REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. 007 of 2014

BETWEEN

ROGER FERGUSON

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

A. Mendonca, J.A.

R. Narine, J.A.

M. Mohammed, J.A.

APPEARANCES:

Mr. D. Khan, Mrs. U. Nathai-Lutchman and Ms. S. Hinds for the Appellant

Mr. G. Busby, Assistant D.P.P. and Mrs. A. Teelucksingh-Ramoutar, Assistant D.P.P. for the Respondent

DATE OF DELIVERY: 16th December, 2016.

MAJORITY JUDGMENT

Delivered by M. Mohammed, J.A.,
A. Mendonca, J.A. concurring;
R. Narine, J.A. dissenting on Ground 6.

Introduction:

(1) On the 22nd March, 2012, the appellant, Roger Ferguson, was convicted of the offence of possession of a dangerous drug, namely, cannabis sativa for the purpose of trafficking, contrary to **section 5(4) of the Dangerous Drugs Act, Chapter 11:25 (The Act)**. On the 26th March, 2012, the appellant was sentenced to 15 years and 93 days imprisonment with hard labour. The sentence was ordered to run from the date of conviction.

The appellant now appeals his conviction and sentence.

Facts:

(2) On the 11th October, 2002, around 5:45a.m., a party of police officers, including Officer Bernard and Officer George, conducted a search at Temple Street in Arima at the premises of Lily Lane. Approximately one month before, Officer Bernard and other police officers had those premises under surveillance. One week before he was apprehended, the appellant was seen on two occasions in the corridor which led to the apartment in which he was found. On the 11th October, 2002, while at the premises, Officer Bernard called out the name of Lily Lane and the appellant answered at the door of an apartment. After a search warrant was shown and read to the appellant, the apartment, which consisted of one room with two beds and a bathroom, was searched. The search revealed a plastic bag containing ten black plastic packets which was hidden under a bundle of dirty male and female clothing close to one of the beds. The contents of the packets were examined and they were found to contain a quantity of compressed plant material resembling marijuana. The appellant was cautioned and he replied, *"Officer, that is mama's goods. I am only living here, she has gone up the road".* The appellant was subsequently arrested, formally charged, and taken to the Arima Police Station.

(3) At the Arima Police Station, the exhibit, namely the ten black plastic packets, was weighed and was found to be approximately 10.2kg. On the 1st November, 2002, the exhibit was sent to the Forensic Science Centre for analysis. It was later retrieved along with a report which indicated that the packets contained cannabis sativa, weighing 9.49kg. In 2003, the exhibit was taken to the Arima Magistrate's Court and then returned to the La Horquetta Police Station. In May, 2008, Police Inspector Forde destroyed the exhibit under the mistaken impression that the case had been completed. The exhibit was weighed prior to its destruction and was found to be 5.73kg.

The Case for the Defence:

(4) The defence case was one of fabrication and that of a *"set up"* by the police. It was suggested that following a search at the premises of Nazir Ali at Temple Street in Arima, the police officers seized a quantity of marijuana, some of which they kept for themselves and some which they used to fabricate a case against the appellant.

(5) The appellant elected to give evidence at the trial and called Nazir Ali as a witness. Ali gave evidence that on the 11th October, 2002 he was at an apartment at Temple Street in Arima which he rented from Lily Lane. At around 5:30am on that day, police officers came to his house, searched the inside, and found seventeen blocks of marijuana. Ali testified that when he was taken to the Arima Police Station, he was charged with possession of only two blocks of marijuana.

(6) The appellant gave evidence that on the 11th October, 2002, around 6:00a.m., he was at his rented apartment at Temple Street in Arima and heard his name being called out by a group of police officers. He responded to the police officers, who were at that time, at the nearby apartment of Lily Lane's son. He asked who they were looking for and they replied, *"Roger Ferguson".* The police officers walked towards him and one of them asked if he was Roger Ferguson and another gave instructions to arrest him. The appellant was taken to the Arima

Police Station where he was informed that he was being charged for possession of marijuana for the purpose of trafficking along with Lily Lane, who he said was his landlady.

The Appeal:

Ground 1: The conviction should be set aside on the ground that it cannot be supported in that the State did not establish a prima facie case that the Appellant was in occupation of the premises in or upon which [according to the State] dangerous drugs were found (sic).

(7) Mr. Khan, counsel for the appellant, submitted that the prosecution adduced insufficient evidence to place the appellant in occupation of the apartment within the meaning of **section 21(1) of the Act**, so as to properly found the operation of the principle of constructive possession. Counsel further submitted that the presence of male clothing in the self-contained apartment, as well as the presence of the appellant at the premises at an early hour, fell short of what was required to prove that the appellant was an occupier or in control of those premises. In support of this argument, he relied on the case of **Bharath and Bohoroquez v The State**[1] which established that the term *"occupier"* imports an element beyond mere presence. In order to be an *"occupier"* within the meaning of the Act, a person must be in control of the premises.

(8) Mr. Khan also relied on the case of **Ramdass and Ramoutar v Knights (Unreported)**[2] where this court examined what constituted occupation of premises in accordance with the Act. In that case, police officers executed a search warrant for illegal arms and ammunition at the home of Kelvin Jadoo in Biche. At the time of its execution, the officers found Jadoo, the two appellants and some young children at the premises. They also found two plastic bags containing marijuana, a shotgun cartridge and a tin holding a quantity of seeds, stems and plant material resembling marijuana. The appellants told the police that they did not live at Jadoo's premises but were staying there at the time while the roof of their house was being repaired. The

[1] Cr. App. Nos. 49 and 50 of 2008
[2] Mag. App. No 13 of 2002

appellants were arrested and the prosecution case was that they were *"occupiers"* within the meaning of **section 21(1) of the Act**.

In that case, Sharma C.J., upon reviewing the Canadian authorities of **R v Gun Ying**[3] and **R v Lou Hay Huang**[4], said at page 8:

> *"The cases thus show that the courts in interpreting "occupies" give it the narrow rather than the wide meaning. There was no evidence that the appellants were in "occupation" of Jadoo's home in the narrow sense of the word. Thus there was no evidence on which the learned Magistrate could have found that both appellants were in occupation of the room and thus in possession of the items found there. As there was no prima facie case of occupation made against the appellants, they were not required to show that they had no knowledge of the drugs on the premises. Such a burden would only have fallen on them if the prima facie case of occupation were made against them. The Magistrate thus erred when he found them to be in occupation of the premises."*

(9) Mr. Khan also argued that two earlier sightings of the appellant in the corridor which led to the apartment were insufficient to establish that he was an occupier or in control of the premises. In support of this argument, he referred to the decision of this court in **Bissessar and Deosaran v The State**[5], which relied on **Bharath and Bohoroquez v The State**[6]. In the former case, a party of police officers went to a two storey building along Huggins Street in Tacarigua. The building was divided into four apartments. The police officers went to one of the apartments, knocked on the door and shouted, *"Keith Bissessar, police".* The first appellant ran out of the apartment and was later apprehended. The second appellant was found in the apartment, hiding close to some boxes which contained marijuana. On being cautioned, the second appellant informed the police that he did not live in that apartment but in another apartment upstairs. That apartment was also searched and nothing illegal was found. Both appellants were convicted of

[3] [1930] 3 D.L.R. 925
[4] [1946] O.L.R 187
[5] Cr. App. Nos. 21 and 22 of 2005
[6] Supra

possession of a dangerous drug, namely marijuana, contrary to **section 5(4) of the Dangerous Drugs Act.** In relation to the second appellant, the prosecution relied on **section 21 of the Act**.

On the issue of occupation, John, J.A. said:

> *"We find that the evidence of occupation against the 2nd appellant, which is simply, that he was seen in the yard of the premises on one occasion and was found hiding next to the boxes containing the drugs, falls woefully short of what is required to prove that he was an occupier or in control of the premises, and consequently in possession of the drugs. The evidence merely revealed that he lived in the upstairs apartment and that the property was owned by his parents; however, there is no evidence that he had any form of control over the premises at apartment 249B. We are of the view that there is insufficient evidence that could place him in occupation."*

(10) In response, counsel for the respondent, Mrs. Teelucksingh-Ramoutar, submitted that there was sufficient evidence capable of justifying the inference that the appellant was in occupation of the premises in which the marijuana was found. The evidence relied on included:

(i) The appellant was previously seen on two occasions standing in the corridor which led to the apartment where he was found;

(ii) On the 11th October, 2002, it was the appellant who opened the door to the apartment when the police officers arrived with the search warrant;

(iii) The appellant answered the door of the apartment barefooted and dressed in multi-coloured shorts and a white vest;

(iv) When the marijuana was found, the appellant was cautioned by a police officer and he responded, *"Boss, that is mama's goods. I only living here. She has now gone up the road"*; and

(v) In the main room of the apartment where the marijuana was found, there were two beds, one of which was not made up and which contained both male and female clothing.

(11) The respondent submitted that the cases of **Bharath and Bhoroquez v The State**[7] and **Bissessar and Deosaran v The State**[8] can be distinguished from this case as there was no evidence to show that the appellant was a mere visitor to the apartment of Lily Lane and that he had no control over the premises and as such, the appellant's presence at the apartment could not be said to be serendipitous. In support of this argument, the respondent relied on the oral utterance of the appellant that he was living at the apartment.

(12) The respondent also sought to differentiate the case of **Ramdass and Ramoutar v Knights**[9] from the present matter on the basis that in that case, it was an undisputed fact that the appellants were mere visitors to the premises and that the premises could have only comfortably accommodated one person. In that case, there was also a statement made by Kelvin Jadoo that he slept in the bed under which the drugs were found.

(13) The respondent contended that it was neither the case for the prosecution nor the defence that the appellant was a visitor to the apartment and any direction by the judge as to the mere presence of the appellant was not necessary in the context of the factual matrix of this case. Reliance was placed on the decision in **Victor Sylvester a/c Hilo et al v The State**[10] in support of this contention. In that case, Weekes J.A. said at paras. 84-85:

> *"…This was not a case of mere presence but a case of being present for the express purpose of guarding with the firearms, which were recovered, the dangerous drugs seized. There was a sufficiency, nay an over-abundance, of evidence to prove that the appellant exercised control over the dangerous drugs found in the premises in which he was found…The judge's direction in respect of this appellant cannot be faulted. Even if it was found to be wanting, it is quite clear from the evidence that the legal meaning of occupation had been met…"*

[7] Supra
[8] Supra
[9] Supra
[10] Cr. App. No. 27-32 of 2008

Analysis and Reasoning

(14) In this matter, there was no material on the prosecution case capable of pointing toward a conclusion that the appellant was a mere visitor to the apartment of Lily Lane and that he had no control over the premises. The prosecution case was based on circumstantial evidence in addition to the oral statement made by the appellant whereby he admitted that he was living at the apartment.

(15) The prosecution based its case on the doctrine of constructive possession which arises where there is no evidence of the actual control of dangerous drugs but there is evidence of occupation of the premises where the dangerous drug is found.

(16) Thus, the oral statement attributed to the appellant, combined with the cogent circumstantial evidence as set out by the respondent, was ample to establish that the appellant exercised some degree of control of the premises, thereby making him an occupier within the meaning of the Act and triggering the operation of the doctrine of constructive possession.

We accordingly find no merit in this ground of appeal.

Ground 2: The Learned Trial Judge erred in his directions on law regarding "occupation" as defined in the Act, in that he failed to sufficiently identify the issue of occupation and failed to isolate all of the relevant evidence in determining whether the Appellant was an occupier of the premises (sic).

(17) Mr. Khan submitted that it was necessary for the judge to assist the jury by explaining the legal principles regarding occupation and isolating the evidence with respect to those principles. He submitted that the evidence in the case, the utterances made by the appellant and the legal presumptions of the Act were not simple matters for the jury to consider. Accordingly, the judge ought to have assisted them by relating the evidence in the case to the questions that they were required to resolve. Additionally, Mr. Khan argued that the evidence in the case could have led

to the inference that the person named on the warrant, Lily Lane, was the landlady of the apartment complex and as a result, the judge ought to have informed the jury that it was not unreasonable to conclude that she was an occupier and had care, control and management of the premises and that the appellant was only present there.

(18) The respondent answered that the judge properly directed the jury as to the law, namely **section 21(1) of the Act**. According to the respondent, the judge explained the meaning of the terms *"occupies", "actual occupation"* and *"an element of control of the premises*" and proceeded to itemise and then direct the jury on specific pieces of the evidence relied on by the prosecution. Those pieces of evidence included:

(i) The appellant himself answered the door of the apartment on the morning in question and he was barefooted and dressed in shorts and a vest;

(ii) The apartment where the drugs were found was relatively small, comprising of one room; and

(iii) The appellant's oral utterance, namely,*"Officer, that is mama's goods. I am only living here, she has gone up the road".*

According to the respondent, the evidence, when considered cumulatively, would have allowed the jury to infer that the appellant was in actual occupation of the premises or had some element of control over it. In those circumstances, it was not necessary for the judge to direct the jury separately on each individual piece of evidence.

(19) Counsel for the respondent also submitted that the judge properly directed the jury on the meaning of the term "occupier" as a person exercising a measure of control over the premises. It was argued that this was what was required of the judge as one can be an occupier within the definition of the Act and not be the owner of the premises.

The respondent relied on the case of **R v Dipnarine**[11] in support of this argument. In that case, the Court of Appeal of Alberta said:

> *"The law with respect to control in the context of constructive possession is well known. What the Crown must prove is that an accused* ***had the ability to exercise some power (i.e., some measure of control) over the item in issue. It is not necessary for the Crown to prove that such power was in fact exercised****..."* (emphasis ours)

Analysis and Reasoning

(20) In his summing up, the judge explained to the jury in clear and unambiguous terms the issue of occupation of the premises and went on to adequately isolate the evidence capable of supporting this.

The judge directed the jury as follows[12]:

> *"...A person who occupies and "occupies" means there is actual occupation or an element of control of the premises and of their use in which the dangerous drug is found is deemed or presumed to be in possession, unless he can discharge the persuasive burden of proving lack of knowledge and consent.*
>
> *So, the State say that the accused, on the date in question, on 11th October, 2002, around 6a.m. answered the door to the apartment which the State say, according to the police officers, they had a warrant to search. The warrant, as you would recall, was in the name of Lily Lane. In any event, upon knocking on the door, the*

[11] 2014 ABCA 328

[12] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 10, lines 23-50; and page 11, lines 1-29

accused answered it. And, in summary, upon reading the warrant, the premises were searched.

Now, this then was what the accused has said that Lily Lane was not at home and she was here earlier but she had gone up the road or words to that effect… When the contents of the search warrant was read out…it was in relation to the possession of a dangerous drug.

Now, when that was read out to the accused, he, according to the police, had replied that words to the effect, he doesn't know what mama has. Then upon search of the premises - now the premises themselves were comparatively self-contained…you heard that the dimensions of the apartment, it was relatively small. There was one main room. And in that main room, of course, other than the fact that there were two beds, under some clothing both male and female in the proximity of the second bed which was not made and which was actually made up, and the inference is that that was not the bed in which the accused had slept in, so it is on the other side of the room, under those clothing… it was said that this black garbage bag with the 10 blocks of marijuana were found.

It is in relation to all of those factors that the State would ordinarily rely on for you to draw the inference that, one, the accused was in actual occupation of the premises or had some element of control over it. And that putting all those inferences together, they say that it is open to you to find that he would have had the necessary knowledge and consent of the drugs in those premises.

So, you also have heard that upon finding the marijuana and the accused having been cautioned by the officer, he is purported to have said that: "Boss, that is mama's goods. I am only living here. She has now gone up the road." So, of course, on the one hand, the State are inviting you to draw the inference that the accused was in occupation or had some element of control over those premises and that is

it now upon him to discharge the knowledge and consent that that marijuana was there…." (sic)

The judge also directed the jury on the meaning of the term "occupier" with respect to premises and indicated that occupier means that there is actual occupation or an element of control of the premises and of their use, in which a dangerous drug is found.

In his summing up, the judge said[13]:

"So, our law says that if an accused person is an occupier of premises and "occupier" means there is actual occupation on element of control of the premises and of their use in which a dangerous drug is found, the law says the accused person is in possession of it unless he can prove that it was there without his knowledge and consent." (sic)

Accordingly, the judge's directions on the law were impeccable and there was no need for him to go any further in his directions to the jury as suggested by Mr. Khan.

In addition, with respect to Lily Lane being named on the search warrant, to have directed the jury along the lines suggested by Mr. Khan in his argument, that it was not unreasonable to conclude that she was the occupier of the premises and that the appellant was merely a visitor, would have been a wholly inappropriate invitation for them to engage in speculation. There was not a scintilla of evidence to properly found such a direction.

This ground of appeal is without merit.

[13] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 12, lines 11-17

Ground 3: The Learned Trial Judge erred in that he did not sufficiently assist the Jury on the law regarding "knowledge" as defined in the Act, in that he failed to sufficiently identify the issue of knowledge and failed to isolate all of the relevant evidence in determining whether the Appellant had knowledge of the dangerous drugs (sic).

(21) Mr. Khan submitted that the judge ought to have assisted the jury by directing them separately on the issues of knowledge and occupation. He argued that the judge failed to indicate to the jury certain presumptions and the burdens of proof that follow them with respect to knowledge in the context of dangerous drugs. Those presumptions included, (i) knowledge of possession by virtue of occupation, (ii) the presumption of knowledge concerning concealed items and (iii) knowledge concerning actual possession, more particularly, knowledge of the nature of the drug.

(22) Additionally, Mr. Khan submitted that the judge's directions on the issue of knowledge sought to establish that the evidence which the prosecution had relied on to prove occupation of the premises could be used to show knowledge of the dangerous drugs. He argued that those were two separate legal and factual issues, further distinguished by separate burdens and standards of proof and because of the judge's inappropriate amalgamation of discrete issues, the burdens became blurred.

(23) It was submitted that first, the judge should have made it clear to the jury that the prosecution must make them sure that the appellant occupied the premises, and in determining this legal issue, the judge should have isolated the evidence which they would have had to rely on. Second, the judge should have indicated to the jury that if they were sure that the appellant was in occupation of the premises, they must then consider whether he had persuaded them that it was more probable than not that he did not know that the dangerous drugs were on the premises.

(24) Mr. Khan further submitted that the prosecution premised its case on constructive possession as well as actual possession and this led to a confusing direction by the judge, which resulted in prejudice to the appellant. He argued that the prosecution ought to have based their case only on one type of possession. He further contended that the issue of actual possession did not arise

in this case as there was no evidence which showed that the accused had in his custody or under his control anything containing a dangerous drug. According to Mr. Khan, as a consequence of the prosecution case being predicated on both actual and constructive possession, the judge ought to have separated the issues of actual possession and constructive possession, isolated the evidence with respect to each and should have indicated to the jury the outcome according to each interpretation.

(25) In response, Mrs. Teelucksingh-Ramoutar submitted that the prosecution had premised its case solely on constructive possession and that the judge gave the relevant direction accordingly. She contended that the judge adequately directed the jury on the issues of occupation and knowledge, separately and sequentially. It was further submitted that it is only when occupation is established that the rebuttable presumption of knowledge and consent arises.

(26) Counsel for the respondent argued that the judge, in dealing with the element of possession, properly directed the jury to first consider whether the appellant occupied the premises in which the drugs were found and indicated to them that once they were sure that occupation was established, they were to consider whether the drugs were there without the knowledge of the appellant[14]. Following this, the judge directed the jury on the shifting of the burden on the appellant to prove that he did not have knowledge of the drugs, and further directed them on the requisite standard of proof[15].

(27) Mrs. Teelucksingh-Ramoutar also submitted that the judge properly directed the jury in relation to the oral utterance of the appellant, namely, *"that's mama own, I don't know nothing about that"* and explained its relevance to the issue of whether he had knowledge of the drugs. According to the respondent, the judge explained to the jury that if they accepted the utterance to be true, then the appellant had no knowledge of the drugs. The judge went on to direct the jury that it was open to them to accept that the appellant made such an utterance but they were entitled to disbelieve him when he denied knowledge of the drugs[16].

[14] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 12, lines 11-25
[15] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 12, lines 18-31
[16] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 13, lines 1-35

Analysis and Reasoning:

(28) In his summing up, the judge properly and adequately directed the jury on the issue of knowledge of the dangerous drugs, including the burden and standard of proof required.

The judge's directions were as follows[17]:

> *"…So, our law says that if an accused person is an occupier of premises and "occupier" means there is actual occupation on element of control of the premises and of their use in which a dangerous drug is found, the law says the accused person is in possession of it unless he can prove that it was there without his knowledge and consent.*
>
> *And remember I told you that generally the accused does not have to prove anything but this is one of those exceptions when he does. And this is one specific circumstance when it arises because when the law deems an accused person to have been in possession of a dangerous drug, the burden is now on him to prove that the dangerous drug was there without his knowledge and consent.*
>
> *And when the burden of proof is on the accused person, the standard of proof is lower and, therefore, less difficult to meet than that placed on the Prosecution. The standard of proof is on the balance of probabilities, that is this say, more probable than not.*
>
> *And on the State's case there was an oral utterance that was made by the accused and you have to decide this aspect of the case. Let me see if I can recap that. The police have a search warrant. They enter the premises. The search warrant is in the name of Lily Lane but on the State's case the accused is present at the apartment. On the State's case there is an inference that he must have been there overnight because of the attire in which he was dressed.*

[17] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 12, line 11 to page 13, line 12

Furthermore, he says he is there but Lily Lane has gone up the road, she was there earlier. They come in, they search the premises and when they find the marijuana on the State's case, in answer to the opinion of the officer that he believes this is marijuana, the accused, on the State's case says, "That's mama's own, I don't know anything about that." So you have to now decide, does that answer the question of knowledge and consent? Clearly, if you accept it as the truth of its contents, he has no knowledge and consent. He is basically saying that's someone else's, that's the occupant, "That's mama's."

On the other hand, the State is saying that if you look at the circumstances in which the drug was found, that is under some clothing. It's in a room. The dimensions of the room are such that it is relative small. That to get to that side of the room, to the bathroom, you have to go past this piling of clothing. And that piling of clothing includes male clothing as well. They are saying with all of those things, all of those factors, they will invite you to draw the inference that he must have known about those drugs…" (sic)

(29) The prosecution premised its case solely on constructive possession and the judge gave all of the relevant components of the direction in relation to this. To have gone further as suggested by Mr. Khan was not only unnecessary but it would have had the serious potential to distort the true basis of the prosecution case and to confuse the jury.

(30) The judge's directions in the summing up in relation to these issues were unassailable. The judge was in faithful compliance with his duty to not put either the prosecution case or the defence case to the jury on a misleading basis.

This ground of appeal is without merit.

Ground 4: The Learned Trial Judge erred in that he did not sufficiently assist the Jury as to the significance of the alleged utterance of the Appellant, and its impact in determining whether the Appellant was an occupier of the premises (sic).

(31) Mr. Khan submitted that the appellant's utterances proved that he was not an occupier of the premises in the context of the Act. He went on to say that in the event that the appellant was shown to be an occupant, the utterances showed that he had no knowledge of the drugs found on the premises. It is in this regard that Mr. Khan argued that the judge's directions on this issue were not sufficiently clear and he ought to have directed the jury that the utterances, if they accepted them to be true, could have led to a finding that the appellant was not an occupier of the premises.

(32) It was further submitted that the issue of whether the appellant had knowledge of the drugs only arose after the burden was shifted onto him. According to Mr. Khan, in those circumstances, the judge erred in two aspects. First, the judge did not adequately assist the jury with the initial position, that is, whether the appellant was in fact an occupier of the premises, as he failed to assist them on the significance of the utterance in resolving this issue. Second, the judge failed to direct the jury that it was only after the occupation issue was resolved, could they have gone on to consider the issue of knowledge.

(33) In response, Mrs. Teelucksingh-Ramoutar submitted that the judge adequately directed the jury on the importance of the appellant's utterance in relation to the issue of whether he was an occupier or had some control of the apartment in which the drugs were found.

(34) The respondent further submitted that the judge directed the jury that the cumulative effect of the evidence could have led to the inference that the appellant was in occupation of the premises and consequently that he had the necessary knowledge of the drugs in the apartment. The judge then directed the jury on the utterance, *"Boss, that is mama's goods. I only living here. She has now gone up the road"*, and properly explained its relevance to both occupation and knowledge[18]. The respondent submitted that this approach by the judge was consistent with

[18] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 11, lines 12-19

section 21(1) of the Act where there is a shifting of the burden to prove knowledge once a person was deemed to be in occupation of the premises in which dangerous drugs were found, in the narrow sense of having some measure of control over the premises.

(35) Additionally, it was submitted on behalf of the respondent that the judge properly directed the jury on the appellant's utterance, *"I only living here"* and indicated that the prosecution was relying on this utterance to establish occupation. The judge then directed the jury on the second portion of the oral utterance, *"that's mama own. I don't know nothing about that"* in relation to the issue of knowledge[19].

Analysis and Reasoning

(36) In his summing up, in dealing with the issue of the oral utterance made by the appellant, namely, *"Boss, that is mama's goods. I only living here. She has now gone up the road",* the judge informed the jury of its importance both with respect to occupation and knowledge.

The judge directed the jury as follows[20]:

> *"So, you also have heard that upon finding the marijuana, and the accused having been cautioned by the officer, he is purported to have said that: 'Boss, that is mama's goods. I am only living here. She has now gone up the road.' So, of course, on the one hand, the State are inviting you to draw inferences that the accused was in occupation or had some element of control over those premises and that it is now upon him to discharge the knowledge and consent that that marijuana was there."* (sic)

Further, the judge gave the relevant directions to the jury with respect to the appellant's oral utterance and the circumstantial evidence in the case. In any event, the jury was required to look at the evidence in the case as a whole and this involved assessing both the oral utterance of the

[19] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 12, lines 46-50
[20] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 11, lines 20-29

appellant and the circumstantial evidence. The circumstantial evidence included the fact that the appellant was seen in the corridor of the apartment on two previous occasions, that the drugs were found under both male and female clothing, the relatively small size of the apartment and the location of the drugs. The cumulative effect of this evidence was to provide a strong foundation upon which a reasonable inference of knowledge could be mounted.

To have directed and focused the jury on an isolated portion of the appellant's oral utterance as suggested by Mr. Khan would have had the potential to confuse the jury as they were required to look at the evidence in the case as a whole.

This ground of appeal is without merit.

Ground 5: The Learned Trial Judge erred in that he failed to assist the jury as to the significance of the destroyed exhibit of the dangerous drugs, and the impact of such on the credibility of the State's witness (sic).

(37) Mr. Khan submitted that the judge failed to direct the jury on the discrepancies in the weight of the exhibit and its destruction. According to Mr. Khan, if the significance of those variances were properly pointed out to the jury, this would have amounted to evidence which they could have taken into account in assessing the truthfulness of the evidence of the prosecution witnesses. It was further argued that the judge in his summing up did not address the assertion by the defence, that the issues regarding both the variance and destruction of the exhibit were for a dishonest reason. Mr. Khan relied on the case of **PC Alleyne v Balroop and Balroop**[21] to support this argument. In that case, Nelson, J.A. cited with approval the judgment of de la Bastide, C.J. (as he then was) in **Rampersadsingh v Griffith**[22] in which it was said that where the absence of an exhibit in court produces some genuine doubt as to the truthfulness of the prosecution evidence, it should lead to an acquittal.

[21] Mag. App. No. 245 of 2003
[22] C.A. Mag. 104/1996

(38) Mr. Khan also relied on the case of **R v Francis Jadusingh and R v Norma Jadusingh**[23] where Lewis, J.A. of the Court of Appeal in Jamaica noted that where there is clear and detailed evidence of the way in which the parcels have been taken to the analyst with all due precautions, and the evidence of the analyst himself as to his findings, the mere fact that there was some rascality with the relevant portion of the exhibit having been *"spirited away",* would not preclude a finding on facts that the matter seized was in fact marijuana.

(39) Mrs. Teelucksingh-Ramoutar replied that the judge dealt with the issue of the discrepancy in the weight of the exhibit and its destruction in his summing up where he gave a detailed direction as to the inconsistencies of the exhibit and directed the jury that such inconsistencies related to the question of credibility of the police officers who gave evidence[24]. It was submitted that the judge went on to remind the jury of the explanation of the forensic analyst as to the discrepancy in the weight of the exhibit and the evidence of Inspector Forde who had mistakenly caused the exhibit to be destroyed[25].

It was further submitted that the judge specifically pointed out to the jury that if they believed that Officer Bernard had anything to do with the exhibit being destroyed, this would affect his credibility[26].

(40) Mrs. Teelucksingh-Ramoutar also contended that there was no challenge under cross-examination that Officer Bernard was involved in the destruction of the exhibit and as such, the judge was not required to give any detailed direction to the jury that they could have used the evidence of the destruction of the exhibit in assessing the truthfulness of the prosecution witness. The case of **PC Alleyne v Balroop and Balroop**[27] was referred to in support this argument.

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[23] 1963 6 WIR 362

[24] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 17, lines 23-50 and page 21, lines 42-50

[25] see Transcript of the Judge's summing up dated the 22nd March, 2012, page 20, lines 38-49 and page 16, lines 26-44

[26] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 22, lines 13-31

[27] Supra

Analysis and Reasoning

(41) The judge properly and adequately reminded the jury of the reasons for the discrepancy in the weight of the destroyed exhibit. The judge also informed them that the inconsistencies in relation to the weight of the exhibit went to the credibility of the police officers who gave evidence. He also reminded the jury of the assertions made by the defence, and the consequences that would follow if those inconsistencies were as a result of the witnesses being untruthful.

Additionally, the judge frontally directed the jury that if they were of the view that Officer Bernard was involved in the destruction of the exhibit, this would impact on his credibility as a witness. The judge also reminded the jury of the explanation of the forensic analyst as to the differences in weight of the exhibit and the evidence of Inspector Forde who had mistakenly caused the exhibit to be destroyed.

As such, the judge's directions to the jury on this issue were without fault and accordingly, this ground of appeal is unmeritorious.

Ground 6: A miscarriage of justice occurred when bad character evidence relevant to the credibility of the State's main witness, capable of belief and sufficient to raise a reasonable doubt in the minds of the Jury if it had been given at trial together with the other evidence, was not available at trial (sic).

(42) Mr. Khan, on behalf of the appellant, sought to adduce fresh evidence of certain documents which disclosed that one of the prosecution witnesses, Officer Bernard, was charged with three offences in the Magistrates' Court after the appellant was convicted. The documents included:

(a) A statement from Police Constable Verson Jeanville attesting to the fabrication of certain search warrants by Officer Bernard - In that statement, Officer Jeanville alleged that on the 20th February, 2012, Officer Bernard instructed him to write up a blank

search warrant bearing what appeared to be a photocopied signature and stamp of a Justice of the Peace. He refused to comply with the instruction as he observed that the search warrant was false. Officer Jeanville also referred to another incident on the 28th March, 2012 during which he was on duty along with PC Cortez. According to Officer Jeanville, they were informed that they were to speak to Officer Bernard to obtain a search warrant to search a particular house. PC Ramkhelawan later handed PC Cortez the search warrant for the house and the search was conducted. However, sometime later, Officer Jeanville observed that the search warrant, which was in the name of Rishi Manna, was false as it bore what appeared to be a photocopied signature and stamp of the aforementioned Justice of the Peace. Officer Jeanville also said that the handwriting on the search warrant resembled that of Officer Bernard's.

(b) A statement in response from Officer Bernard in the police enquiries against him, denying knowledge of the fabrication of a search warrant.

(c) The informations relating to the charges against Officer Bernard. The charges are as follows:

(i) Misbehavior whilst acting as a member of the Police Service in that Junior Bernard uttered a forged search warrant bearing the stamp and signature of a Justice of the Peace which he knew to be false and with the intention to deceive - alleged to have occurred on the 2nd February, 2012;

(ii) Misbehavior whilst acting as a member of the Police Service in that Junior Bernard uttered a forged search warrant in the name of Rishi Manna, police constable, which bore the stamp and signature of a Justice of the Peace which he knew to be false - alleged to have occurred on the 28th March, 2012; and

(iii) Conspiracy to do an act which had the tendency to pervert the course of public justice in that Junior Bernard and another person prepared a search warrant in the name of Denton Cortez, police constable, which bore a stamp and signature of a Justice of the Peace, to conceal the offence of uttering a

forged document – alleged to have occurred on diverse days between the 27th March, 2012 and 12th May, 2012.

(43) Mr. Khan contended that the pending charges laid against Officer Bernard amounted to misconduct in the form of bad character evidence and that notwithstanding that the pending charges arose out of an incident post-conviction, they were of substantial probative value in establishing propensity and his lack of credibility with respect to his evidence. The cases of **R v Braithwaite**[28], **Brewster v R**[29], **R v Miller**[30] and **R v Peter Wayne Scott**[31] were relied on to support this contention.

In **R v Braithwaite**[32], Hughes, L.J. said:

> *"In a case such as the present, where "important explanatory evidence" is not in point, he must assess: a) the issue to which the evidence goes…; b) whether that issue is of substantial importance in the context of the case as a whole; and c) whether the evidence has substantial probative value in relation to that issue…This assessment is, by definition, highly fact-sensitive in each case. It is an assessment of whether the evidence in question substantially goes to show (prove) the point which the Applicant wishes to prove on the issue in question. The issue will often, but not always, be either the propensity of the person against whom the application is made to behave in a particular way, or his credibility. The probative value of the evidence advanced falls to be assessed in the context of the case as a whole. That means that it may in some cases be appropriate to consider whether or not it adds significantly to other more probative evidence directed to the same issue."*

[28] [2010] EWCA Crim. 1082
[29] [2010] EWCA Crim. 1194
[30] [2010] EWCA Crim. 1153
[31] [2009] EWCA Crim. 2457
[32] Supra

In **Brewster v R**[33], Pitchford, L.J. opined at para. 23:

> *"The first question for the trial judge under s 100(1)(b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole…If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions. However, we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence."*

In **R v Miller**[34], Pitchford, L.J. dispensed with the notion that bad character evidence as it relates to a non-defendant witness must be confined to previous convictions. At paras. 20-21, it was said that:

> *"**Evidence of bad character is not confined to proof of previous convictions**, but whether or not the evidence relied upon comprises convictions **or previous conduct otherwise proved**, it must pass the s 100(1) test of being (1) important explanatory evidence or (2) of substantial probative value on an issue of substantial importance…"* (emphasis ours)

In **R v Peter Wayne Scott**[35], the appeal was allowed on the ground that the trial judge failed to admit for the jury's consideration, statements contained in the Crime Reporting Information System (CRIS) reports, of two persons which could have affected the character of the main witness against the appellant. The appellant was convicted of the offences of sexual assault and rape. The appeal centered solely on the fact that there were three allegations made against the

[33] Supra
[34] Supra
[35] Supra

main witness which were contained in the CRIS reports, which never amounted to formal charges. The court found that the evidence had substantial probative value in relation to a matter which was of significant importance in the context of the case as a whole for the purposes of section 100(1)(ii)(b) of the 2003 Act.

At para. 45 of the judgment, Akien LJ said:

> *"In R v Carr [2008] EWCA Crim 1283, Dyson LJ giving the judgment of the court, described a decision on whether to admit "non - defendant bad character" evidence as the exercise of a "discretion". He said that the question for the Court of Appeal when such a decision was challenged was "whether the decision [the judge] made fell within the relatively generous band given to a judge exercising a discretion on whether or not to allow cross - examination in relation to bad character": With respect, we would prefer to characterise the exercise that the judge has to perform under section 100 as one of judgment, taking into account all relevant factors, specifically those referred to in section 100(3). The judge must not take into account irrelevant factors. His judgment can also be attacked if it is clearly wrong."*

Akien LJ went on to say at para. 55:

> *"Evidence that the complainant had made false allegations against someone, particularly if the allegations were of sexual misconduct, even if not the defendant in the trial, can (if properly admissible consistent with section 41 of the YJPEA) often be powerful material in a trial of alleged sexual offences in which the key issue is the parties' credibility. We accept, of course, that the events in this case concerned a different man, the alleged "sexual advances" were very different and the events concerning Mr Dildar took place some five to six months before the events resulting in the charges against the appellant. We also recognise that if the complainant's evidence was that the allegations were true, the jury would have to decide who to believe. However, taking account of all the factors that we must, we have concluded that the judge was wrong to hold that the evidence of Mr Dildar*

and the supporting evidence of Ms Bean would not have been of "substantial" probative value in relation to the issue of the credibility of the complainant concerning the two charges against the appellant."

(44) Mr. Khan submitted that the pending charges against Officer Bernard satisfied the four requirements for its admission as fresh evidence under **R v Parks**[36], which are: (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) it must be credible evidence in the sense of being capable of belief; and (iv) whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

(45) The respondent, on the other hand, argued that the appellant's application for fresh evidence should not be allowed by the Court. It was contended that the charges against Officer Bernard were preferred post-conviction, having been laid on the 27th July, 2012 and that the charges had no probative value in the case at bar as they did not share significant features with the conduct being alleged by the defence.

(46) The respondent argued that the proposed evidence must go towards an issue in the proceedings which is of *"substantial probative value":* **section 15 M(1)(b) of the Act**. This requirement is referred to as the test of *"enhanced relevance"* and is different from that under **section 15 N (1)(d) of the Act** which deals with the bad character of the accused, where the proposed evidence must only be *"relevant"*. Accordingly, when evidence of bad character against a person other than the accused is to be admitted, it must pass a higher threshold than in the case of an accused.

[36] [1961] 3 All ER 633

Counsel for the respondent referred to the case of **R v Braithwaite**[37] where Hughes, L.J. said at paragraph 12:

> *"… The test of "substantial probative value" is not the same as the test for gateway (d) of s 101 (1) in relation to the common case of bad character evidence affecting the defendant which the Crown seeks to adduce. There the test is whether the evidence is "relevant". It is however the same as appears in 10 gateway (e) in relation to an application made by one defendant against another ... This assessment is, by definition, highly fact-sensitive in each case. It is an assessment of whether the evidence in question substantially goes to show (prove) the point which the applicant wishes to prove on the issue in question."*

Hughes, L.J. continued at paragraph 15:

> *"The question which mattered was whether the material which the defence wanted to put before the jury had "substantial probative value" in relation to those issues. That expression has been referred to in some quarters as importing a test of "enhanced probative value". We can see why, although we ourselves prefer not to rephrase the statute, remembering only that the distinction we have mentioned exits between this test and that of simple relevance."*

(47) The respondent also argued that pursuant to **section 15 M (3) of the Act**, where the evidence in question related to a person's misconduct and it is suggested that the evidence has probative value by reason of similarity between the conduct and the other alleged misconduct, the nature and extent of the similarities must be considered. The decision in **R v Hanson**[38] was relied on in support of this argument.

[37] Supra
[38] (2005) EWCA Crim. 824

In that case, the court said at para. 9:

> *"There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence…Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity."*

(48) It was further submitted on behalf of the respondent that where the misconduct relied upon related to a charge, allegation or suspicion, proof of such misconduct is required in order for the evidence to be admitted. According to the respondent, it is doubtful whether the mere making of an allegation is capable of constituting bad character evidence. Counsel submitted that this conclusion is entirely consistent with the decision in **R v Bovell and R v Dowds**[39] where Rose, L.J. opined at para. 21: *"It was in considerable doubt whether the mere making of an allegation is capable of bad character evidence."* The respondent also relied on the cases of **R v Hussain**[40] and **Miller v R**[41] in support of this submission.

In **R v Hussain**[42], the UK Court of Appeal said at para. 13:

> *"…a mere charge, unproved, could not be evidence of bad character, still less could it be bad character itself. Bad character evidence is evidence of something bad done*

[39] (2005) EWCA Crim. 1091
[40] (2008) EWCA Crim. 1117
[41] (2010) EWCA Crim. 1153
[42] Supra

by the person in question in the past. Note that it is the misconduct which is bad character. Evidence is simply the means by which the misconduct is proved. It is not unusual to see the concept of bad character wrongly elided with that of conviction. It may well be that often they go together, but a conviction is not by itself misconduct. Its status is that it is excellent and very often irrefutable evidence of misconduct. A mere charge unproved cannot begin to be conduct."

In **Miller v R**[43], it was held that cross-examination of a witness to suggest that he was guilty of offences with which he had been charged but not yet found guilty should not have been permitted unless the cross-examining party was in a position to prove the guilt of the witness and intended to do so.

(49) The respondent also contended that the cross-examination of police officers on the basis of unresolved criminal charges or complaints should not be permitted. To support this contention, counsel for the respondent relied on the case of **R v Edwards**[44] where it was held that a police officer could be questioned as to any relevant criminal offences or disciplinary charges found proved against him, but the charges which have not been adjudicated upon should not be put in cross examination.

(50) Counsel for the respondent also relied on the dicta of Lord Clyde in **Krishna Persad and Ramsingh Jairam v The State**[45]. At paras. 14-16, it was said that:

"Previous misconduct or bad character are among the matters which may legitimately be raised in cross-examination with a view to questioning the reliability of any witness. Police officers are in no special category in this regard. But there must be a solid basis for any questions put in cross-examination for this purpose. The court retains a discretion in the allowing or refusing such questions to be asked, and as was observed by Lord Lane CJ in R v Edwards [1991] 1 WLR 207 at 216 'it

[43] Supra
[44] (1991) 2 All ER 266
[45] (2001) 58 WIR 433

is impossible and would be unwise to lay down hard-and-fast rules as to how the court should exercise its discretion'. But it can be affirmed that the alleged misconduct must be misconduct by the witness himself and the misconduct must not be a matter of speculation or doubt, but of probability. Thus it is not proper to raise matters which are merely matters of complaint about the behaviour of the witness where those complaints have not been considered and determined by the appropriate authority established to adjudicate upon complaints. Far less is it proper to question the witness about charges which have been made against him and which have not yet been tried. On the other hand, where there has been some finding in the past that a police officer has been guilty of malpractice in a way which may bear upon the reliability of his evidence regarding his behaviour in the instant case, it may be admissible to challenge his reliability by reference to such a past incident.

These principles apply in particular in relation to questions about evidence which a police officer has given in past trials. The mere fact that the officer has given evidence in a past case and the accused has been acquitted is far from sufficient to form the basis for an attack on reliability. The acquittal would at least have to be linked to a rejection of the officer's evidence. In many cases it may be difficult to determine with precision why a jury has returned a verdict of acquittal. It could be that the defence case has raised a sufficient doubt in their minds, without any necessary disbelief of the evidence of the police officer. On the other hand, if there is clear evidence to show that the officer has lied in the witness-box, or that he has fabricated some piece of evidence, or committed some other malpractice, in a subsequent case such conduct may be raised by way of challenge to his reliability. Examples of that can be found in R v Dandy (1987) (unreported) and R v Jones (1987) (unreported), both discussed in Edwards (at p 219)… Behind all this is the necessity of securing a fair trial for the accused person consistently with fairness to a witness. It is not fair for a witness to be assailed with unproved allegations of misconduct or with mere suspicions of past malpractice. Nor is it acceptable for the time of the court to be taken up with matters extrinsic to the case in hand, nor for

the jury to be distracted from the issue before them by inquiries into uncertain and unresolved issues about the earlier conduct of a witness. The investigation of a witness's reliability in the course of cross-examination must be kept within bounds. It cannot be allowed to degenerate into a ranging and speculative inquiry into any or all of the occasions on which the witness has given evidence in the past. It is not to be expected that records must be kept of every occasion on which a police officer has given evidence and the accused has been acquitted (see R v Guney [1998] 2 Cr App Rep 242 at 258). Indeed the admission of evidence upon matters collateral to the issue in the trial is generally to be discouraged."

(51) The decision of **R v Guney**[46] was also relied on in support of this argument. In that case, Judge, L.J. said that:

"Cross-examination of police officers on the basis of unresolved criminal charges or complaints to the Police Complaints Authority is not permitted. Accordingly, the fact that an allegation has been made does not provide a secure foundation for cross-examination. The same reasoning applies a fortiori once the complaint has been heard and dismissed or the witness has been acquitted of the criminal charge."

Analysis and Reasoning:

(52) The test regarding the introduction of bad character evidence against a person other than the accused is more stringent than the test applicable to the introduction of bad character evidence against an accused person– see **Section 15M (1)** and **(3) of the Evidence Act Chapter 7:02 and R v Weir**[47].

[46] (1998) 2 Cr. App. Rep. 242
[47] [2005] EWCA Crim 2866

In order to assess whether the evidence of bad character has substantial probative value in relation to the creditworthiness of Officer Bernard, the dicta of Pitchford, L.J. at para. 23 in **Brewster and Cromwell v R**[48] is instructive as it sets out the test to be applied:

> *"The first question for the trial judge under section 100(1)(b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witness' credibility. If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue.* ***Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions. However, we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence****."* (emphasis ours)

(53) In determining whether the fresh evidence of the allegations against Officer Bernard might reasonably cause a fair-minded tribunal to regard them as affecting the worth of that witness' evidence, we look at the alleged nature of the events to which the evidence relates and the alleged frequency of such events. The allegations against Officer Bernard did not only involve an element of dishonesty and corruption, but they were also alleged to have occurred on more than one occasion. We are of the view that, on the face of it, the alleged underlying conduct associated with the pending charges against Officer Bernard is of persuasive force in relation to the creditworthiness of that witness. The alleged underlying conduct has substantial probative value in relation to an issue of substantial importance (viz the creditworthiness of Officer Bernard) in the case as a whole, in a manner envisaged by the legislation.

[48] [2010] EWCA Crim 1194

(54) With respect to the respondent's submission that the misconduct in question is in the form of allegations that have not been subject to judicial findings, we note the decision in **R v Braithwaite**[49], where Hughes, L.J., in explaining the court's position in **R v Bovell and R Dowds**[50], held that the important consideration for the court was the nature of the evidence going to prove the misconduct. The court left open the possibility that in certain cases, although the misconduct alleged was a mere allegation, no conviction having resulted, it might yet satisfy the enhanced relevance test. More directly, in **Miller v R**[51], it was explicitly said that evidence of bad character is not confined to proof of previous convictions.

(55) In our view, it is within the scope of the wide discretionary latitude accorded to trial judges and reasonably open to a judge hearing an application to adduce the bad character evidence in question, to admit such evidence as having satisfied the "enhanced relevance" test. This is so even though the evidence is not predicated upon any convictions and the relevant acts were allegedly committed after the conviction in issue in this appeal.

(56) In addition, it is important to note that the position expressed with respect to the cross-examination of police officers on unresolved allegations of criminal misconduct, in the cases of **R v Edwards**[52], **Persad and Jairam v The State**[53]; and **R v Guney**[54], all predate the introduction of the statutory scheme on bad character evidence. That scheme significantly altered many aspects of the common law on the adduction of bad character evidence. While the test for the admission of bad character evidence against a non-accused became stricter, once the evidence passed that more stringent threshold, the range of the material that could be deployed as bad character evidence became wider.

[49] Supra
[50] Supra
[51] Supra
[52] Supra
[53] Supra
[54] Supra

(57) In the present case, Officer Bernard was not the sole witness for the prosecution. Officer George also gave evidence which was materially the same as that of Officer Bernard. The only difference was that Officer George was not involved in the prior surveillance of the apartment in question.

(58) The evidence of Officer George can be summarised as follows:

(i) On the 11th October, 2002, he and a party of police officers, including Officer Bernard visited the premises at Temple Street in Arima, where the appellant was found;

(ii) Officer Bernard called out the name Lily Lane and the appellant opened the door, barefooted and dressed in multi-coloured shorts and a white vest;

(iii) Upon enquiring of the whereabouts of Lily Lane, the appellant replied, *"She was here and she left earlier."* Officer Bernard then informed the appellant that he had a warrant to search the premises and upon inquiring if the appellant had anything in the warrant, he replied, *"I ent know what mama have."* Officer George also testified that the appellant's name was not on the search warrant;

(iv) The apartment was approximately 29ft. x 9ft. and had two beds, one on the eastern side which was not made up and one of the western side which was made up. There were articles of female clothing near the western side of the room and male clothing near the eastern side;

(v) A black plastic bag containing ten packets of what appeared to be marijuana was found in the apartment under a pile of male and female clothing;

(vi) Officer Bernard cautioned the appellant and told him that he was of the opinion that the ten black plastic packets contained marijuana and the appellant replied, *"Boss, that is mama goods. I only living here. She gone up the road."* The appellant was then arrested and informed of his rights and privileges; and

(vii) The ten black plastic packets were weighed and were found to be approximately 10.2kg.

(59) The prosecution case did not pivot only on the evidence and the credibility of Officer Bernard but also on that of Officer George. The proposed fresh evidence would have had a crucial bearing on the jury's assessment of the credibility of Officer Bernard. But equally important is that the possibility cannot be reasonably excluded that the fresh evidence might also impact, in a cross-contaminating manner, on the credibility of Officer George.

(60) Additionally, the observations made by Officer Bernard during surveillance of the apartment in question whereby he saw the appellant on two occasions standing in the corridor which led to the apartment, was significant probative evidence in relation to the appellant's occupation and control of the premises. Without that bit of evidence, it simply cannot be said that a jury would inevitably convict on the evidence of Officer George alone.

(61) As such, the three charges against Officer Bernard satisfy the four requirements for its admission as fresh evidence under **R v Parks**[55] as:

(i) The proposed fresh evidence was not available at the trial as the charges were laid after the trial on the 27th July, 2012;

(ii) It is relevant to an issue in the case as the creditworthiness of Officer Bernard was a matter in issue in the proceedings as he was a main witness for the prosecution;

(iii) It is credible and capable of belief;

(iv) It is sufficient to have raised a reasonable doubt in the minds of the jury if it was given at the trial along with the other evidence in the case.

[55] Supra

(62) We turn to the impact on the conviction of the admission of the fresh evidence. In light of the admission of this evidence, for the reasons explained above, the conviction is fundamentally compromised and cannot stand. This is because the possibility of cross-contamination of the evidence of Officer George cannot be reasonably excluded and thus it cannot be said that a jury would inevitably have convicted on the evidence in the case. It is also because Officer George was not involved in the prior surveillance of the apartment in question where Officer Bernard had seen the appellant on two previous occasions and which was significant probative evidence in relation to the appellant's occupation and control of the premises.

There is merit in this ground of appeal.

Ground 7: The Learned Trial Judge's comment on the plausibility of the defence case went beyond the proper bounds of judicial comment and undermined the believability of the defence advanced.

(63) Mr. Khan contended that the judge's comments in his summing up conveyed to the jury a level of implausibility of the defence case which resulted in unfairness and prejudice to the appellant.

The impugned comments are as follows:

> *"…The conspiracy that the defence are suggesting has taken place then, that would mean that on the morning, having taken out the search warrant two days before, they were hoping, at least, to find sufficient marijuana in this parallel arrest of the accused at Nazir Ali's or someone else's…"*

The case of **Brown and Outram v The State**[56] was relied on to support this submission. In that case, this court at para. 35 and 37 said:

> *"The primary duty of the Judge is to marshal the evidence around the central issues to be left to the jury and so focus the jury's attention on the principal issues in the case. Once that is done in a careful fashion so as not to usurp the function of the jury, there is no reason why a jury should not have the benefit of the analytical focus which the Judge can helpfully bring to bear in order to promote a systematic approach to the assessment of the evidence….The Privy Council provided additional guidance in Mears (Byfield) v. R (1993) 42 WIR 284 at 289 under the rubric "The judge's comments": "Comments which fall short of such a usurpation [of the jury's function] may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes."*

(64) The respondent submitted that the comments of the trial judge on the plausibility of the defence case were permissible within the boundaries of reasonable commentary that was open to him. It was argued that the judge was entitled to direct the jury's attention to the improbabilities and inconsistencies in the defence case.

(65) The respondent advanced the case of **Brown and Outram v The State**[57] in support of this argument. In that case, this court at para. 35 referred to the case of **John v The State**[58] where de la Bastide, C.J. (as he then was) opined:

> *"We recognise, and wish to re-affirm, that it is no part of the trial judge's duty to cover up the weaknesses of the defence case. Indeed the judge is entitled, and may be bound, to direct the jury's attention to the improbabilities and inconsistencies in*

[56] Cr. App. No. 19 and 20 of 2013
[57] Supra
[58] Cr. App. No. 102 of 1998

the defence. The matter was aptly put by Simon Brown, L.J. in Nelson (1997) Crim. L.R. 234 in the following passage taken from the transcript of his judgment and quoted by Rose, L.J. in Peter Johannes & Others [2000] 2C. R. App. R. 361 at 382: 'Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing-up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities - as plainly this appellant's defence was -there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side, so as to correct any substantial imbalance. He has no duty to cloud the merits, either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

(66) The respondent also adverted to the comments of Lord Lane in **Mears (Byfield) v R**[59] at page 289:

"Comments which fall short of such a usurpation [of the jury's function] may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L J observed in R v Gilbey (1990) (unreported):'A judge … is not entitled to comment in such a way as to make the summing-up as a whole unbalanced … It cannot be said too often or too strongly that a summing-up which

[59] (1993) 42 WIR 284

is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.' Their lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings.....in assessing the weight of any misdirections... their lordships have to take the summing-up as a whole....and then ask themselves in the words of Lord Sumner in Ibrahim v R [1914] AC 599 at page 615 whether there was – 'Something which … deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future.' Their lordships [considered whether the judge's comments].....went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting."

(67) In addition, counsel for the respondent submitted that the judge indicated to the jury that counsel for the prosecution, counsel for the defence as well as himself as a judge may express views on the facts but ultimately the facts of the case were the jury's responsibility and the jury was not to adopt his views unless they agreed with him[60].

Analysis and Reasoning:

(68) It is our view that the trial judge's comment on the plausibility of the defence case did not go beyond the proper bounds of judicial comment. In his summing up, the judge was entitled to comment on the facts of the case and express his opinions on those facts.

[60] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 7, lines 12-19

In **Brown and Outram v The State**[61], this Court said that:

> *"…The primary duty of the Judge is to marshal the evidence around the central issues to be left to the jury and so focus the jury's attention on the principal issues in the case. Once that is done in a careful fashion so as not to usurp the function of the jury, there is no reason why a jury should not have the benefit of the analytical focus which the Judge can helpfully bring to bear in order to promote a systematic approach to the assessment of the evidence."*

At the beginning of his summing up, the judge directed the jury that the facts of the case were their responsibility and that although he, the prosecution, and the defence would express certain views concerning the evidence of the case, they were not to adopt those views unless they agreed with them[62].

In looking at the summing up as a whole, we do not find that the judge's commentary on the plausibility of the defence case amounted to a usurpation of the jury's function and the judge did not go beyond the bounds of judicial comment. Applying the case of **John v The State**[63], there was no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. He had the duty to assist the jury to reach a logical and reasonable conclusion on the evidence.

Additionally, this was not a case where the judge exhibited blatant unfairness towards a particular side. The judge at all times gave full and fair weight to the evidence and arguments of both the prosecution and the defence.

This ground of appeal is unmeritorious.

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[61] Supra
[62] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 7, lines 12-23
[63] Supra

Ground 8: The order of approach to the issues by the Learned Trial Judge was erroneous and, the Judge's "and/or" and "on the one hand then" directions when assessing the facts were confusing. (sic)

(69) Mr. Khan submitted that the jury should have been given appropriate instructions on the issue of credibility, not only in relation to the main charge, but on any recharge, which was not given and which had the effect of eroding the defence case. He made reference to what he considered the correct form which was taken from the case of **Brown and Outram v The State**[64] at para. 53:

> *"The trial judge erred in providing the jury with an incorrect order of the approach they should adopt when assessing the evidence when he invited them to start off first with a consideration of the State's case and only proceed to the Defence case if they were sure that all the elements of the State's case were made out - see pages 32 and 33 of the Summing up. The most helpful and logical order of approach is precisely the opposite one. Tipping J in R v McI [1998] 1 NZLR 696 said at page 708:*
> *"Ideally, the direction should have followed the logically correct form, that is, if you accept the accused's evidence on the key issues, you should acquit; if you consider there is a reasonable possibility the accused's evidence on the key issues might be true, you should acquit; if you reject the accused's evidence on the key issues, you must not automatically conclude he is guilty, you must still examine all the evidence which you do accept and decide whether it establishes the accused's guilt beyond reasonable doubt."(emphasis ours)"*

(70) It was also argued the judge's directions in his summing up did not fully and clearly explain to the jury the evidential burden of proof against which the direction on credibility needed to be assessed and applied. He further argued that the judge's use of the terms *"on the one hand"* or *"on the other hand"* eliminated the consideration of a middle ground where the jury were in a position of reasonable doubt. According to Mr. Khan, the use of such words, whether as a free standing direction or as part of a special direction could be misinterpreted by a jury as implying

[64] Supra

that they are required to believe one side or the other. The case of **Brown and Outram v The State**[65] was relied on to support this argument. In that case, this Court said at para. 60:

> *"We wish, respectfully, to sound a note of caution because this is a mistake that can very easily be made, even by experienced trial judges. Trial judges would be best advised to avoid the use of such "either/or" terminology, whether as a freestanding direction or as part of a special direction, because it could be misinterpreted by a jury as implying that they are required to believe one side or the other. The danger in such a direction is that it eliminates the consideration of the middle position where the jury are in a position of reasonable doubt, after considering the totality of the evidence."*

(71) In response, Mrs. Teelucksingh-Ramoutar submitted that the judge's directions in the summing up were clear and unambiguous when placed in its proper context of the summing up as a whole. It was submitted that the judge, in directing the jury, gave the standard and appropriate direction as it related to accepting the prosecution case in part, the defence case in part or accepting both the prosecution and the defence case in part. The judge indicated to the jury that they were entitled to assess the evidence in this way as they were the judges of the facts and their function was to determine *"where the truth lies."*

(72) The respondent also argued that in the context of the utterance, *"That is mama's own. I don't know anything about that",* the judge directed the jury on the different ways in which the statement could be construed. The first option was favourable to the appellant, where the jury accepted the truth of the contents and the second option was the prosecution's position, that the appellant was not telling the truth based on the circumstances inferring knowledge of the drugs. He also reminded them of the appellant's case, which was that he denied making such an utterance and that the dangerous drugs were not found in his apartment.

[65] Supra

Analysis and Reasoning

(73) The judge at the very inception of his summing up indicated to the jury that it was their responsibility to judge the evidence and decide all the relevant facts of the case[66]. The judge also directed the jury that as the judges of facts, it was open to them to decide whether all or part of any witness' evidence was true and that it was open to them to accept the prosecution case in part and/or the defence case in part[67]. In addition, the judge went on to properly and adequately explain the essential features of the evidence and the relevant burdens and standards of proof.

(74) It is not the correct approach to suggest that the judge made errors in his summing up by dissecting the summing up and looking at various directions in microscopic isolation. The summing up must be evaluated in its entirety to ascertain whether the judge gave correct, clear and consistent directions.

(75) In the context of the summing up as a whole, the jury was properly and adequately directed on the various issues in the case. The judge's directions in his summing up, when looked at in its entirety, were unassailable.

This ground of appeal is without merit.

Ground 9: The Sentence imposed by the Learned Trial Judge was too severe.

(76) It was submitted that the appellant's sentence should be reviewed as it is too severe.

Mr. Khan argued that in sentencing, the judge, while repeating the general law with respect to sentencing, failed to explain how he applied the facts of this case to those principles. He argued

[66] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 6, lines 42-45
[67] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 7 lines 24-27.

that the judge, but for a reference to the quantum of drugs, did not refer to the aggravating factors not any mitigating factors in the case.

(77) It was further submitted that the judge, while referring to the aims of punishment, did not refer to which aim he considered most pertinent in this case, that is, whether the sentence would achieve the aim of rehabilitating the appellant or deterring potential offenders. According to Mr. Khan, the judge ought to have focused on the rehabilitative aim of sentencing as opposed to the deterrent aim as the latter is no longer applicable in this jurisdiction.

(78) In addition, Mr. Khan argued that the judge ought to have only compared other drug sentences on the basis of quantum and that he went on to apply the individual circumstances of both the appellant and the offence in arriving at the appropriate sentence.

(79) Mr. Khan also argued that reference ought to have been made to the fact that the search warrant was not made out in the name of the appellant, a relevant factor in determining the sentence in this case.

(80) The respondent argued that the sentence imposed by the judge was reasonable upon consideration of all the circumstances of the case. The respondent submitted that the judge properly considered the mitigating factor in the case, that is, the testimony of the Prison Missionary. The judge also took into account the time spent in pre-trial custody which amounted to two hundred and seventy-two days. Further, the judge considered the aggravating factors of the case, including the appellant's four previous convictions for possession of marijuana and the substantial quantity of marijuana in the case at bar, being 9.49kg[68].

(81) Counsel for the respondent relied on several authorities to support her contention that the sentence imposed by the judge was appropriate. In **Otto Lancaster v The State**[69], the appellant was convicted on March 1st, 2011 on a charge of possession of a dangerous drug, namely

[68] see Transcript of the Judge's summing up dated the 22nd March, 2012 at page 6, lines 42-45
[69] Cr. App. No. 4 of 2011

marijuana, for the purpose of trafficking. The marijuana weighed 10.47kg. The judge imposed a sentence of twenty-five years imprisonment with hard labour and a fine of $100,000, in default of payment, a term of imprisonment of fifteen years. In that case, Yorke-Soo Hon, J.A. said at para. 8:

> *"In Barry Francis and Roger Hinds, Crim. App. Nos. 5 & 6 of 2010 this Court held that the mandatory minimum imposed by the conjoint effect of Sections 5(5) and 61 of the Act was unconstitutional. In passing sentence the court said: "The effect of our decision is that the sentence for the offence of possession of a dangerous drug for the purpose of trafficking may vary from a maximum sentence of life imprisonment to such minimum sentence as the court sees fit, and in determining the appropriate sentence in any case the court must have regard to all of the factors set out in Smith, many of which are encompassed and repeated in Mano Benjamin. In addition, the court must have regard to the significant factor of Parliament's clear intention."*

At para. 12, Yorke Soo-Hon said that:

> *"The authorities on which counsel for the appellant relied, unfortunately, predate the recent decision of Francis and Hinds which has impacted the law of sentencing in drug possession cases. In that case, the Court was careful to point out that Parliament's clear intention to introduce severe penalties for trafficking offences could not be ignored: "On the question of approach by the sentencing judge, we are of the view that all the pertinent factors including, of course, the minimum sentence should be "put into the pot" and a balance struck where there are competing factors. This is as opposed to using the minimum sentence as a starting point and adjusting as circumstances warrant. The approach adopted will in no way ignore or diminish the intended purpose of Parliament."*

(82) In **Jerome Jobe v The State**[70], the appellant was sentenced to twenty years imprisonment. A deduction was allowed, taking into account the time he had spent in custody awaiting trial. The quantity of marijuana seized was 45.75kg. The appellant had a previous conviction for possession of marijuana. In passing sentence, the court considered the following: (i) the seriousness and prevalence of the offence and its deleterious effects on society, (ii) the quantity of the drugs, (iii) the previous conviction of the appellant, (iv) the clear legislative intent of parliament as reflective by section 5(5) of the Act and (v) the particular circumstances of the case.

(83) In **Uraz Mohammed v The State**[71], this court said at para 89:

> *The objectives of sentencing as outlined in the case of Benjamin v R (1964) 7W.I.R. 495 are applicable here and we are required to consider the five principal objects. First, the punitive, second, deterrent in respect of the appellant, third, deterrent in respect of potential offenders, then, the risk of the appellant reoffending and the rehabilitation of the appellant. As observed in the case of Farfan v R Cr App No. 34 of 1980 (unreported) in any particular sentencing exercise, some factors may be given more prominence than others. As in most offences of this nature, the object of general deterrence must be a weighty consideration given the prevalence and potential injury to the society of narcotic offences. Additionally, the issue of punishment must be carefully considered. Parliament in its wisdom has provided a minimum sentence of 25 years for this offence and this is a significant factor that must be considered alongside any other relevant matters.*

[70] Cr. App. No. 11 of 2011
[71] Cr. App. No. 23 of 2011

Analysis and Reasoning

(84) In sentencing, the judge took into consideration the aggravating factors of the offence, that is, the prevalence of drug trafficking offences in society, and the weight of the drugs involved (9.49 kg). After taking into account the two hundred and seventy-two days that he spent in pre-trial custody, the appellant was ordered to serve fifteen years, ninety-three days imprisonment.

(85) There is no basis to justify appellate interference with the judge's sentence. The judge correctly applied the relevant sentencing principles and remained within the available range of sentences. Further, the judge identified the relevant aggravating factors and took them into account. The sentence of fifteen years and ninety-three days falls within an appropriate range for similar offences involving a comparable quantum of drugs and factors peculiar to the offender.

This ground of appeal is without merit.

Disposition:

(86) We have found merit in the sixth ground of appeal. The appeal is allowed on this ground only and the conviction is quashed and the sentence of the judge is set aside.

Retrial

(87) With the convictions having been quashed and the sentence set aside, we turn now to consider whether it is appropriate to order a re-trial of this matter.

(88) In **Reid v R**[72], Lord Diplock set out the factors to be considered in deciding whether to retry a case. These include:

(i) The seriousness and prevalence of the offence;

(ii) The expense and length of time involved in a fresh hearing;

(iii) The ordeal suffered by an accused person on trial;

(iv) The length of time that would have elapsed between the offence and the new trial; and

(v) The strength of the case presented by the prosecution.

It was noted that this list is not exhaustive. It was otherwise held that it is in the interest of justice and the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.

(89) On the one hand, a factor that points against a retrial is the significant period of time which has elapsed, some fourteen years since the alleged offence. On the other hand, factors that point to the need for a retrial are the inherent seriousness of the offence, its prevalence in society and the appellant's criminal history, which may indicate an ascending level of involvement in drug offences. These latter factors coalesce into generating a strong public

[72] (1978) 27 WIR 254

interest in the appellant being retried, notwithstanding the passage of time. The balance comes down therefore in favour of ordering a retrial.

A retrial is accordingly ordered.

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A. Mendonca, J.A.

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R. Narine, J.A.

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M. Mohammed, J.A.