply was not sustainable on the evidence adduced and so must be set aside[6].

54. However, the offence of the handling of controlled drugs proscribed by section 7 of the Act, is clearly made out from the circumstances of the case. In particular, the inference is unavoidable that when the Appellant retained the packet which he must have known or believed contained cocaine despite the onrush of the BPS and then threw it out the window of the shelter, he did so for the purpose (in the words of section 7) "of … concealing the controlled drug.[7]"

55. That was the appropriate offence for indictment in this case and one for which, on the evidence presented, the jury properly directed, would have been bound to convict.

56. That being so, section 22(2) of the Court of Appeal Act 1964 arises for consideration where it provides:

> *" Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the*

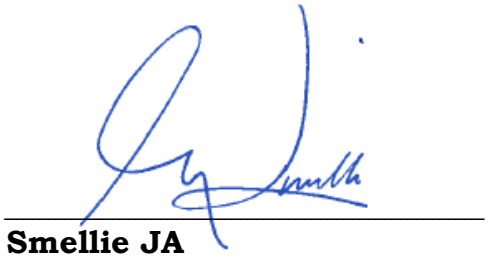
[6] In light of the presumptive effect of section 27D when read with Schedule 7 of the Act, had possession been established in the Appellant of this amount of cocaine being many times more than 1 gram, his intention to supply would have been presumed.

[7] See also section27 of the Act which prescribes that this offence is triable either on indictment or summarily.

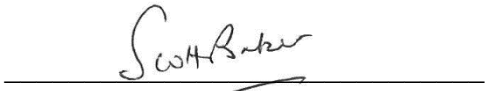
jury it appears to the Court of Appeal that the jury must have been satisfied of acts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

57. In keeping with those provisions and with the interests of justice in this case, instead of allowing the appeal, the conviction for possession with intention to supply the cocaine is set aside and substituted by a verdict of guilty of the offence of the handling of controlled drugs under section 7 of the Act.

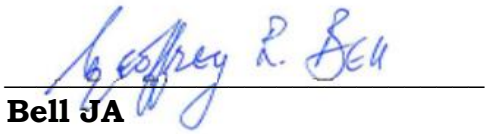
58. The sentence of 2 years' imprisonment shall remain the same.



Smellie JA



Baker P



Bell JA