COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 124 of 2023

BETWEEN

PETER LEWIS

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 139 of 2023

BETWEEN

ANDY GLINTON

Intended Appellant

AND

THE COMMISSIONER OF POLICE

Intended Respondent

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 164 of 2023

BETWEEN

COLLIN RUSSELL

Intended Appellant

AND

THE COMMISSIONER OF POLICE

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Charles, JA

APPEARANCES: **Ms. Cassie Bethell with Mr. Ian Cargill, Counsel for the Appellant, Peter Lewis**

Ms. Maria Daxon, Counsel for the Intended Appellants, Andy Glinton and Collin Russell

Ms. Darnell Dorsette, Counsel for the Respondent

DATES: **5 October 2023, 9 November 2023**

****

Criminal appeal – Application for an extension of time within which to appeal - Possession of dangerous drugs with intent to supply – Appeal against convictions – Evidential burden of proof on owner or occupier of premises – Who is an occupier - Rebuttable presumption – Was the presumption discharged – No case to answer submission in summary proceedings - Whether the respective verdicts are unreasonable in light of the evidence – Whether evidence insufficient to sustain conviction – Whether the Magistrate erred or acted unreasonably Sections 22 (1), 22(3) and 29(6) of the Dangerous Drugs Act Ch. 228

Drug Enforcement Officers, armed with a search warrant, conducted a search on premises owned by Franklyn Emmanuel situated on Fire Trial Road East. The officers, with the assistance of Rexo, a drug detective dog, found 13 crocus bags and 2 loose packages of suspected marijuana in an apartment unit. The appellants were searched and found to all be in possession of a key that unlocked the door to the apartment unit where the drugs were found. As a result, the appellants, along with two others, were charged with possession of dangerous drugs with intent to supply, conspiracy to possess dangerous drugs with intent to supply, importation of dangerous drugs with intent to supply and conspiracy to import dangerous drugs. All accused pleaded not guilty and a trial ensued in the Magistrate's Court. Before the prosecution closed its case, one of the co-accused, Emmanuel Brown, died. At the close of the prosecution's case, the appellants and Franklyn Emmanuel made a submission of no case to answer. The Magistrate found that the prosecution's case did not support the charges of conspiracy to possess dangerous drugs with intent to supply, importation of dangerous drugs with intent to supply and conspiracy to import dangerous drugs. He acquitted and discharged the appellants of all offences except the charge of possession of dangerous drugs with intent to supply. The trial continued. The appellants denied knowledge, control and custody of the drugs which was found in the apartment unit. Franklyn Emmanuel was acquitted and the appellants were all found guilty and sentenced to 2 ½ years' imprisonment, fined $10,000.00, and an additional 6 months imprisonment, failing to pay the fine. The appellants now appeal their conviction on the basis, inter alia, that their convictions could not be supported having regard to the evidence.

Held: appeals allowed, convictions and sentences quashed.

Possession requires the physical control or custody of a thing and knowledge that you have it in your possession. Section 29(6) of the Dangerous Drugs Act deems possession of drugs found at a premises on "the owner" or "the occupier" of that premises. It is beyond dispute that the appellants were not "the owners" of the apartment. It is not clear from the Ruling whether, at the submission of no case to answer stage, the Magistrate considered the appellants to be "occupiers" and, as a

result, called upon them to answer to the charge of possession of dangerous drugs with intent to supply.

The only evidence against the appellants is that they each possessed a key to the apartment. However, the appellants were not the only ones with keys to the apartment. Based on the law, having a key in one's possession does not make that person "an occupier" for purposes of the DDA. Notably, there was no evidence that personal belongings of any of the appellants were found in the apartment, nor was there any forensic (fingerprint) evidence or surveillance camera capturing any of the appellants entering or exiting the apartment.

In the Court's view, additional evidence was necessary before the Magistrate could properly have satisfied himself beyond reasonable doubt that the appellants, being concerned together, had the requisite knowledge, control and custody of the drugs. In the circumstances, no evidential burden was placed on the appellants to provide any explanation consistent with their innocence and the Magistrate should have accepted their respective submissions of no case to answer.

Campbell v HM Advocate [2008] HCJAC 50 considered
Daryl Elmer Bartlett v The Commissioner of Police MCCrApp No. 136 of 2015 considered
Henderson and others v The Commissioner of Police [2015] 2 BHS J. No. 91 mentioned
Jessica Trembley v The Commissioner of Police SCCrApp No. 109 of 2011 considered
R v Carr-Briant [1943] 1 KB 607 mentioned
R. v Cavendish [1961] 2 All ER considered
Regina v Boyesen [1982] AC 768 considered
Seymour v COP [2014] 1 BHS J. No. 60 considered
Thompson v Solomon and another [2011] 3 BHS J. No. 11 mentioned
Thow v Campbell [1996] QCA 522 considered

JUDGMENT

Judgment delivered by the Honourable Madam Justice Charles, JA:

Introduction

1. The appellant, Peter Lewis and the intended appellants, Andy Glinton and Collin Russell (together and conveniently "the appellants"), along with two co-accused, Franklyn Emmanuel ("Franklyn") and Emmanuel Brown ("Brown"), were arrested and charged for:

> **"(i) Possession of dangerous drugs with intent to supply contrary to section 22(1) and 22(2)(b) of the Dangerous Drugs Act, Chapter 228;**
>
> **(ii) Conspiracy to possess dangerous drugs with intent to supply contrary to section 30(1), 22 (1) and 22(2)(b) of the Dangerous Drugs Act, Chapter 228;**

(iii) Importation of dangerous drugs with intent to supply contrary to section 15(6) and 29(2)(b) of the Dangerous Drugs Act, Chapter 228 and;

(iv) Conspiracy to import dangerous drugs contrary to section 30)1), 15(6) and 29(2)(b) of the Dangerous Drugs Act, Chapter 228."

2. In a trial in the Magistrate's Court before Magistrate Samuel McKinney ("the Magistrate"), the appellants were all found guilty of possession of dangerous drugs with intent to supply as charged under section 22(1) and 22(2)(b) of the Dangerous Drugs Act, Chapter 228 ("the DDA") and acquitted on all other charges. On 16 June 2023, they were each sentenced to two years and six months' imprisonment and fined the sum of $10,000.00 or an additional six months' imprisonment in default of payment of the fine. Their co-accused, Franklyn, was found not guilty and was acquitted. During the trial and before the close of the prosecution's case, the other co-accused, Brown, died.

Background

3. Since there was no issue with the accuracy of the Case Summary of the Magistrate in his Ruling, we rely of it for the factual matrix of these appeals with some modifications.

4. The case for the prosecution is as follows: On 10 March 2021, drug enforcement officers ("DEU officers"), armed with a search warrant and with the assistance of Rexo, the police drug detection dog, went to a yellow and white two-storey stone structure located at Fire Trail Road East to execute a search warrant on the owner(s) or occupier(s) of the building relative to the possession of dangerous drugs and firearms.

5. Upon arrival at the location, the DEU officers met the appellants standing in the front of the apartment complex where the drugs were found. The appellants, and the deceased, Brown, were taken from their respective homes and brought to the area of the apartment by some police officers who had preceded the DEU officers to the scene. To be succinct, the appellants were not found in the area of the apartment where the drugs were found.

6. The appellants were informed by Corporal King, one of the DEU officers, that they were suspected of being in possession of dangerous drugs and firearms and that a search of their person would be carried out. Corporal King carried out a search of the appellants and, during the search, he found a set of keys in the possession of each of the appellants.

7. Rexo, the drug detection dog, was then deployed by its handler, Corporal Knowles, to sniff the area for the presence of dangerous drugs. Rexo went to a northwestern door of a downstairs 'unoccupied' apartment that annexed the main building and gave Corporal Knowles an indication that drugs may be in that section of the building. The single entry door to the apartment had an entry lock and a deadlock fitted to it. Corporal King checked the locks to the door and found both to be locked. Using the set of keys which was retrieved

from Lewis, Corporal King tried them in the locks and found that one of the keys fitted and opened both locks. Once the door was opened, thirteen crocus bags and two loose packages of suspected marijuana were found on the floor near the door in plain view. The total weight of marijuana contained in the thirteen crocus bags and two loose packages was 336 pounds.

8. Lewis was then cautioned and arrested as a suspect for possession of dangerous drugs with intent to supply. He did not respond when he was informed.

9. Corporal King then tried the keys which he had retrieved from Russell and Glinton in the locks to the same door in which the suspected drugs were found. One of the keys retrieved from each of these appellants opened both locks of the door.

10. Russell and Glinton were also arrested as suspects for possession of dangerous drugs with intent to supply. Neither of them responded to Corporal King when he informed them that they were being arrested.

11. Franklyn, the owner of the apartment in which the drugs were found, was not present on the day of the search. He later turned himself in to the police. He was arrested and cautioned as a suspect for possession of dangerous drugs with intent to supply. He was also charged along with the appellants.

12. Later that day, Woman Detective Constable Elyse Pinder ("WDC Pinder") interviewed Brown, who was also charged. She informed him that he was suspected, along with others, of possessing thirteen bags and two loose packages of suspected marijuana with intent to supply them to another. She testified that Brown elected to participate in the interview without having an attorney present. She asked him a series of questions to which he provided answers. Brown admitted that the suspected marijuana belonged to him because he and Lewis gathered them. At the end of the interview, she invited him to read it over and sign it, which he did in her presence and that of Corporal King.

13. Brown also volunteered to make a statement under caution in which he stated:

> **"…Two days ago while I was home, my boy who I know as 'Jah man'/Rasta (Peter Lewis) came to me and told me that he saw some bags. He took me to where he saw them further down the curve about two corners down. He showed me the bags in the bush and I told him 'bey, that's weed, let's wait until dark fall.' When dark came me and Lewis went to move the bags and hide them someplace else. I don't know where he hid them…."**

14. The following day, on 11 March 2021, WDC Pinder conducted an interview with the appellant, Glinton. He denied that the drugs found in the apartment to which he had keys belonged to him. He averred that he lived with his uncle, Franklyn, in the main residence and when he moved to live with him in August, his uncle gave him the bunch of keys. He said that he was unaware that one of the keys was for the door to the apartment which was rented.

15. The appellant, Russell, was also interviewed by WDC Pinder on 11 March 2021. He had arrived from Jamaica just a few days prior to the incident on two weeks' vacation. He was staying with his friend, Franklyn, who gave him a set of keys. He said that Franklyn gave him the keys so he could enter the main residence where he was staying. He denied that the drugs belonged to him.

16. WDC Pinder also interviewed the appellant, Lewis, on 11 March 2021. During the interview, he acknowledged that he knows Franklyn and Glinton. He also knew Brown from the Grove area. Lewis said that Franklyn gave him the keys to the apartment where the drugs were found because he did some work for him in the apartment in October 2020. He did the tiling and assisted Franklyn in building the cabinets. He said that he was given the keys to enable him to easily access the apartment so that he could work. The last time he used the keys for the apartment was "**months ago**." He did not return the keys to Franklyn. Like the other appellants, Lewis denied that the drugs belonged to him.

17. On 23 March 2021, WDC Pinder conducted an interview with Franklyn in the presence of Officer 3304 Mackey. His passport was found in the apartment. He denied any knowledge, control and custody of the drugs which were found in the apartment.

The Trial in the Magistrate's Court

18. The trial took place before the Magistrate with the appellants and their two co-accused pleading not guilty to the four charges. Shortly before the prosecution closed their case, Brown, who was also charged with the four offences, died.

19. At the trial and following the close of the prosecution's case, through their respective Counsel, Lewis and Russell made submissions of no case to answer. Glinton, who was unrepresented, also made a no case submission. Pursuant to section 203 of the Criminal Procedure Code Ch. 91 ("the CPC"), the appellants, as well as Franklyn, were all acquitted and discharged on all charges save for the possession of dangerous drugs with intent to supply. The Magistrate ruled that they each had a case to answer on that charge.

20. The trial continued. Franklyn testified. Under oath, he stated that he rented the apartment where the drugs were found to Brown for $400.00. On the day in question, he was in Abaco. He left Glinton and Russell in the main residence. The apartment is attached to the main residence. Frankly said that he had a key for the apartment where the drugs were found because he is the owner of the apartment. His niece, Monique Bullard, also had a key to the apartment which she gave to Glinton. Russell had a key because he was doing work over a year before the drugs were found and accidently took the keys with him to Jamaica. He said that Russell had painted the apartment. He denied any knowledge of the drugs which were found in the apartment.

21. During cross examination, Franklyn stated that Lewis did work for him in the apartment and he gave him one key to put some baseboards in the apartment. According to him, there were four sets of keys to the apartment and the original keys which came with the lock. He testified

that Lewis had the key to the apartment about a month before the drugs were found. Franklyn also stated that Russell got the key to the apartment from his niece.

22. Lewis testified and called his fiancée, Tanzinia Higgs ("Higgs"), as his witness. His evidence is that on 10 March 2021, around 5 or 6 in the morning, he was awakened by a loud knock on the door of his residence and persons saying, "**police, police**." He put on some clothes and opened the door. He saw police officers who said that they wanted to search his residence for drugs. They searched and they did not find any drugs. The officers then took him and Higgs outside and left them speaking to three other officers while they left with the dog to search the yard. About fifteen to twenty minutes later, the officers returned and took him to Brown's residence, which is in another yard. They searched Brown's yard and then Franklyn yard. The officers found drugs in the apartment to which he had a key. According to him, Franklyn gave him a key to do some work in the apartment, which he completed about two months before the drugs were found. He lived a couple of blocks away from the apartment where the drugs were found.

23. During cross examination by the prosecutor, Lewis said that he knows the other appellants. He also knows Franklyn and he knew Brown. They live in the same area. He said that Brown was not staying in the apartment where the drugs were found and no one lives there. Lewis said that he had the key about two months prior to the incident. He did baseboards, crown moulding and other works. He said that the police did not take him to the apartment, but they took the key from him. Lewis emphatically denied knowledge of the drugs found in the apartment.

24. Higgs testified that she was at home sleeping when she heard a loud knock on their door. When she found out that they were police officers, "**they"** opened the door. The officers searched their residence and then took Lewis to another yard with them. She was arrested but not charged. During cross examination, Higgs stated that she knew Brown because he lived in the back building. The drugs were found in Franklyn building. She was aware that Lewis had a key to Franklyn building because he did some work for him there.

25. Glinton and Russell remained silent and closed their respective cases.

26. The appellants were all found guilty of possession of dangerous drugs with intent to supply pursuant to sections 22(1) and 22(2) (b) of the DDA. They were each sentenced to two years and six months' imprisonment and fined the sum of $10,000.00 or an additional six months' imprisonment in default of payment of the fine.

27. Additionally, the Magistrate found that there was not sufficient evidence to convict Franklyn. He was therefore acquitted and discharged of the offence of possession of dangerous drugs with intent to supply under section 209 of the CPC.

28. After a correct exposition of the law on possession, the Magistrate asked the question: "**why would all of the defendants need keys for the same door?**" He determined that this question was a very important one, considering the circumstances surrounding the apartment space where the drugs were stored.

29. With respect to Lewis, the Magistrate at page 7 of the Ruling stated:

> **"Why did defendant Peter Lewis have a key for an apartment that has been rented out to another who held exclusive rights to the rental space? As in the case of defendant Russell, <u>there exist great differences in the story told by defendant Peter Lewis and defendant Franklyn Emmanuel, the property owner, as to the reason and length of time Peter Lewis was given a key for the apartment space in which the drugs were found.</u> This suggests that the defendants who are charged with committing the same offence may be untethered to the truth. [Emphasis added]**
>
> **The following are some questions asked by the interviewer of defendant Peter Lewis and the answers in response he gave to the interviewer explaining how he came to be in possession of the apartment key in which the drugs were found:**
>
> **Q 5: Do you know Franklyn Emmanuel?**
>
> **A 5: Yes mam. I do some work for him in October.**
>
> **Q 6: Where was the last place you helped him with?**
>
> **A 6: The apartment where y'all find the stuff. I did the tiles and helped him build the cabinets last year.**
>
> **Q 7: Do you own keys for this apartment?**
>
> **A 7: Yea I did get the key from him that's when I was working for him so I could go back and forth.**
>
> **Q 8: When was the last time you used the key for the apartment?**
>
> **A 8: That's months ago.**
>
> **Q 9: I now show you a set of keys. Does this key belong to you?**
>
> **A 9: Yes mam.**

Q 10: I now show you a key on your bunch that was used to open the apartment door. Do this belong to you?

A 10: Yes, I mean I have it now. I was doing the work. I just ain't give it back." [Emphasis added]

30. The Magistrate recorded that Lewis relied on some receipts to demonstrate that he did work for Franklyn in the apartment where the drugs were found. He found that the receipts were in Lewis' name; they were dated more than a year prior to the discovery of the drugs and they relate to roofing and general construction materials (windows, felt, roofing shingles, etc.) as opposed to tiling, cabinet construction and baseboards; the kind of work Lewis alleged that he did in the apartment where the drugs were found. In essence, he disbelieved Lewis' account.

31. With respect to Russell, the Magistrate, at pages 6 -7 of his Ruling, stated:

"Not only did Collin Russell arrive in The Bahamas on March 3, 2021, and possessed a key for the unoccupied space in which a substantial amount of drugs were discovered, but following his arrival in the country, he used a key to enter that same space twice within a week prior to the discovery of the drugs. This defendant was asked the following questions and provided the following answers in his record of interview dated March 11, 2021:

"Q 3 (sic): When did you arrive in The Bahamas?

A 3 (sic): Friday.

Q 5: When were you to return back to Jamaica?

A 4 (sic): Next week Friday on the 19th.

Q 13: I now show you a set of keys with a FedEx bottle opener key ring. Does (sic) these keys belong to you?

A 13: It's Mr. Emmanuel's key. He give it to me so that I could have gotten back inside. I only used the key two times Saturday and Monday.

Q 14: Did he tell you what the keys was (sic) for?

A 14: No ma'am.

Q 16: Who owns the apartments?

A 16: <u>Mr. Emmanuel</u>." [Emphasis added]

32. With respect to Glinton, the Magistrate, at page 9 of the Ruling, stated

> **"The story defendant Andy Glinton gave for how he came to be in possession of a key that also unlocked both locks to the apartment in which the drugs were found <u>is also different from that given by defendant Franklyn Emmanuel, the property owner, who is his uncle</u>. In his sworn evidence from the witness box, defendant Franklyn Emmanuel testified and said, "My niece, Monique Bullard, had a key for the apartment where the drugs were found. She gave the apartment key to Any Glinton, my nephew.**
>
> **Defendant Andy Glinton was asked the following questions by the interviewing officer and gave the following answers:**
>
> **Q 7: Who do you live with?**
>
> **A 7: I live with my uncle, Franklyn Emmanuel, and he have (sic) a friend that just came from Jamaica on Friday, Collin.**
>
> **Q 8: I now show you a bunch of keys. Do they belong to you?**
>
> **A 8: Yes mam, They were given to me.**
>
> **Q 9: I now show you a key that was used to open the apartment door. Does this belong to you?**
>
> **A 9: <u>I don't know the label of these keys. When I move (sic) by my uncle in August he gave me them keys.</u>**
>
> **Q 10: <u>Did he tell you what the keys was (sic) for</u>?**
>
> **A 10: <u>He tell (sic) me these keys for the house. I didn't know they was (sic) for the back because he does rent them.</u>" [Emphasis added]**

33. At page 10 of the Ruling, the Magistrate noted that, at the time that the drugs were found, the apartment seemed to have been used as a storage or junk room. He examined the exhibits which were produced by the prosecution and opined that the apartment space was not in a

condition fit for human habitation. He justified his finding on the fact that there was a weed wacker, quarts of motor oil, a bucket, a portable generator, pieces of cut wood and containers of nails on the floor.

34. Franklyn also exhibited some photographs which, according to the Magistrate, showed a totally different apartment space which resembled an occupied living space. He concluded that the photographs produced by Franklyn were "**deceptive**".

35. It is important to mention that Lewis' evidence, as well as the other appellants' Record of Interviews (they did not testify at the trial), were not controverted by any of the prosecution witnesses. That said, it appeared that where the appellants' evidence contradicted that of Franklyn, the Magistrate preferred Franklyn's evidence over theirs, although he refrained from saying that he found Franklyn to be a credible witness. In fact, relative to the rental receipts which Franklyn produced in his attempt to demonstrate that he rented the apartment to Brown, the Magistrate opined that those receipts were "**dubious**". He also candidly rejected the photographs that Franklyn introduced into evidence to make the space look like an occupied living space and referred to them as **"deceptive."**

The Appeal

36. The appellants now appeal their respective convictions, having abandoned their appeals against sentence.

37. Lewis launched his appeal on three substantive grounds namely:

> **"Ground One: The decision of the Learned Magistrate to convict the Appellant was unreasonable and could not be supported having regard to the evidence.**
>
> **Ground Two: The decision of the Learned Magistrate to convict the Appellant was unreasonable, unsatisfactory and unsafe.**
>
> **Ground Three: The decision of the Learned Magistrate was one that another Magistrate viewing the circumstances could not properly arrive at."**

38. Glinton's amended grounds of appeal are as follows:

> **Ground One: That he decision of the Magistrate was unreasonable or could not be supported having regard to the evidence that the Intended Appellant had no knowledge or custody and control of the drugs.**
>
> **Ground Two: That evidence was wrongly rejected and there was not sufficient evidence to sustain the decision.**

(a) The Magistrate convicted the appellants notwithstanding that Emmanuel Brown confessed in his record of interview and statement and admitted to and took ownership of supplying and being in possession of the drugs, rendering the [intended] appellant's conviction unsafe.

(b) The Magistrate was unfair in convicting and sentencing the [intended] appellant as there is no cogent evidence to support the conviction."

39. Russell's grounds of appeal mirror that of Glinton's. There is no need to repeat them.

40. In our judgment, these grounds raise the following two issues:

(i) Whether the decision of the Magistrate to convict the appellants was unreasonable and could not be supported having regard to the evidence and;

(ii) Whether the convictions were unreasonable, unsafe and unsatisfactory.

The Law

41. Section 22(1) of the DDA provides:

"22(1) It is an offence for a person to have a dangerous drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of the provisions of this Act."

42. Additionally, section 22 (3) provides:

"22(3) For the purposes of subsection (1), where a person is found in possession of two or more packets containing dangerous drugs, or a quantity of dangerous drugs in excess of such quantity as may be prescribed in regard to that drug, <u>it shall be presumed, until the contrary is proved</u>, that he was in possession of that drug with intent to supply it to another or others, irrespective of whether that other or others be within The Bahamas or elsewhere." [Emphasis added]

43. Since there is no statutory definition of "possession", we must therefore rely on judicial authorities to find out what constitutes "possession." On possession, Lord Scarman, in the House of Lords case of **Regina v Boyesen** [1982] AC 768 at page 773 said:

> **"Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it."**

44. In the case of **Daryl Elmer Bartlett v The Commissioner of Police** MCCrApp No. 36 of 2015, Isaacs JA expounded on the meaning of possession and stated:

> **"18. This Court (differently constituted) stated in Seymour v Commissioner of Police [2014] 1 BHS J. No. 60:32. Section 22(1) of the Dangerous Drugs Act provides that it is an offence for a person to have dangerous drugs in his possession, whether lawfully or not, with intent to supply it to another. There is no statutory definition of 'possession' and one must therefore rely on judicial authorities to discover what constitutes 'possession.'**
>
> > **33. In this regard, we refer to the dictum of Dame Joan Sawyer in paragraph 24 of her judgment in Kapry Kemp v Commissioner of Police (MCCr.App. No. 37 of 2005), where she explained what in her view was the meaning of 'possession' in the Firearms Act. Notwithstanding that was a case involving the possession of firearms, we find the passage equally instructive to the meaning of 'possession' in section 22 of the Dangerous Drugs Act. She said:**
> >
> > > **'For my part, I think <u>the word 'possession' as used in sections 5 and 9 of the Act means actual or constructive possession with knowledge of what the thing possessed is. It is not concerned with any particular act but rather a state of affairs, for a person may be in legal possession of property in several different countries or places simultaneously although actually and physically resident in another while the property or properties are in the actual control of another or others.'</u>**
> >
> > **<u>34. It is well settled that to be in possession of a thing does not require one to be in actual physical possession of that thing. Indeed, one is in</u>**

> **possession if the drug is in the custody of the appellant, or is subject to his control, provided he knows that the drug exists, and is in his possession (See R v Lambert [2001] 3 All ER 577 at 598)" [Emphasis added]**

45. Subsection 29(6) of the DDA states:

> **"29(6) Where any drug to which this Act applies is, without the proper authority, found in the possession of any person or stored or kept in a place other than a place prescribed for the storage or keeping of such drug, such person, or the occupier or owner of such place or the owner of or other person responsible for the keeping of such drug unless he can prove such drug was deposited there without his knowledge or consent, shall be guilty of an offence against this Act." [Emphasis added]**

Discussion

Issue 1: Whether the decision of the Magistrate to convict the appellants was unreasonable and could not be supported having regard to the evidence

46. Ms. Bethell, appearing as Counsel for Lewis, submits that during the trial no evidence was led to suggest or establish that Lewis was in possession of the drugs that were found in the apartment. She further submits that the prosecution failed to establish that Lewis was the owner or the occupier of the apartment.

47. According to her, the evidence led by the Prosecution witness WDC Pinder, is that the apartment where the drugs were found was owned by Franklyn and not Lewis. In addition, another Prosecution witness, Corporal King, stated during cross examination that Lewis' name was not on the search warrant which authorised them to search the apartment. Counsel contends that this evidence supports Lewis' argument that he was not the owner and was never the occupier of the apartment and the Magistrate ought to have acquitted him at the submission of no case to answer stage.

48. In bolstering her case for Lewis, Ms. Bethell argues that the Prosecution failed to adduce any evidence, documentary or otherwise, to refute Lewis' evidence that he was not an occupier of the apartment. In fact, during the trial, Lewis and his fiancée Higgs testified that Lewis did not reside in the apartment where the drugs were found, but they lived several hundred feet away from the apartment. Lewis and Higgs also testified that the police removed them from their residence and took Lewis to the apartment where the drugs were found. Ms. Bethell asserts that this evidence remained uncontroverted. Further, during the cross examination of WDC Pinder, she admitted that when she arrived at the scene, Lewis was already detained and she never saw him inside the apartment where the drugs were found.

49. Ms. Bethell submits that, on the evidence, the statutory presumption of possession in section 22(3) of the DDA was never engaged relative to Lewis and, consequently, he was not required to rebut that presumption. She argues that the presumption of ownership ought to have been placed on the owner of the apartment, Franklyn, who was acquitted at the end of the trial.

50. Ms. Bethell further submits that the Prosecution's case against Lewis, taken at its highest, is that Lewis had a key to the apartment where the drugs were found. The fact that he had a key without more, is insufficient to impute custody, control and knowledge of the drugs to him, bearing in mind that other persons had keys to the apartment. She further submits that because someone has access to a premises does not equate to him being in possession of the contents therein without any proof of the same.

51. Ms. Bethell further argues that, during the trial, Lewis testified that he was given the keys to the apartment by the owner, Franklyn, because he was hired to do some work in the apartment, namely baseboard work, tiling and crown moulding which he did months prior to the alleged incident. Lewis' evidence was corroborated by Franklyn. The differences in the two versions, as identified by the Magistrate, is that Franklyn said that he had given Lewis the key to the apartment about a month prior to the discovery of the drugs and the reason why he gave Lewis the key was to install some baseboards and not tiling and cabinets as Lewis stated. She submits that the Magistrate gave no reason why he preferred Franklyn's evidence to that of Lewis or, for that matter, the other appellants, especially since he had already ruled that Franklyn had produced dubious receipts with respect to the rental of the apartment to Brown and also photos which did not portray what the apartment looked like on the day in question.

52. Ms. Bethell submits that for Lewis to be convicted the Prosecution ought to have produced forensic (fingerprint) evidence, photos and/or surveillance footage depicting that Lewis transported the drugs to the apartment at some point in time. She next submits that, given the insufficiency of evidence, the decision of the Magistrate to convict Lewis was not only unsafe and unsatisfactory, but it could not be supported by the evidence and is one that another Magistrate viewing the circumstances could not properly arrive at all.

53. Ms. Daxon, who appeared for Glinton and Russell, made similar arguments to that of Ms. Bethell. Additionally, she submits that the drugs were found in the apartment which was rented to the deceased Brown, who had exclusive control of the apartment and that the Magistrate ought to have accepted Brown's confession and convict him and any unsworn statement he made pointing to the involvement of any co-accused is not evidence against the co-accused. We accept that it is trite law that out of court admissions by co-accused is only evidence against the maker and cannot be used against his co-accused at trial.

54. Ms. Daxon further submits that Glinton had no knowledge that one of the keys was for the apartment where the drugs were found. In his Record of Interview with the police, Glinton stated that he was given a set of keys by his uncle, Franklyn, when he moved in to live with him. His uncle told him that the keys were for the house (main residence) and he did not realise that one of the keys opened the door to the apartment which was rented.

55. With respect to Russell, Ms. Daxon submits that he was on vacation and was staying at the main residence. He was given a bunch of keys by Franklyn. One of the keys opened the door to the apartment where the drugs were found. He had previously done some work in that apartment.

56. It appears to us that the Magistrate fell into error when he concluded that Russell used a key to enter **that same space** [the apartment] twice within a week prior to the discovery of the drugs when, in fact, Russell was referring to the key to enter the main residence. Franklyn himself said that he left Glinton and Russell in the main residence.

57. With respect to the appellants, the Magistrate had this to say:

> **"The court has had the opportunity to see, hear and observed (sic) the witnesses as they gave their evidence under oath from the witness stand. The court found witnesses for the prosecution to be truthful and credible. None of the witnesses was shaken or discredited during cross examination.**
>
> **The court prefers the evidence of the prosecution over that of the defendants Peter Lewis, Collin Russell and Andy Glinton and found that the prosecution proved its case to the requisite standard, beyond reasonable doubt, that these three defendants were concerned together on March 10, 2021, without the requisite authority to possessed (sic) with intent to supply, the 336 pounds of marijuana which were stored in an apartment building to which they all possessed a key permitting total access to, custody and control of the drugs.**
>
> **<u>Why would all of the defendants need keys for the same door</u>? The answer the court found is that given the circumstances of this case, the unbelievable explanation the three defendants gave for how they came to possess, and for what purpose they each possessed a key for the apartment door in which the drugs were found, the court infers that these defendants had knowledge that the drugs were stored in the unoccupied apartment, and imputes guilt to defendants Peter Lewis, Collin Russell and Andy Glinton."[Emphasis added] (At pages 10- 11 of the Ruling)**

58. The Magistrate preferred the evidence of the prosecution over that of the appellants and found that the prosecution proved its case to the requisite standard, beyond reasonable doubt.

59. Ms. Dorsette, appearing as Counsel for the prosecution, tersely argues that the fact that each appellant had a key to the apartment where the drugs were found is cogent evidence to support the Magistrate's decision that he acted reasonably in convicting the appellants. She also submits, albeit incorrectly, that the appellants were found standing in the front of that very building/apartment. The evidence is that the police officers who had preceded the DEU officers to the scene went to the respective homes of the appellants, including the deceased Brown and brought them to the area of the apartment. It is a fact that when the DEU officers arrived at the scene, the appellants were standing in front of the building/apartment because the officers brought them there.

60. It is a fact that the Magistrate disbelieved the appellants' version and preferred the evidence adduced by the prosecution witnesses. Now, what is the evidence given by the prosecution witnesses?

61. In a nutshell, their undisputed evidence is that the police officers took the appellants from their respective homes, brought them to the area in front of the apartment and searched them. Previous to that, the officers searched their homes. No illegal substance was found in their homes or on their person. Each appellant had a set of keys, one of which opened the door of the apartment where the drugs were found. It is also undisputed that Franklyn is the owner of the main residence and the apartment where the drugs were found.

62. Section 29(6) of the DDA deems possession of drugs found at a premises on "the owner" or "the occupier" of that premises. It places an evidential burden on the "owner" or "occupier" of that premises or place where the drugs are found to provide an explanation consistent with innocence. It is beyond dispute that the appellants were not "the owners" of the apartment. It follows that if any/all of them were "occupiers", then the statute places the evidential burden on them to explain their innocence.

63. It is not clear from the Ruling whether, at the submission of no case to answer stage, the Magistrate considered the appellants to be "occupiers" and, as a result, called upon them to answer to the charge of possession of dangerous drugs with intent to supply. This, in our opinion, was the first hurdle that the Magistrate ought to have addressed his mind to. Scrutinizing the Ruling, it appeared that he failed to do so.

64. Were the appellants or any one of them "the occupier" of the apartment? The DDA does not provide a definition of " occupier", so it becomes a question of fact to be determined on a case-by-case basis by the courts. We must therefore rely on judicial authorities. That said, there appears to be a dearth of case law from our region. Certainly, none was proffered to us. Our own research guided us to the case of **Thow v Campbell** [1996] QCA 522 from the Supreme Court of Queensland which provides useful assistance on some factors which are considered relevant to determining " occupier" under s. 57(c) of their Misuse of Drugs Act, namely:

(i) Ownership of the place where drugs are found is not enough to establish occupation of it; and

(ii) Mere presence in a place is not enough to establish occupation of it. Rather, occupation is commonly treated as "being dependent upon control, in the sense of being able to exclude strangers." The occupier of a place will thus have the ability to exclude strangers from it. [Emphasis added]

65. Importantly, a person does not need to be present at the property to be deemed an occupier, but there needs to be proof the person had, or purported to have, a right to exclude others from the place. **[Emphasis added]**

66. In this appeal, taken at its highest, the evidence of the prosecution witnesses is that the appellants possessed keys to the apartment where the drugs were found. Does having the keys without more make the appellants "the occupiers" of the apartment? In our opinion, the question must be answered negatively.

67. In a somewhat factually similar case of **Campbell v HM Advocate** [2008] HCJAC 50, the appellant was charged with and convicted of a number of offences, including being in possession of a firearm without holding a firearm certificate. The evidence in support of the firearm charge consisted of a single finger and partial palm print of the appellant on a plastic bag in which the firearm was wrapped. There was no evidence to establish that the appellant's fingerprints were deposited on the bag at a time when the firearm was in it. Seven other unidentified impressions were found on it. The appellant appealed his conviction on two discrete grounds; the first being that the trial judge erred in rejecting a submission that there was insufficient evidence to support the charge. In allowing the appeal on this ground, the court ruled that the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge of and control over the rifle concealed in the cupboard. The court continued:

> **"16. …the sufficiency of circumstantial evidence must be decided on the basis of the particular facts and circumstances of each case….**
>
> **…**
>
> **19. …There was no evidence that the appellant had ever been seen with the rifle, … There was no evidence that his prints had been found on the cupboard itself, or on the water tank, or on the plinth supporting the tank, or on any nearby surfaces… The rifle itself did not carry the appellants prints, and there was no evidence assisting with the date on which, or the circumstances in which, the appellants prints came to be on the plastic bag wrapped round the rifle… Nor was there any evidence which might assist in ascertaining the date on which the rifle had been concealed. We do not regard as significant the circumstance that, at the time when police searched the flat, there were no plastic bags available for domestic**

> **use. All that the evidence could establish was that one of the two black plastic rubbish bags wrapped round the concealed rifle carried the appellant's fingerprint and palm print, together with seven other unidentified prints unrelated to either the appellant or his co-accused.**
>
> **20. …The jury would be entitled to infer that the appellant had indeed come into contact at some time with the black plastic bag (a moveable item) which had been used by someone to wrap up the concealed rifle. … thus additional evidence would in our view be necessary before the inference could properly be drawn beyond reasonable doubt that he had been involved in handling or concealing the rifle and thus that he had the requisite knowledge of and control over the rifle… However in our view the evidence in the present case did not reach the stage or attain the level at which a jury would be entitled in law to consider competing interpretations including one of guilt on the part of the appellant of the offence libelled in charge 31." [Emphasis added]**

68. The case of **Jessica Trembley v The Commissioner of Police** SCCrApp. No. 109 of 2011 also provides some assistance. In that case, the appellant was charged with three other persons, JH, MS and SC, with one count of being in possession of a firearm and one count of being in possession of ammunition contrary to the provisions of the Firearms Act Chapter 213.

69. The case for the prosecution was that police officers on patrol along Windsor Lane in New Providence observed a grey Kia vehicle travelling in the opposite direction. That vehicle turned into a parking lot in the vicinity of the government building complex. The police intercepted the vehicle and asked the occupants to come out. SC and Trembley were sitting in the rear seat. SC immediately exited the vehicle and ran. The appellant, when asked to come out of the vehicle, did not do so right away. When she eventually came out, a black revolver was found on the passenger seat. SC was subsequently arrested. At the close of the prosecution case, SC was discharged after a submission of no case to answer was made on his behalf. In discharging him, the Magistrate ruled:

> **"that there was insufficient evidence adduced relative to him. The court further noted that the only evidence pointing to his involvement was contained in the statement of a co-accused and that, in law, it is not evidence against him."**

70. Trembley gave evidence on oath. The Magistrate found her evidence to be untruthful, unreliable and simply incredible. She was found guilty and sentenced to 18 months' imprisonment.

71. On appeal, her conviction was quashed because the Court of Appeal opined that the finding of guilt by the Magistrate demonstrated a lack of the principles set out in **R. v Cavendish** [1961] 2 All ER at 858 and **R v Carr-Briant** [1943] 1 KB 607. In **Cavendish**, Parker LJ said:

> **"The sole question, as it seems to this court, is whether a case was made out at the end of the prosecution's case which called for an answer. Certain propositions are quite clear. It is quite clear, without referring to authority, that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he has become aware of them and exercised some control over them…" [Emphasis added]**

Submission of No Case in Summary Proceedings

72. The appellants complained that the Magistrate erred when he determined that they each had a case to answer on the charge of possession of dangerous drugs with intent to supply.

73. Section 203 of the CPC deals with the acquittal of an accused person if there is no case to answer. It provides:

> **"203. At the close of the evidence in support of the charge, the court shall consider whether or not a sufficient case is made out against the accused person to require him to make a defence, and if the court considers that such a case is not made out the charge shall be dismissed and the accused forthwith acquitted and discharged." [Emphasis added]**

74. At page 3 of his Ruling, the Magistrate stated:

> **"After hearing submissions from counsel on behalf of their clients, and Andy Glinton, who was unrepresented, and response from prosecution with regards to no case to answer, the court acquitted and discharged the defendants pursuant to section 203 of the Criminal Prodecure Code Chapter 91 on the following charges due to insufficient evidence led by prosecution to call upon either defendant to make a defence:**
>
> **(a) Conspiracy to possess dangerous drugs with intent to supply contrary to section 30(1), 22 (1) and 22(2)(b) of the Dangerous Drugs Act, Chapter 228;**

(b) Importation of dangerous drugs with intent to supply contrary to section 15(6) and 29(2)(b) of the Dangerous Drugs Act, Chapter 228; and;

(c) Conspiracy to import dangerous drugs contrary to section 30)1), 15(6) and 29(2) (b) of the Dangerous Drugs Act, Chapter 228."

75. By calling on each appellant to make a defence with respect to the remaining charge of possession of dangerous drugs with intent to supply, it is reasonable to infer that the Magistrate found that a case was made out sufficient to require each of the appellants to make a defence in accordance with section 204 of the CPC.

76. In **Seymour v COP** [2014] 1 BHS J. No. 60, this Court, differently constituted, examined what is required by a sufficient case in summary matters. Allen P said:

> **"19. What is a sufficient case can be discovered from the guidance of Lord Parker C.J. (as he then was) in his Practice Direction (Submission of No Case) [1962] 1 WLR 227 handed down particularly for the guidance of magistrates in summary trials, and the guidance given in R v Galbraith [1981] 1 W.L.R. 1039 by the English Court of Appeal, for determining a no case submission in trials on indictment.**
>
> **20. Lord Parker's test is that: '<u>A submission that there is no case to answer may properly be made and upheld:</u>**
>
> > **<u>(a) when there has been no evidence to prove an essential element in the alleged offence;</u>**
> >
> > **<u>(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.</u>'**
>
> **21. The guidance in Galbraith is somewhat different from that given by Lord Parker for summary trials, in that allowance is made for the fact that in trials on indictment, the judge is the judge of the law, and the jury is the judge of the facts. That guidance is as follows:**
>
> > **'1.If there is no evidence that a crime alleged has been committed by the defendant there is no difficulty the judge will stop the case.**

2. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence:

(a) where the judge concludes that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case;

(b) where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the jury's province and where on one possible view of the facts there is evidence on which the jury could properly conclude that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

22. Moreover, as suggested by the authors of the 1999 Blackstone's Criminal Practice, the Parker test appears to allow a somewhat broader discretion to magistrates than that given to judges in R v Galbraith. They suggest that the test in R v Galbraith is marginally more restrictive than the Parker test in that it requires the judge to take the prosecution at its 'highest' whereas Lord Parker allows for the evidence before magistrates being 'so discredited by cross-examination that, in their view no reasonable tribunal can safety convict on it'.

23. The authors go on to say, however, that they are nevertheless of the view that the Parker test is close to that in R v Galbraith. At paragraph D19.8 they said:

'Nonetheless, the broad thrust of Lord Parker's Practice Direction- as of the judgment in Galbraith-is that, assuming the necessary minimum amount of prosecution evidence has been adduced so as to raise a case on which a reasonable tribunal could convict, the magistrates should allow the trial to run its course rather than acquitting on a submission.'

> **24. We are satisfied that the above view comports with the guidance given by the above tests, taking into account the dual role of magistrates in summary trials, and that of judge and jury in trials on indictment. We adopt it as applicable to the exercise of the discretion on a no case submission in summary trials." [Emphasis added]**

77. This approach to a no case submission in summary trials was reaffirmed by Isaacs JA in delivering the judgment of the Court in **Henderson and others v The Commissioner of Police** [2015] 2 BHS J. No. 91 at paragraphs 31 to 34.

78. In the present appeal, at the close of the prosecution's case, the only evidence against the appellants is that they each possessed a key to the apartment. However, the appellants were not the only ones with keys to the apartment. Franklyn acknowledged that, as the owner of the apartment, he also had a key. In her testimony, WDC Pinder stated that she found a set of keys on a microwave in the main residence and Franklyn said that there was an original set of keys and four other sets. Based on the law, having a key in one's possession does not make that person "an occupier" for purposes of the DDA. Notably, there was no evidence that personal belongings of any of the appellants were found in the apartment, nor was there any forensic (fingerprint) evidence or surveillance camera capturing any of the appellants entering or exiting the apartment.

79. In our judgment, additional evidence was necessary before the Magistrate could properly have satisfied himself beyond reasonable doubt that the appellants, being concerned together, had the requisite knowledge, control and custody of the drugs. The evidence did not attain the level.

80. In the circumstances, no evidential burden was placed on the appellants to provide any explanation consistent with their innocence and the Magistrate should have accepted their respective submissions of no case to answer.

81. For argument sake, if we accept that, by rejecting the appellants' no case submission, the Magistrate impliedly deemed them "the occupiers", then the burden shifts to the appellants to give some explanation consistent with their innocence.

82. Lewis gave evidence in his Defence. He testified that he lives in a different residence in the same yard. He had the key because Franklyn gave it to him to do some work in the apartment. He completed the work months prior to the discovery of drugs in the apartment. Lewis' explanation is consistent with what he stated in his Record of Interview. WDC Pinder admitted during cross examination that no clothes or fingerprints belonging to Lewis was found in the apartment. She also stated that Franklyn confirmed that Lewis was hired to do work for him.

83. Glinton and Russell rested their respective cases. In his unsworn and untested Record of Interview, Glinton said that when he came to live with his uncle, Franklyn, in August,

Franklyn gave him a bunch of keys and told him that the keys were for the main residence. Franklyn said that his niece gave Glinton the keys.

84. In his Record of Interview, Russell said that he arrived in The Bahamas a few days prior to the incident. He was staying with his friend Franklyn who gave him a bunch of keys for the residence where he was staying.

85. As earlier stated, at no time did the Magistrate find Franklyn to be a credible witness. That said, he evidently preferred Franklyn's evidence to that of the appellants. In doing so, he failed to give any reason.

86. The case against the appellants is that they each had a key which opened the door to the apartment. The fact that they had keys (together with at least two others) without more is insufficient to impute them with knowledge, custody and control of the drugs that were found in the apartment. In our view, the Magistrate ought to have acquitted all of the appellants because the prosecution had not proved its case beyond reasonable doubt against them.

87. Parenthetically, we also observe that in her evidence in chief, WDC Pinder testified that when she conducted an interview with the deceased Brown on 10 March 2021, he admitted to knowledge, custody and control of the drugs found in the apartment. Brown also gave a statement under caution wherein he implicated Lewis. According to WDC Pinder, Brown stated that **"he along with Peter Lewis found the drugs and then hid them in the apartment where they were found."**

88. In his Ruling, the Magistrate did not allude to this evidence. He did not state that the only strand of evidence pointing to Lewis' involvement was contained in an out-of-court statement of a co-accused, which, in law, is not evidence against Lewis. In the absence of such a critical finding, we are unable to postulate whether or not the Magistrate considered this evidence and whether he disabused his mind of it when he found Lewis guilty of possession of drugs with intent to supply.

Issue 2: Are the convictions unsafe and unsatisfactory?

89. It is well settled that, as an appellate court, we will not lightly interfere with the decision of a magistrate on primary facts, unless satisfied that it was "plainly wrong" or the judge has reached a conclusion which is unreasonable and cannot be supported by the evidence: **Thompson v Solomon and another** [2011] 3 BHS J. No. 11.

90. On the totality of the evidence, we are satisfied that, having regard to the evidence adduced by the prosecution witnesses, it was unreasonable and unsatisfactory for the Magistrate to have found the appellants guilty.

91. In the circumstances, the convictions are unreasonable, unsafe and unsatisfactory. With respect to Lewis, we allow the appeal, quash the conviction and set aside the sentence. Having regard to the prospect of success on appeal, the application for an extension of time within which to appeal relative to Glinton and Russell are granted, and after hearing their

substantive appeals, we also allow their appeals, quash the convictions and set aside their respective sentences. Due to the tenuous nature of the evidence which was led by the prosecution against the appellants, we do not order a re-trial.

The Honourable Madam Justice Charles, JA

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Evans, JA