REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. S001 of 2015

BETWEEN

DENNIS SANDY
A/C "BROW"

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

P. Weekes, J.A.
A. Soo-Hon. J.A.
M. Mohammed, J.A.

APPEARANCES:

Mr. Daniel Khan for the appellant.
Mrs. Angela Teelucksingh-Ramoutar for the respondent

DATE DELIVERED: June 09th 2016

JUDGMENT

Delivered by P. Weekes, JA

1. In December, 2014, the appellant was convicted of possession of a dangerous drug, to wit, marijuana, for the purpose of trafficking, contrary to ***S. 5(4) of the Dangerous Drugs Act***[1]. He was sentenced to seventeen (17) years, one hundred and three (103) days imprisonment with hard labour. He has appealed his conviction.

2. To understand the nature of the grounds of appeal, it is necessary to rehearse the facts.

Facts:

3. On the 3rd January 2007, PC Ramadhin, armed with a search warrant to search the premises of one "Brow" for firearms and ammunition, arrived at a house at Lowkie Trace, Penal. The appellant was at the house when the police arrived and confirmed that he was known as "Brow".

4. After the appellant denied having anything mentioned on the warrant in the home, the premises were searched. In one of the bedrooms of the house, under a bed, four straw bags containing packets of what under testing was confirmed to be marijuana were found.

5. After caution the appellant remained silent. He was arrested subsequently. Later analysis confirmed that the marijuana weighed 61.44 kgs. At trial, the appellant did not himself give evidence, but called as witnesses two neighbours from Lowkie Trace. They spoke as to the appellant's presence around the home in question. One testified that the appellant had actually built the house, but he did not see the appellant daily because he, the witness, was not at home and he had not seen the appellant in or around the house for more than a month before January 3rd. He further said that the appellant had got married and left the house but that he saw him clearing up the place in the previous December. The other witness said he had not seen the appellant in months before the incident but that the appellant used to be in and out of the house.

[1] Chap 11:25

6. It was quite clear that the witnesses implied that the appellant was not resident at the premises, but interestingly, they both said that he owned them and put the appellant at the premises on the date in question. It is against that backdrop that grounds one (1) and two (2) have been filed.

The Appeal

Ground 1:

The trial judge erred in summing up as to the meaning of "occupier" in relation to the operation of S. 21(1) of the Dangerous Drugs Act in the context of this case.

Ground 2:

The trial judge did not properly sum up the appellant's defence, namely, that he was not in occupation of the premises.

7. The grounds essentially complain that the judge did not at all deal properly with the issue of whether or not the appellant was in occupation of the premises within the context of the relevant section of the ***Dangerous Drugs Act (The Act)***. S 21(1) of ***The Act*** provides as follows:

> *21. (1) Without limiting the generality of section 5(1) or (4), any person who* ***occupies, controls****, or is* ***in possession*** *any building, room, vessel, vehicle, aircraft, enclosure or place in or upon which a dangerous drug is found shall be deemed to be in possession thereof unless he proves that the dangerous drug was there without his knowledge and consent. [****Emphasis ours****]*

The effect of S 21(1) is to shift an evidential burden upon any person who is found to "occupy", "control" or be in "possession of" (ownership) of any building etc.

8. The judge focused his attention heavily on the element of occupation, correctly explaining its elements in keeping with the learning in ***Bharath and Bhoroquez v The State***[2]**.** He explained in general terms that presence, together with an element of control, constituted

[2] Cr. App. No. 49 & 50 of 2008.

occupation. We note additionally, that the other two limbs of the deeming provision, as S 21(1) is referred to, were also applicable. The legislation, by use of the three terms, seeks to cover a number of circumstances which may exist individually and/or cumulatively. So in respect of a building, one may own it without being in control or occupation of it, e.g. as where one rents out one's building to a tenant.

9. One may control without being in occupation or possession, e.g. when one neighbor has left his house keys with a fellow neighbor so that he can enter the neighbour's house to feed his fish. Such a neighbour is in control of those premises but neither occupies nor possesses them. And finally, one who does not control premises in the most obvious sense, or possess them, may occupy them where he is present and has some element of control over the physical space, e.g. where a squatter has taken to leaving his possessions in an abandoned building while he comes and goes. While each situation is distinct, they may all exist at one and the same time, as was clearly the case in the instant matter. An owner's absenteeism is not proof, without more, that he no longer has control of his premises. If one secured one's premises and went away on a long vacation, one cannot be said to have lost control of them.

10. Contrary to what was submitted by counsel, a finding that the appellant was an absentee owner would in no way be a "complete defence" to the charge. One being absent from one's home cannot automatically mean that what was in the home at the time of your absence is there without your knowledge and consent. A complete defence would only have been raised if and when the appellant proved that the drugs were there without his knowledge and consent. It was uncontroverted, (in fact, bolstered by the defence witnesses themselves) that the appellant was the owner of those premises (a fact which was never denied). He was in control of them, since there were no other occupants and he would come and go frequently, including maintaining the yard, and on the day in question he was present at those premises, as he would be from time to time. One witness did say that some persons would come into the yard of the premises from time to time but he had never seen them inside the house.

11. The appellant did not testify and therefore, never said that he did not own the premises. The warrant itself named "Brow" (the appellant) as owner and it was never disputed. Further, when approached by the police and asked whether he had anything in the warrant on the premises, the appellant did not take the opportunity then, (and this was not under caution) to distance himself from occupation, or for that matter, control or possession. The evidence of the neighbours was, in effect, that he owned the premises. While the probable intent of their evidence was to deny occupation, it in fact, had the opposite effect.

12. We are of the view that occupation was a clear inference on the facts, as were control and possession. The State could therefore rely on all three limbs of the deeming provision.

13. We are satisfied that the trial judge dealt with the issue of occupation adequately when the summation is read as a whole and the jury was sufficiently apprised of the connected issues. In any event, the other two limbs were alive and we do not find therefore, that the trial judge's emphasis on occupation was to the detriment of the appellant. Further, the evidence clearly satisfied S 21(1) in the other two particulars.

14. On the issue of the appellant's defence, counsel suggested that there were two aspects of the appellant's defence; (1) that the drugs were never found on his premises and (2) even if the drugs were found, they were there without the appellant's knowledge and consent. The trial judge confined his assessment of the case for the defence to the issue of whether or not the drugs were found on the appellant's premises. We are clear that that was the only defence that could have been advanced for the appellant.

15. The evidential burden having shifted to the appellant as per S 21(1), it fell to him to prove that the drugs were there without his knowledge and consent. His neighbours could not be of any assistance on that issue, as they could not speak to his knowledge or whether he had given any permission to have the drugs there. On the evidence, the appellant, who was at the home alone when the police arrived, was the only person who had access to the building.

There was no evidence that the neighbours or anyone else enjoyed the same privilege. It was only the appellant who could say that the dangerous drugs were there without his knowledge and consent. He did not testify and therefore, provided no evidence from which the presumption could be rebutted.

16. We have noted a recent trend in the conduct of criminal trials in which the accused gives no evidence (and sometimes calls no witnesses) and expects, in the absence of proof positive, that some "defence" will be put to the jury on his behalf. We pause to remind trial judges that while it is their duty to put before the jury fully any defence, however tenuous, that may be of assistance to an accused, they must be careful to determine whether any, or any particular defence has indeed been raised in law. In this case, the appellant did not either himself nor through his witnesses advance any evidence whatsoever that could raise the issue of his not having knowledge and consent of the drugs. The effect of the evidence of his witnesses was limited to addressing the issues of "occupation", "control" and "possession".

17. The judge was completely correct to couch the defence of the appellant as he did.

18. The foregoing grounds are without merit.

19. Ground three (3), that ***the trial judge improperly commented on the failure of the appellant to give evidence in the context that there was a burden shifted on him to rebut certain elements of possession, when in fact such evidence was given by the defence witnesses (sic)***, is connected to the foregoing grounds.

20. In respect of this ground, much of what has been addressed in ground two (2), answers the complaint herein made. We need only to say that the judge's comment that the appellant had not proven that the drugs were there without his knowledge and consent was entirely appropriate. The evidence which was led by the appellant's two witnesses in no way addressed this issue. Since no evidence was led by the appellant or his witnesses to raise the

issue, then clearly, the appellant could not have proven the matters falling upon him by virtue of the evidential shift.

21. This ground too must fail.

Ground 4:

The trial judge erred in law by misdirecting the jury with regard to the appellant as a person of good character.

22. Ground four (4) can be described as a non-starter, in the sense that it misapprehends the meaning of the direction. The direction given by the trial judge is what is considered to be the standard direction. A jury is not bound to give any weight, far less considerable weight, to an accused's good character and that is why the direction is couched in the terms that "*you, the jury may think that the accused is entitled to ask you to give considerable weight to his good character".* The emphasis is on the degree of weight, not whether or not, they consider the issue of good character. It is entirely for the jury to decide whether or not an accused is entitled to ask them to give considerable weight to his good character. It is open to them to find that when they consider all that they have heard about an accused in the course of a trial, that despite the fact that he has no previous convictions, he is not entitled to ask them to give considerable weight to the fact.

23. Giving the direction in the standard form leaves the question of the appropriate weight of an accused's good character for the jury. Counsel for the appellant, was forthright in saying that he could make no complaint about the judge's standard good character direction and that the propensity limb was the only one which was relevant as the appellant made no statement nor gave any evidence.

24. The judge's direction on this issue was impeccable.

25. This ground is entirely without merit.

Ground 5: [Withdrawn]
The trial judge erred in law when he refused an application by the defence to admit bad character evidence of a State's witness.

Disposition

26. In the above premises the appeal is dismissed. The conviction and sentence are affirmed, with sentence to run from date of conviction.

P. Weekes
Justice of Appeal

A. Yorke-Soo Hon
Justice of Appeal

M. Mohammed
Justice of Appeal