In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 28 of 2019

BETWEEN:

THE QUEEN

-and-

CHARLES BUTTERFIELD

First Defendant

KINTE SMITH

Second Defendant

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Appearances: Ms. Cindy Clarke for the Prosecution
Mr. Marc Daniels for the Second Defendant

Date(s) of Hearing: 10th & 19th December 2019
Date of Ruling: 6th January 2020

RULING

Application for Dismissal – Section 31 of the Criminal Jurisdiction and Procedure Act 2015 – Test to be applied on a Section 31 Application – Fingerprint evidence

1. The Second Defendant has been charged with the single count of Handling a Controlled Drug contrary to section 7(2)(a) of the Misuse of Drugs Act 1972 (the "MDA") *to wit*

Cannabis Resin (Count 3 on the Indictment dated 18th September 2019). On the same Indictment the First Defendant has been charged with two counts of Possession of a Controlled Drug with Intent to Supply contrary to section 6(3) of the MDA, *to wit* Cannabis Resin and Cannabis.

2. The Second Defendant now makes an application for dismissal of the sole Count against him pursuant to section 31 of the Criminal Jurisdiction and Procedure Act 2015 (the "CJPA")("Section 31 application"). The First Defendant has not decided at this time to make a section 31 application.

The Prosecution's Case

3. By way of disclosed witness statements, search reports, interviews, fingerprint analysis, and photographs, the Prosecution allege the following against the Second Defendant (unless it provides context to the case against the Second Defendant I will not in detail set out the case against the First Defendant as no section 31 application is being advanced on behalf of the First Defendant):

- On 20th December 2018 police officers attended the First Defendant's premises located at No. 3 Ferry Close in St. George Parish and executed a search warrant under the MDA (see the relevant Search Report on pages 39 to 49 of the Court Record). Upon entry into the premises the First Defendant said to the police officers *"Everything in this house is mine"* and as he spoke he pointed to a blue knapsack on the floor near a closet. After he was cautioned the First Defendant said *"Look, I'll give you guys everything, whatever you guys need; I'll just give it to you"*, and after he was arrested the First Defendant said *"you can start with my knapsack. It's hash in there"*. The blue knapsack was searched by the police officers and it was found to contain a white "Sports Locker" plastic bag which contained a large brown paper bag which contained five (5) heat-sealed clear bags with a greenish-brown substance which the First Defendant identified as "hash".

- The First Defendant also pointed to a black trunk at the foot of his bed and told police officers that in it was a bag and a green knapsack which both contained "weed". The police officers checked the black trunk and removed a green knapsack which contained six (6) clear heat-sealed packages containing plant material, as well as a grey plastic bag with two (2) clear heat-sealed packages containing plant material.

- Upon later analysis by authorized analyst Chalsey Symonds at the Government Laboratory (see her Certificate dated 25th January 2019 on pages 75 to 77 of the Court Record) the following was found:

  (i) The five (5) heat-sealed clear packages from the blue knapsack represented: a heat-sealed plastic bag containing four (4) self-sealed plastic bags each containing nine (9) plastic packages with a quantity of the controlled drug cannabis resin in each; and four (4) heat-sealed plastic bags each containing four (4) self-sealed plastic bags containing a quantity of cannabis resin. The total weight of the cannabis resin found in the five (5) heat-sealed packages is 5029.2 grams;

  (ii) The six (6) heat-sealed bags found in the green knapsack represented: three (3) heat-sealed plastic packages each containing cannabis; two (2) heat-sealed plastic bags containing a self-sealed plastic bag containing a quantity of the controlled drug cannabis; and, a heat-sealed plastic bag containing four (4) self-sealed plastic bags each containing a quantity of the controlled drug cannabis. The total weight of the cannabis is 670 grams; and,

  (iii) The two (2) heat-sealed packages from the grey plastic bag were found to contain 335.4 grams of the controlled drug cannabis.

- Photographs of the First Defendant's residence as well as the items and controlled drugs seized by the police officers can be found on pages 86 to 92 of the Court Record).

- The total street value of all the cannabis found is $50,250, and the total street value of all the cannabis resin found is $502,950 (see pages 78 to 80 of the Court Record).

- The heat-sealed packages were swabbed for DNA examination and were examined for fingerprints by a DC 2064 James Eli (see his statement dated 15th April 2019 on pages 81 to 83 of the Court Record). DC Eli's evidence is that fingerprints were revealed on one of the wrappings from one of the five (5) clear heat-sealed packages which were found in the blue knapsack. No other fingerprints were found on any of the other heat-sealed packages or wrappings which were seized from the First Defendant's residence.

- Fingerprint expert Ms. Monique Hill-Lee said in her statement dated 28th March 2019 (see pages 99 to 100 of the Court Record) that the Second Defendant's right thumbprint was found on one of the heat-sealed clear plastic bags which were in the blue knapsack and which had concealed the cannabis resin. Specifically, she found that when comparing the finger mark found on the said clear heat-sealed plastic bag against the fingerprints taken from the Second Defendant on the 20th December 2018 (see pages 101 to 102 of the Court Record) the 16+ matching ridge characteristics leave her in no doubt that the thumbprint on the said clear heat-sealed bag was that of the Second Defendant.

- The DNA examination yielded negative results.

- On the 21st December 2018 the First Defendant was interviewed and he answered *"no comment"* to questions asked by the police (see pages 55 to 65 of the Court Record).

- On the 22nd July 2019 the Second Defendant was arrested for handling a controlled drug and in a subsequent interview he answered *"no comment"* to questions asked by the police.

- The police received information that after the arrest of the First Defendant that he moved into the residence of the Second Defendant at No. 11 Lighthouse Hill in St. George Parish, and, they also observed several interactions between the First and Second Defendant.

4. The crux of the Second Defendant's section 31 application can be distilled down to whether the Second Defendant's single thumbprint found on one of five (5) clear heat-sealed bags which were in a brown paper bag, and which was in a plastic "Sports Locker" bag which was in a blue knapsack which was in the bedroom of premises in which the Second Defendant does not reside, is sufficient evidence upon which a properly directed Jury could convict the Second Defendant of the charge of handling a controlled drug.

The test to be applied on a Section 31 Application

5. Section 31 of the CJPA provides the following:

> *"Application for dismissal*
>
> *31 (1) A person who is sent for trial under section 23 or 24 on any charge or charges may, at any time—*
>
> *(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and*
> *(b) before he is arraigned (and whether or not an indictment has been preferred against him),*
>
> *apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed.*
>
> *(2) The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject*

of any such application if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him.

(3) No oral application may be made under subsection (1) unless the applicant has given to the Supreme Court written notice of his intention to make the application.

(4) Oral evidence may be given on such an application only with the leave of the judge or by his order; and the judge shall give leave or make an order only if it appears to him, having regard to any matters stated in the application for leave, that the interests of justice require him to do so.

(5) If the judge gives leave permitting, or makes an order requiring, a person to give oral evidence, but that person does not do so, the judge may disregard any document indicating the evidence that he might have given.

(6) If the charge, or any of the charges, against the applicant is dismissed—

(a) no further proceedings may be brought on the dismissed charge or charges except by means of the preferment of a voluntary bill of indictment; and

(b) unless the applicant is in custody otherwise than on the dismissed charge or charges, he shall be discharged.

(7) Rules may be made under section 540 of the Criminal Code Act 1907 which make provision for the purposes of this section and, without prejudice to the generality of the forgoing, may make provision—

(a) as to the time or stage in the proceedings at which anything required to be done is to be done (unless the court grants leave to do it at some other time or stage);

(b) as to the contents and form of notices or other documents;

(c) as to the manner in which evidence is to be submitted; and

(d) as to persons to be served with notices or other material."

6. With its enactment in 2015 the CJPA ushered in a more streamlined procedure for committing criminal matters from the Magistrates' Court to the Supreme Court. It did so by abandoning the rather unnecessary and often abused committal procedures known as "short and long form preliminary inquiries". However, the test of "sufficiency" which was the backbone of the former committal proceedings was retained by section 31 of the CJPA. That is, a judge may dismiss a charge "*if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him".*

7. In this regard, paragraph 1-54 of the 2019 Edition of Archbold lends some helpful guidance as to this sufficiency test and the proper approach on dismissal applications (it refers to Schedule 3 of the Crime and Disorder Act 1998 which is the United Kingdom's equivalent to our section 31 of the CJPA). Archbold states:

> *"It has been said that this test……requires application of the criteria commonly applied on a submission of "no case to answer"…..*
>
> *The relevant words also require the judge to take into account the whole of the evidence against a defendant. It is not appropriate for the judge to view any evidence in isolation from its context and other evidence, any more than it is appropriate to derive a meaning from a single document or from a number of documents before the court. Nor is the court bound to assume that a jury might make every possible inference capable of being drawn from a document against a defendant. The judge must decide not only whether there is any evidence to go to a jury, but whether that evidence is sufficient for a jury properly to convict. That exercise requires him to assess the weight of the evidence. That is not to say that the judge is entitled to substitute himself for the jury. The question for him is not whether the defendant should be convicted on the evidence put forward by the prosecution, but the sufficiency of that evidence."*

8. The Archbold extract also cites the authority of *R(Inland Revenue Commissioners) v Crown Court at Kingston [2001] 4 All ER 721* in which it was held that where a case depends on the inferences or conclusions to be drawn from the evidence, the judge must assess the inferences or conclusions that the prosecution propose to ask the jury to draw, and decide whether it appears to him/her that the jury could properly draw those inferences or come to those conclusions.

9. The sufficiency test for dismissal applications therefore bears some of the hallmarks of the two limb test of the well-known authority of *Galbraith [1981] 1 WLR 1039*, and accordingly I must be satisfied that in the case at bar (i) there is evidence that the Second Defendant handled the controlled drug cannabis resin, and that (ii) that evidence is sufficient enough for a jury to properly convict him of the offence charge. In doing so, I should (a) have regard to the weight of the evidence (if there is any evidence) and (b) assess any inferences or conclusions which the prosecution proposes to ask the jury to draw from that evidence.

10. Before turning to whether the Prosecution have met the sufficiency test for the purposes of this section 31 application it is important to first set out the elements of the offence of Handling a Controlled Drug.

The offence of Handling a Controlled Drug

11. Section 7(2)(a) of the MDA stipulates:

> *"Handling of controlled drugs*
>
> *7 (1) A person commits an offence if he knowingly handles a controlled drug which is intended, whether by him or some other person, for supply in contravention of section 5(1).*
>
> *(2) A person handles a controlled drug for the purposes of this section if—*
>
> *(a) he is in any way concerned in carrying, removing, harbouring, keeping or concealing the controlled drug or anything containing the controlled drug; or*
> *(b) he deals in any manner with the controlled drug."*

12. For the purposes of this section 31 application the Prosecution must therefore have sufficient evidence that between a date unknown and the 20th December 2018 the Second Defendant was "in any way concerned" in "carrying", "removing", "harbouring", "keeping", or "concealing" the cannabis resin, or, "anything containing" the cannabis resin. Each of these words/terms can be given their ordinary dictionary meaning and as such there is a multitude of ways that one can, by touching, carry, remove, harbour, keep, or conceal an item. Mr. Daniels questioned the logicalness of whether an item can be handled with just a thumb. I see no value in this assertion because as I just alluded to there is a plethora of anatomical ways in which one may manipulate an item, including the use of just one finger, thumb, or any part of the hand or body.

13. Moreover, there is no dispute at this time that the greenish-brown substance found in the heat-sealed bags which were in the blue knapsack in the First Defendant's bedroom

contained the controlled drug cannabis resin. There was also no challenge at this time to the continuity or chain of evidence in respect of the seizure or analysis of the cannabis or the cannabis resin, and in particular, there was no issue at this time as to the lifting and the analysis of the Second Defendant's right thumbprint which was found on one of the clear heat-sealed clear plastic bags which were in the blue backpack and which had contained the cannabis resin.

14. The question for me to determine is whether the Second Defendant's single thumbprint which was found on one of five clear heat-sealed which were in a blue knapsack which was in another's residence is sufficient evidence upon which a Jury can properly convict the Second Defendant for the offence of handling a controlled drug.

Decision

15. So, is the Second Defendant's single thumbprint which was found on one of five heat-sealed which were in a blue knapsack which was in another's residence sufficient evidence upon which a Jury can properly convict him for the offence of handling a controlled drug. In answering this question Mr. Daniels submits that *"it is a fallacy and that it is illogical to make the quantum leap that the mere presence of a fingerprint on a single plastic bag translates to the reasonable and rationale interpretation that Mr. Smith handled the control drugs found inside of the plastic bag"*; and, that *"The evidence against Kinte Smith is vague, weak, tenuous, and far too remote for any jury, properly instructed, to sustain a conviction"*. In support of his submissions Mr. Daniels referred to the following authorities:

- *Barry Jonathan Campbell v. Her Majesty's Advocate [2008] HCJAC 50* – The accused was charged with six co-accused of, *inter alia,* a firearms offence. When police attended a flat in which the accused's girlfriend resided they recovered a rifle wrapped in two plastic refuse bags concealed in a cupboard in the hallway. Fingerprint examination of the bags used to wrap the rifle disclosed a number of unidentified fingerprints and the right thumbprint, the right forefinger, and the right palm print of

the accused. The accused was convicted of possession of a firearm offence (along with other offences) and he lodge an application with the Scottish Criminal Cases Review Commission arguing that there was insufficient evidence to permit the jury to infer that he had knowledge and control of the firearm and that the judge had erred in repelling his submission of no case to answer. The Crown argued that when the taken together the circumstances were capable of supporting an inference beyond a reasonable doubt that the accused had been in possession of the rifle, where there was evidence that: the accused's girlfriend was an occupier of the flat; the accused had been living with her for three months prior to the police search; the day before the police search the accused was present in the flat and he admitted staying in the flat overnight; the accused did not have keys to the flat; the rifle was found concealed behind a water tank in a cupboard in a hallway, wrapped in two refuse bags; and, the rifle was not visible from the hallway.

It was held by the Scottish High Court of Judiciary that:

> *"…….the evidence was insufficient to entitle a jury to draw an inference beyond reasonable doubt that the appellant had had knowledge and control of the rifle: there were two matters of particular significance: first, the evidence established that the appellant was not the sole occupant or user of the flat and the hall cupboard was accessible to several other people, and secondly, the evidence established that the rifle was well concealed behind a water tank in the hall cupboard, it could not be seen from the hallway, there was no evidence that the appellant had been seen with the rifle and his fingerprints were not found on the rifle, on the water tank or any part of the cupboard itself, and there was no evidence assisting the date on which or the circumstances in which his finger prints came into contact at some time with the black plastic bag; the jury would be entitled to infer that the appellant had come into contact at some time with the plastic bag used to wrap up the concealed rifle, but given that the appellant was a visitor to the flat and that he might have come into contact with items and surfaces within or brought to the flat, some additional evidence would have been necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had been involved in handling or concealing the rifle and that he had the requisite knowledge of and control over the rifle."*

The accused's conviction was quashed.

- In *Campbell* Lady Paton referred to the authorities of *Maguire v HM Advocate 2003 SLT 1307*, *Langan v HM Advocate 1989 JC 132*, and *Hamilton v HM Advocate 1934 JCI*.

Lady Paton quoted Lord Hamilton in *Maguire* as stating:

> *"Much will depend on the nature of the item on which the fingerprint or identifying link was found and its association in time and place with the crime. The readiness with which the accused may innocently have come to be in contact with such an item may be such that, even in the absence of an explanation from him, no inference of sufficient association between him and the crime can be legitimately be drawn."*

Lady Paton further observed:

> *"Thus in the particular circumstances of Maguire, there were several strands of circumstantial evidence coming from more than one source which provided "aptitude and coherence of the several circumstances".....Thus there was sufficiency of evidence, entitling a jury to assess the evidence and to decide what to accept, what to reject, and whether guilt had been established beyond a reasonable doubt".*

In respect of *Langan* Lady Paton said:

> *"....the appellant's finger print in blood was found on the hot water tap of the kitchen sink. The blood was not identified, but another trace of blood on the kitchen sink was found to be of the same group as that of the deceased. There was evidence that the deceased's blood could have remained liquid for about 24 hours after death. When cautioned and charged, the appellant stated that he had never been in the victim's home. The circumstances in that case, taken together, provided a cogent body of evidence from which the inference can be drawn, beyond reasonable doubt that the fingerprint had been made by the murderer when cleaning up after the murder. Accordingly there was a sufficiency of evidence for consideration by the jury."*

As to *Hamilton*, Lady Paton stated:

"……a shop was broken into. A bottle which before the housebreaking had been in the shop, wrapped in paper, was found after the housebreaking to have been unwrapped and opened. The appellant's fingerprints were found on the bottle. There was nothing to suggest that the fingerprints might have been placed on the bottle at any time other than that at which the crime was committed. There was therefore a cogent body of circumstantial evidence entitling a jury to draw an inference of guilt beyond reasonable doubt."

Distinguishing *Campbell* from *Maguire*, *Langan* and *Hamilton* Lady Paton said:

"…….we do not consider the circumstances in the present case provided a cogent body of evidence sufficient in law to entitle a jury to infer to the standard beyond reasonable doubt that the appellant had knowledge of, and control over, the rifle…..the most that the jury could in our view properly infer from the particular circumstances of this case would be that the appellant had indeed come into contact with the moveable plastic bag in question. The circumstances in which, at the time at which, such contact was made, could not be inferred with any degree of certainty from the evidence led. Such contact could not in our view properly found an inference that the appellant had the requisite knowledge and control of the rifle concealed in the hall cupboard."

- *David Slater v Alfred Douglas Vannet No. 36 1997 J.C. 226*: A break-in occurred at a marketplace and in one of the units at the marketplace the accused's palm prints were found on a bag. There was no evidence as to where the bag was found nor was there any evidence directed to the bag associated with the particular unit at which a break-in had occurred and items stolen prior to the date of the crime. The accused had been at the market on occasion and had been in premises from which items had been stolen but denied at the police interview that he had been within the premises at which the plastic bag was found. Members of the public ordinarily had access to the market premises. A submission of no case to answer failed and the accused was convicted.

Upholding the accused's appeal the High Court of Judiciary held that:

"(1) that the mere identification of the pannel's [the accused] palmprints on one of the plastic bags did not fix either the time or the place the prints came to be there nor did the evidence that the plastic bag was found within a unit immediately after the break-in fix those premises as having necessarily been the premises in which the bag had been when the pannel's palmprints were placed

on it as the premises were within a market to which members of the public ordinarily had access and which the pannel himself claimed to have visited prior to the break-in; (2) that, accordingly, it could not be suggested that there was no possibility of the palmprints having come to be on the plastic bag at some time other than that at which the crime was committed so that the evidence at the conclusion of the Crown case had been insufficient in law to identify the pannel as having been the intruder who broke into the units and hence the thief on the occasion charged."

- *R v. I [2011] EWCA Crim 557*: The accused was jointly charged with others with conspiracy to supply a class A drug and the case against the accused relied entirely on circumstantial evidence. The facts were that on 21st May 2008 one of the accused co-conspirators (a Mohammed Usman), who was in a Toyota Corolla motorcar, was seen handing over what appeared to be a block of heroin to two other co-conspirators. This block of heroin was taken from a black and white carrier bag with a draw string. The two other co-conspirators drove away in another car and were later arrested by the police. The heroin was recovered from their car.

  Two days later on the 23rd May 2008 Usman's Toyota was recovered by the police and in it they found a black and white carrier bag. The accused's fingerprints were found on this bag. This black and white bag: (a) was not of draw string design but otherwise was consistent with the black and white bag the police saw two days earlier, and (b) did not have any traces of drugs.

  In delivering the ruling of the Court Mr. Justice MacDuff concluded that the circumstantial evidence in this case was of limited strength and was sufficiently weak for the judge to reach the conclusion that no jury properly directed could safely convict.

16. Ms. Clarke relied on the authority of *R v. Tsekiri [2017] EWCA Crim 40* which, *inter alia*, answers the question as to whether the Second Defendant's single thumbprint on the heat-sealed bag, without more evidence, could on its own pass the sufficiency test (*Tsekiri* was followed in the later authority of *R v Lyndon Jermaine Lewis [2018] EWCA Crim 1101*). *Tsekiri* involved the accused's DNA which was left at the scene of a crime. While the case at bar involves fingerprint evidence it can be as forensically credible and reliable as DNA

for the purposes of identification, particularly given the as yet unchallenged evidence of Ms. Hill-Lee that the 16+ matching ridge characteristics leave no doubt that the thumbprint on the clear heat-sealed bag was that of the Second Defendant.

17. The facts of ***Tsekiri*** are that on 11th June 2016 a lady got into her car which was parked outside of a tube station and as she prepared to drive away a man opened the driver's door and then put his hand over her mouth. A struggle ensured and when she screamed for help her assailant, and another who was with him, ran away. Swabs were later taken from the driver's door handle and it was found that the DNA was consistent with the DNA profile of the accused. Davis J handed down the Judgment which included the following paragraphs:

> *"The facts of this appeal require us to determine the position when a defendant's DNA profile at the scene is the only evidence. In our view the fact that DNA was on an article left at the scene of a crime can be sufficient without more to raise a case to answer where the match probability is 1:1 billion or similar. Whether it is will depend on the facts of the particular case. Relevant factors will include the following matters.*
>
> *Is there any evidence of some other explanation for the presence of the defendant's DNA on the item other than involvement in the crime? If a defendant in interview gives an apparently plausible account of the presence of his DNA profile, that might indicate that the prosecution had not raised a case to answer. On the other hand, the total absence of any explanation would leave the evidence of the defendant's DNA unexplained. This is not to say that the absence of explanation of itself would provide additional support for the prosecution case. Section 34 of the Criminal Justice and Public Order allows for the possibility of an adverse inference capable of being considered when a judge determines whether a defendant has a case to answer in which case the adverse inference would be additional support for the prosecution case. But that is unlikely to arise in a case involving DNA evidence for the reasons as explained fully in FNC at paragraphs 14 to 18. Rather, the absence of explanation in such a case would mean that there would be no material to undermine the conclusion to be drawn from the DNA evidence.*
>
> *Was the article apparently associated with the offence itself? Here the DNA profile was found on the door handle which was used by the offender in the course of committing the offence. There can be no doubt that the offender did touch the article in question. The position could be different if the article was not necessarily so connected with the offence e.g. if a DNA profile were to be found on a cigarette stub discarded at the scene of a street robbery.*

How readily movable was the article in question? A DNA profile on a small article of clothing or something such as a cigarette end at the scene of a crime might be of less probative force than (as was the case here) the same profile on a vehicle.

Is there evidence of some geographical association between the offence and the offender? The facts of this case are an example of this.

In the case of a mixed profile is the DNA profile which matches the defendant the major contributor to the overall DNA profile?

Is it more or less likely that the DNA profile attributable to the defendant was deposited by primary or secondary transfer? In this case the expert evidence was that secondary transfer was an unlikely explanation for the presence of the appellant's DNA on the door handle.

This is not an exhaustive list and each case will depend on its own facts. The crucial point is that there is no evidential or legal principle which prevents a case solely dependent on the presence of the defendant's DNA profile on an article left at the scene of a crime being considered by a jury.

On the facts of this case it is quite clear that there was a case for the appellant to answer. His was the major DNA profile on the door handle of the car which was used by the offender in the course of the robbery. The expert evidence was that the likely reason for the defendant's DNA profile being on the door handle was that he had touched it. At the close of the prosecution case there was no explanation for this fact. The rhetorical question posed by the judge demonstrated some geographical connection between the location of the offence and the appellant albeit not sufficient to amount to supporting evidence qua Bryon.

No suggestion is made that the conviction otherwise is unsafe. None could be made. The appellant did not give evidence. Thus, the jury were simply invited to conclude that the prosecution had failed to prove its case. The jury were quite entitled to reject that proposition in part because they could rely on the appellant's failure to give evidence. At that stage the jury had no explanation of the presence of the appellant's DNA plausible or otherwise.

It follows that the appeal is dismissed."

18. No doubt the Prosecution's case against the Second Defendant in the case at bar may not be as evidentially detailed as some of the handling cases that have come before the Courts. Particularly: the cannabis resin was not found in the Second Defendant's residence; the Second Defendant was not at the First Defendant's residence when the police officers searched it on the 20th December 2018; the Prosecution have no evidence that the Second

Defendant was seen at the First Defendant's residence on the 20th December 2018 or on any date prior, or that he ever visited or resided at the First Defendant's residence; the Second Defendant's fingerprints nor his DNA were not found on any of the other heat-sealed bags, self-sealed or plastic packaging which contained or wrapped the cannabis or cannabis resin found in the blue knapsack, the green knapsack, or the grey plastic bag; none of the Second Defendant's fingerprints or DNA were found anywhere else in the First Defendant's residence, and there is no evidence that the Second Defendant was seen handling any of the clear heat-sealed plastic bags containing the cannabis resin or the cannabis seized. However, having the strongest Prosecution case is not the test for a section 31 application. At this stage, I am only concerned with whether the Prosecution have sufficient evidence from which a jury can properly convict the Second Defendant of the offence of handling the cannabis resin found at the First Defendant's residence (I do not think Mr. Daniels is relying on Limb 1 of ***Galbraith*** that there is no evidence of the offence of handling).

19. On may reasonably argue that the Prosecution's evidence in the case at bar does not reach the volume of the evidence in ***Campbell***, ***Maguire***, ***Langan***, ***Hamilton*** and ***Slater***. However, as each of these authorities show (including ***Tsekiri***), cases of this nature each turn on their own set of circumstances, and the specific inferences and conclusions that can be drawn from those circumstances. The circumstances in the case at bar can be distinguished from those in ***Campbell***, ***Slater*** and ***R v I***. The circumstances of this case are more in line with those of ***Maguire***, ***Langan***, ***Hamilton***, and ***Tsekiri*** particularly in respect of (i) the nature of the packaging on which the Second Defendant's finger prints were found, and (ii) the absence of any credible competing explanation for the Second Defendant's thumbprint being found on a clear heat-sealed bag which contained cannabis resin and which was in premises in which the Second Defendant did not reside.

20. As was argued by counsel in ***Campbell***, Mr. Daniels submitted that the heat-sealed clear plastic bags in which the cannabis resin was found were "moveable objects" of unknown origin and therefore the Prosecution could not establish sufficient proximity or linkage with the heat-sealed bag on which the Second Defendant's thumbprint was found and the

commission of the offence of handling the cannabis resin. I do not accept this submission. The fact that the cannabis resin was in clear self-sealed bags which were in a clear "heat-sealed" plastic bag which the jury may infer required a level of sophisticated preparation and packaging (and possibly the use of specialized tools to heat-seal the bags), and, which transformed the clear plastic bags from an everyday moveable object into a fabricated item designed and used to package the cannabis resin. Essentially, the clear heat-sealed bags could be seen by the jury as being an integral part of the wrapping of the cannabis resin so that it could be effectively carried, removed, harboured, kept or concealed for onward supply by him or some other person. Therefore, there is close proximity between the Second Defendant's thumbprint on the clear heat-sealed bag and the commission of the offence of handling. This is very much unlike the seemingly unaltered two plastic refuse bags which wrapped the rifle in ***Campbell*** or the bags in ***Slater*** and ***R v I*** (which had no evidential association with the unit at which the break-in occurred and from where items were stolen).

21. Therefore, if the jury accept that the cannabis resin was found wrapped in a clear heat-sealed bag which the Second Defendant could see the cannabis resin, and which had the Second Defendant's thumbprint on it, they are then open to infer that (i) the Second Defendant was present at a time and place on or before 20th December 2018 when the cannabis resin was placed in a clear plastic bag which then went through the process of being heat-sealed, or (ii) that sometime after the cannabis resin was heat-sealed in the clear plastic bag that the Second Defendant handled the said heat-sealed bag which clearly revealed the cannabis resin; or (iii) that the Second Defendant handled the clear heat-sealed bag with the clearly visible cannabis resin on or before the 20th December 2018 at a place which may have included the First Defendant's residence (because that is where the police found the cannabis resin in the blue knapsack). At trial, the jury, most likely during the Prosecution's case, will have the opportunity of seeing the nature of the clear heat-sealed bags and the photos of the cannabis resin packaged in the clear heat-sealed bags, and this may assist them in considering whether they accept that such inferences can reasonably be drawn.

22. This leads me to segue to my next point that at this stage in the criminal proceeding there is no other competing explanation for the Second Defendant's thumbprint being found on a clear heat-sealed bag which contained cannabis resin and which was in someone else's residence. Mr. Daniels is absolutely correct that the Second Defendant's constitutionally based presumption of innocence is and should always be sacrosanct and that no adverse inferences should be drawn from him giving a "no comment" police interview on the 22nd July 2019. Nor should Mr. Daniels, as part of this section 31 application, be required to set out in detail the Second Defendant's defence (although should this matter proceed to trial the Second Defendant would be obliged to file a defence statement pursuant to section 5 of the Disclosure and Criminal Reform Act 2015("DCRA")). Herein lies the Second Defendant's conundrum though. On the one hand it is constitutionally and strategically sound for the Second Defendant to not reveal his defence unless or until he is required to do so under section 5 of the DCRA. However, in doing so the Court is bereft of facts upon which it can draw other inferences or arrive at other conclusions which may be favourable to the Second Defendant. Especially if they are inferences which compete with inferences that can be drawn by facts put forth by the Prosecution.

23. In all of the authorities cited there was before the relevant Court other alternative explanations for the presence of the accused's finger prints on an item. Specifically, in ***Campbell*** and ***Slater*** the accused were visitors to the premises in which the item was located and therefore it was reasonable to infer that they would have been innocently in contact with the item and surfaces within or brought to the premises. It was against this background that the respective Courts in ***Campbell*** and ***Slater*** illuminated their conclusion that the Crown in those cases could not fix the time or place on which the accused fingerprints landed on the items, and therefore the Crown could not with any degree of proximity link the finger print of the accused with the commission of a crime.

24. In the case at bar though there is no evidence at this time from which I can draw any inference or conclusion that the Second Defendant's thumbprint could have been innocently placed on the clear heat-sealed bag which contained the cannabis resin. Of course there is the possibility that there is an innocent explanation and that the Second

Defendant touched one of the plastic bags prior to the commission of the offence as asserted by Mr. Daniels. But for the purposes of this section 31 explanation I should not be concerned with possibilities or speculations, but rather facts from which I am able to draw reasonable inferences or conclusions. At this time however there are no facts which will enable me to conclude that the Second Defendant's thumbprint was innocently placed on the clear heat-sealed bag which contained the cannabis resin. Facts such as: the Second Defendant had visited or resided in the First Defendant's residence on or prior to the 20th December 2018; at some point in time the First Defendant had asked the Second Defendant for clear plastic bags; or, the Second Defendant, at some point, innocently may have touched the plastic bag before it was heat-sealed and when nothing was inside of it. These are facts from which competing inferences can be drawn that the Second Defendant did not and could not have known that he handled a heat-sealed sealed bag containing cannabis resin. Using the words of ***Tsekiri***, the absence of an explanation from the Second Defendant means that there is no material to undermine the inferences to be drawn from the fingerprint evidence.

Conclusion

25. I therefore find that there is sufficient evidence for a jury properly to convict the Second Defendant of the offence of handling a controlled drug, namely cannabis resin, pursuant to section 7(2)(a) of the MDA.

26. Accordingly, I dismiss the Second Defendant's section 31 application.

Dated the 6th day of January , 2020

The Hon. Acting Justice Juan P. Wolffe