Neutral Citation Number: [2020] CA (Bda) Crim 11

Case No: Crim/2019/9

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MRS JUSTICE SIMMONS
CASE NUMBER 2019: No. 14

Sessions House
Hamilton, Bermuda HM 12

Date: 23/07/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

THE QUEEN

Appellant

- and -

TONAE PERINCHIEF-LEADER

Respondent

Mr. Alan Richards (Office of the Director for Public Prosecutions) for the Appellant

Mr. Charles Richardson (Compass Law Chambers) for the Respondent

Hearing dates: 16th June 2020

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APPROVED JUDGMENT

CLARKE P:

Introduction

1. At 5.15. a.m. on Monday 6 July 2015, police officers went to execute a search warrant, issued under the Misuse of Drugs Act, at the upper apartment of a house at 36 Railway Trail, Sandy's, the address of Tonae Perinchief-Leader ("the Respondent"). The subject of the warrant was Michael, her uncle. The account of what follows is derived from the police evidence contained in the record. The police were allowed in by the Respondent's mother who told them that her elderly mother was in a bedroom and that the Respondent and her brother were in another bedroom. When the officers went to the Respondent's bedroom, one of them – DC 2316 Smith – knocked on the door. The Respondent opened the door. Also in the bedroom was her brother, Antonio, who was asleep on the floor. In the search of that room, two suitcases were found on the western side of the room– one dark brown and one black. DC Smith asked the Respondent who they belonged to and the Respondent stated, "*It is mines*".

2. The brown suitcase contained a purple plastic bag in which there was a revolver covered in clear cellophane, wrapped in a white tee shirt. When DC Smith asked the Respondent what the object was, the Respondent replied, "*I don't know*". The brown suitcase also contained a brown bag with a zippered pouch. The bag contained three duct taped packages and a clear plastic bag, containing what looked like ammunition. When asked if the bag belonged to her the Respondent said, "*It is mine*". When asked what the items in the brown bag were, the Respondent again replied, "*I don't know*". When the Respondent's brother was asked about the firearm and ammunition, found in the suitcase he said "*Nothing. I don't even live here*".

3. When officers searched the black suitcase, they found a shot gun, wrapped in cellophane tape, and two large trash bags, which, or one of which, contained boxes of what appeared to be ammunition. In total 485 rounds of ammunition of eight different types were found. The Respondent was arrested and detained in relation to the firearms. She was interviewed at the police station twice. She replied "*no comment*" to most of the questions. She confirmed at the start of both interviews that 36 Railway Trail was her current address. She did the same on her reception at Hamilton Police Station.

The Criminal Proceedings

4. On 19 March 2019 the Respondent was sent for trial pursuant to section 23 of the Criminal Jurisdiction and Procedure Act 2015 ("the CJPA 2015") in respect of four offences which formed the subject matter of the subsequent indictment. On 12 April 2019, almost four years after the execution of the search warrant, an indictment was signed containing four counts. Two of the counts were for handling firearms and two for knowingly handling ammunition, contrary in each case to section 19 A (1) of the Firearms Act 1973.

5. On 1 May 2019, the Respondent was arraigned and pleaded not guilty before the Supreme Court to all four counts. On 6 May 2019, her then counsel, who was not the counsel who appeared for her when she was arraigned, informed the court that he would not be making an application to

dismiss on the ground of insufficiency of evidence pursuant to section 31 of the CJPA 2015. At a later date, Mr Charles Richardson, her new counsel, made precisely such an application.

6. In a decision dated 14 August 2019, following on a hearing on 8 August 2019, the Honourable Justice Charles-Etta Simmons dismissed all the charges. (The date of 14 August may be a mistake for 14 October 2019). The Crown appeals from that decision. For reasons I shall set out later in this judgment, we are satisfied that we have jurisdiction to hear the Crown's appeal.

The appeal to this court

7. On reviewing the papers, I considered that the case raised some jurisdictional issues which did not seem to have been addressed in the Supreme Court (because of two earlier decisions to which I refer below), and I invited written submissions upon them. The central issue is whether, pursuant to section 3 of the CJPA 2015, the Supreme Court had jurisdiction to hear a dismissal application at the point when it did, namely after the arraignment. This issue and the consequences that flow from its determination can only be understood by reference to the relevant statutory provisions.

The Statutory Provisions

The Firearms Act 1973

8. By section 19A of the Firearms Act 1973:

> *"(1) It is an offence for a person to knowingly handle a firearm or ammunition without lawful authority.*
>
> *(2) A person "handles" a firearm or ammunition if—*
>
> *(a) he is in any way concerned with removing, harbouring, keeping or concealing a firearm or ammunition, or anything containing a firearm or ammunition; or*
> *(b) he deals in any manner with a firearm or ammunition."*

9. Section 31 of the Act then provides:

> *"(1) In a prosecution under this Act and without prejudice to any other provision of this Act—*
>
> *(a) where it is proved that a person imported anything containing a firearm or ammunition it shall be presumed, until the contrary is proved, that such person knew that such firearm or ammunition was contained in such thing;*
>
> *(b) where it is proved that a person had in his possession or custody or under his control anything containing a firearm or ammunition, it shall*

be presumed until the contrary is proved, that such person was in possession of or handled such firearm or ammunition.

(2) The presumptions provided by subsection (1) shall not be rebutted by proof that a person never had physical possession of the firearm or ammunition."

The Criminal Jurisdiction and Procedure Act 2015

10. Section 31 of the CJPA 2015 provides:

*"31 **Application for dismissal***

(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 ("the Criminal Code") which make provision for the purposes of this section and, without prejudice to the generality of the forgoing, may make provision—*
>
> *(c) 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);*
> *(d) as to the contents and form of notices or other documents;*
>
> *(e) as to the manner in which evidence is to be submitted; and*
>
> *(f) as to persons to be served with notices or other material."*

11. The judge decided that there was insufficient evidence for a jury properly directed to convict the Respondent of the four counts in the indictment and dismissed the charges. On the assumption that the judge had jurisdiction to entertain the application, the effect of her decision was therefore that the Respondent was discharged and no further proceedings could be brought on the dismissed charges save by the preferment of a voluntary bill.

12. There are in this appeal two jurisdictional questions. The first is whether the judge had jurisdiction to do what she did. The second is whether we have jurisdiction to entertain the Crown's appeal.

Did the judge have jurisdiction to dismiss under section 31 of the CJPA 2015?

13. In our view, the language of section 31 is clear. An application under this section can only be made before arraignment. These words mean what they say. In the present case the application was made a considerable time after arraignment. We do not regard this express statutory provision that an application may be made after one specific event and before another specific event as equivalent to a procedural time limit which the Court can extend. The Act confers an entitlement to apply after service and before arraignment, and thereby it sets out a window within which any application must be made (viz: after service of the evidence and before arraignment). The intention of the Legislature appears to us to have been that the application might be made within that window but not otherwise. An application, such as this one, made after arraignment, cannot, by definition, be one made before arraignment. Accordingly, the judge had no jurisdiction to make the order that she did.

14. There have been previous cases in which the Supreme Court has entertained section 31 applications after arraignment. In *Trenton Williams* [2018] SC (Bda) 19 Crim, Greaves J accepted that the omission to make an application before arraignment was the result of counsel's oversight in the context of a case that had proceeded expeditiously through the early stages. He found the excuse

proffered by counsel to be "*reasonable in the circumstances".* He concluded his decision with the words: "*I shall treat the application as if it were a section 31 application and allow it*". The question of jurisdiction does not seem to have been argued; and is not really addressed in the judgment.

15. It is important to consider the true nature of the issue that the judge was deciding in that case. On the face of it, the papers disclosed a sufficiency of evidence in the form of recognition of the defendant by two police officers. The primary issue was, therefore, as to the admissibility of that evidence. It was only after the judge had ruled that it was inadmissible, and the Crown had conceded that the remaining evidence was insufficient to sustain a conviction, that it could be said that there was nothing worthy of consideration by the jury, which had been selected but not yet sworn. It seems to us that the judge reached the correct conclusion but was in error in treating the application "as if it was a section 31 application". In truth, it was an application to exclude evidence which, when excluded, left the Crown without a case (as was conceded).

16. The second case was *Albuoy*, Supreme Court, Criminal Jurisdiction, Case 15 of 2018. There, the defendant had pleaded not guilty to a multi-count indictment. At trial, after a jury had been selected but not sworn, defence counsel applied for a dismissal of counts seven and eight. The application was made pursuant to section 31 of the CJPA 2015 on the grounds of insufficiency of evidence. Acting Justice Attridge appears to have acknowledged the chronological requirement of section 31 (1), but sought to circumvent it by reference to section 31 (7), which enables rules to be made to provide for, inter alia:

> "*The time and stage of the proceedings at which anything requires to be done is to be done (unless the court grants leave to do it at some other time or stage)"*

17. The Criminal Procedure Rules 2013 made pursuant to section 540 of the Criminal Code apply generally to all criminal cases, essentially for case management purposes. No rules have in fact been made under section 540 making provision for the purposes of section 31 (7). Further, section 540 (1) provides that rules made under that section may not be inconsistent with the Criminal Code or any other enactment.

18. The Acting Justice considered that the words in parentheses preserved "*the court's inherent jurisdiction to control its own processes*", including, it would seem, by overriding the chronological requirement of section 31(1) in an exceptional case. He proceeded to quash counts seven and eight and the trial proceeded on the remainder of the indictment.

19. With respect, this reasoning seems to me to be erroneous. Whatever rules made under section 31(7) may or may not do they cannot, in my view, override the chronological requirement of section 31, which is the statutory pre-condition for the entitlement to apply and the exercise of the power to dismiss following an application. Nor can the inherent jurisdiction of the Court extend to doing that which the rules could not do. Further, section 31 (7) would appear to have contemplated that any rules would contain provision for timings and that such rules would themselves state that any timings specified in them should be subject to any leave granted by the Court.

20. No injustice was done in either of these cases. One way or another it was right that the charges in question were withdrawn from consideration by a jury. That would be, and was, the effect of the

ruling on inadmissibility in *Trenton Williams*, and would have been the effect of a ruling on *Galbraith* (1981) 73 Cr App R 124, CA in *Albuoy*. In my view, however, they do not provide helpful guidance on the construction of section 31 (1), which was not the correct jurisdictional foundation for the decisions.

21. Section 31 of the CJPA 2015 is the equivalent in Bermuda of the procedure which was enacted in England and Wales in paragraph 2 of schedule 3 to the Crime and Disorder Act 1998 ("the CDA 1998"). The wording is essentially the same. The purpose of the procedure was to ensure that a defendant still had an opportunity to secure dismissal of a charge by reason of evidential insufficiency even after the abolition of committal proceedings or their equivalent in the Magistrates Court. The statutory provision was considered by the Court of Appeal Criminal Division in *Thompson* [2007] 1WLR 1123. In the course of his judgement, Rix LJ observed in three passages that an application to dismiss under this procedure "can only be made before arraignment": see paragraphs 6, 33 and 34.

22. That, it seems to me, is a result of the plain meaning of the words in the statute and having regard to the obvious purpose of the procedure, namely to preserve the potential right to challenge the sufficiency of the evidence before the accused is called on to plead. The same analysis must apply to section 31 of the CJPA in Bermuda. This leads inevitably to the conclusion that, once a defendant has been arraigned, section 31 is no longer in play. It follows that, when the judge purported to dismiss the charges pursuant to section 31, she had no jurisdiction so to do.

23. To place this in a wider context, there are two stages at which a defendant has the right to challenge the sufficiency of the evidence on what are customarily referred to as *Galbraith* grounds: prior to arraignment under section 31, and at the conclusion of the Crown's case on a submission of no case to answer. This does not necessarily mean that, once a trial has commenced, a defendant must inevitably wait for proceedings to take their course until the end of the Crown's case. It sometimes happens that a crucial part of the Crown's case is destroyed in the course of its evidence – for example, a vital witness is so discredited by cross examination that his account must be wrong or an expert resiles from the opinion which he had expressed in his witness statement. If the case for the Crown is thereby irretrievably damaged, ideally counsel for the Crown will simply offer no further evidence and an acquittal will be directed at that stage. However, if counsel for the Crown insists on proceeding, it is, in my view, always open to the judge, on an application by the defence, or on his or her own motion, to intervene and to stop the case. This is not part of the Court's jurisdiction under section 31, which will have fallen out of the picture. Nor is it the result of any other statutory provision. It is part of the Court's inherent jurisdiction, enabling it to ensure that the case does not consume valuable court time for no good purpose and that the defendant is discharged as soon as it has become apparent that a submission of no case to answer at the end of the Crown's case will inevitably succeed. If those conditions are satisfied it can properly be said that the continuation of the case amounts to an abuse of process. It seems to me that, in *Trenton-Williams* and *Albouy*, this was the power upon which Justice Greaves and Acting Justice Attridge could and should have based their decisions, without making reference to section 31.

24. Mr Richardson contends that the judge had jurisdiction because the Respondent had "not yet been arraigned for trial", because she had not entered a plea before the jury. In this jurisdiction a defendant will be called upon to plead at the regular arraignment sessions; but he or she will also

be called upon to plead again before a jury which is empanelled to try him or her. I do not regard this submission as well founded, for a number of reasons.

25. First, to say that "*arraigned*" means "arraigned before the jury" would be to add a gloss to the words of the statute to the effect that it should mean "before he was arraigned a second time", which seems to me unwarranted.

26. Second, both statute and authority give "*arraignment"* a clear meaning, namely when the accused is first called on to plead to the indictment. In *De la Chevotiere* [1991] Bda LR 2 this court held that a trial on indictment begins when a person is arraigned and is asked to plead to the indictment. This is consistent with section 503 of the Criminal Code which provides:

> *"**Commencement of trial; arraignment***
> *(1) At the time appointed for the trial of an accused person, he shall be informed in open court of the offence with which he is charged, as set forth in the indictment, and shall be called upon to plead to the indictment, and to say whether he is guilty or not guilty of the charge.*
>
> *(2) The trial is deemed to begin when he is so called upon."*

27. Given that the trial is deemed to begin when the defendant is called upon to plead it seems to me that the words "*at the time appointed for the trial*" are properly to be regarded as referring to the time when he is first called upon to do so.

28. In *R v NM,* Criminal Appeal No 19 of 2014, the indictment against NM was permanently stayed by the Supreme Court Judge on the ground that, on account of delay, the continuation of the prosecution would be an abuse of process. This Court held that for the purposes of section 17 (2) of the Criminal Appeal Act (see below) a trial begins at the moment when a person enters a plea regardless of the fact that no jury has been sworn, no evidence has been heard, and no other steps in the trial process undertaken. Further it held that a defendant is "*discharged*" whenever he is "free to go" as a result of the Court's order.

29. It is, thus, plain from the Criminal Code and the authorities, as well as ordinary language, that the Respondent in this case had been arraigned on I May 2019; she had entered a plea; and her trial had begun. The fact that, if the case had gone ahead, she might be arraigned again does not mean that she had not been arraigned before; nor, as I have said, can we see any warrant for interpreting "*arraigned*" " in section 31 (1) (a) as meaning arraigned a second time round - an interpretation which would allow an application to be made very late in the day and up to the moment when the jury is sworn and the accused pleads before it, when the intention of the statutory provision, like its UK counterpart, is to allow a challenge to the sufficiency of the evidence, but only at a much earlier stage. I note also that the judgments in *Trenton Williams* and *Albuoy* were not based on the proposition that the arraignment referred to in section 31 is an arraignment the second time round.

30. In the present case, therefore, I conclude that the judge had no jurisdiction to entertain the application upon which she based her decision.

The Jurisdiction of this Court

31. By section 17 (2) (a) of the Court of Appeal Act 1964:

> *"Where:*
>
> *(a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged;*
>
> *...*
>
> *the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."*

32. In the light of the authorities to which I have referred the Respondent was a person tried on indictment who was discharged. In the circumstances, the Crown has a right of appeal to this court "on a question of law alone". An appeal on the ground that the judge had no jurisdiction to entertain a section 31 application post arraignment, was and is an appeal on a question of law alone.

33. I do not consider that the provisions of section 31 (6) that, if the charges, against the applicant are dismissed, no further proceedings may be brought on the dismissed charges save by way of a voluntary bill affects the matter. I say that for two reasons. Firstly, those provisions cannot be applicable if the order was made without jurisdiction since, on that footing, there was no effective dismissal, and this Court must have jurisdiction to say so. Second, even if the judge did have jurisdiction, I regard it as open to the Crown to appeal from that decision. In so doing it would not, in my view, be bringing further proceedings on the dismissed charges, e.g. by way of summons or a fresh indictment, but contending that the existing proceedings should not have been dismissed in the first place.

34. I am fortified in reaching that conclusion by a consideration of the background to section 31 of CJPA 2015. The wording "*no further proceedings may be brought on the dismissed charges*" is wording is taken from the CDA 1998. That wording cannot have been designed to restrict an appeal because in 1998 there was in England no appeal from a terminating ruling of the Crown Court. They were clearly intended to prevent the commencement of fresh proceedings on the dismissed charges in the Magistrates' Court by way of laying a fresh information, as was possible following discharge of the defendant by examining justices. That was also possible in Bermuda. Mr Richardson, for the Respondent, submits that, given the existence of the prosecution's entitlement to appeal set out in the Court of Appeal Act 1964, the Bermudian Legislature must have intended the wording to apply so as to foreclose any right of appeal from a dismissal of charges under section 31. In my judgment the better guide to the meaning of the wording is to be derived from considering what that wording meant (and what it did not mean) in the context of schedule 3 to the CDA 1988, from which section 31 of the CJPA 2015 was plainly imported.

35. I have not forgotten that in *Thompson*, where the point in the previous paragraph does not appear to have been raised, the English Court of Appeal was not attracted by the argument that the phrase "*no further proceedings may be brought on the dismissed charges*" would, nevertheless, permit the obtaining of an appeal in the same proceedings. The Court said:

> "*We do not think that such a conclusion would have gone unremarked in the language or amendments of the 2003 Act. Nor do we think that the 2003 Act has silently effected an implied amendment of Schedule 3's paragraph 2 (6) (a) [of the CDA 1998].*"

36. But the Court in that case was considering whether an appeal to them lay under section 58 of the Criminal Justice Act 2003 which introduced a right of appeal from a terminating ruling. That right of appeal is differently structured to the right afforded to the DPP in Bermuda by section 17 (2) (a) of the Court of Appeal Act 1964. Under the UK legislation, if the Crown abandons or fails in its appeal, the defendant will be acquitted – see sections 58 (12) and 61 (3). It was crucial to the first and second planks of the decisions in *Thompson* (see paragraphs [33] and [35]) that an acquittal does not result from a successful application to dismiss and that, as a result, section 58 was not applicable to the dismissal of a charge under the CDA 1988.

37. Further, the interpretation by the English Court of Appeal (by which we are not bound) of the language equivalent to section 31 (6) (a) was only one part of the Court's reasoning; and it attached weight to the fact that the 2003 Act did not modify Schedule 3, paragraph 6 (a) of the 1998 Act. In Bermuda, by contrast, the right of the DPP under section 17 (2) (a) of the Court of Appeal Act 1964 predated the CJPA 2015. Section 17 (2) (a) of the 1964 Act provides:

> *"(2) Where—*
>
> *(a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged; or*
> *(b) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or*
> *(c) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,*
> *the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."*

38. Section 17 (5) then provides:

> *"(5) For the purposes of this Part, a decision of a judge in respect of a trial on indictment—*

> *(a) directing the jury to acquit an accused person on the grounds that there is no case to answer;*
> *(b) staying proceedings as an abuse of process; and*
> *(c) issuing a ruling which would otherwise have the effect of terminating the trial,*
>
> *shall be deemed to involve a question of law alone."*

39. In the present case the ruling of the judge had the effect of terminating the trial, so that the case comes within section 17 (5) (c). I do not think that the wording of section 31 (6) (a) was apt, or sufficient, to deprive the DPP of his pre-existing rights of appeal.

The Merits of the Ruling

40. I have considered whether the lack of jurisdiction can now be remedied by the indulgence of this Court, by treating the decision as one made pursuant to the non-statutory inherent jurisdiction on the basis that, it is the same *Galbraith* principles that inform the decision in relation to both circumstances. In my judgement such an indulgence, even if permissible, would be wrong, not least because we consider that, quite apart from the issue of jurisdiction, the Judge erred in her application of the *Galbraith* principles. Put simply, the evidence was such that it was sufficient to leave the case to a jury.

41. The evidence disclosed that the firearms and ammunition were in the suitcases which the Respondent admitted were hers and were located in her bedroom. When asked what was in the brown suitcases, and the brown bag within it, she simply said "I don't know". The Crown's case is that the Respondent knowingly handled the illicit items by "harbouring, keeping or concealing" them. They invoked the statutory presumption (section 31 of the Firearms Act) and asserted that their evidence showed that the Respondent was in possession of the items seized, so it is to be presumed, until the contrary is proved, that the Respondent was in possession of, or handled, the firearms and ammunition. This, they submit, is sufficient evidence to satisfy the *Galbraith* test. Whether the evidence in fact satisfies the jury of the Respondent's guilt will be a matter for them.

42. The judge's approach is reflected in these paragraphs from her decision:

> *"16. Contrary to Mr Rickett's submission, it is for the court on this application to assess the evidentiary value of this evidence. The court is inclined to accept that a statement made by an accused when first taxed has evidentiary value. Such statements have historically been held to carry evidentiary weight whether they are for or against a defendant. The Applicant's reaction, in the circumstances is to be distinguished from a mouthing [of] the words of any section of the Fire Arms Act.*
>
> *17 On the facts of this case the denial of knowledge by the Applicant in the circumstances is sufficient to displace the presumption of knowledge provided in section 31 of the Fire Arms Act. The consequences for the Crown is that, the presumption having been displaced, it is required to establish the requisite mens rea in its case with other evidence supporting the element of "knowingly handled".*

> *…*
>
> *21 It is the role of the Court at this juncture to determine if sufficient evidence exists to undergird a presumption of wilful blindness. The court finds that such facts do not exist in this case. There is no evidence capable of showing that the Applicant looked into the suitcase prior to the police showing the contents to her. Nor is there any evidence that the Defendant was confronted by other facts or circumstances which would inform her or an ordinary person that firearms were contained in the suitcases or to cause the applicant to ignore such. The court finds that there is no evidence upon which a jury properly instructed could draw an inference of knowledge based on wilful blindness.*
>
> *…*
>
> *29 The court finds that in all of the circumstances of the case there is a dearth of evidence of how the Applicant was involved or interested in harbouring, or keeping or concealing the firearms and ammunition. The suitcases were found in her grandmother's house. The Applicant used that address as her permanent address. There is evidence that she usually lived elsewhere. Other people had access to the room she was found sleeping in; indeed, her brother was found there when the police executed the search warrant. The police were looking for the Applicant's uncle, a person known to the police to be involved in gang like activity. The police did not previously know the Applicant.*
>
> *30 In the court's judgment none of this evidence supports or is capable of supporting the Crown's case that the Applicant was involved in or interested in harbouring, or keeping or concealing the firearms and ammunition. No other evidence is capable of such support. There is a risk however that the jury will conflate evidence suggestive of simple possession with knowingly handling.*
>
> *31 In all the circumstances the court finds that the Crown has failed to prove that the Applicant had the requisite mens rea for the offence charged. Further the court finds that there is insufficient evidence to prove that the Applicant was in any way concerned with harbouring, or keeping or concealing the firearms and ammunition. The Crown has therefore failed to present any evidence that the Applicant knowingly handled the firearms and ammunition, the subjects of the indictment. Therefore, there is insufficient evidence for a jury properly directed to convict the Applicant of the 4 counts in the indictment.*
>
> *32 Accordingly the charges against the Applicant are dismissed"*

43. With respect, I regret to say that we consider the approach of the Judge to have been erroneous. The question for her was not whether the Crown had proved its case (the phrase used in the first sentence of paragraph 31 above), but whether the evidence against the accused would not be sufficient for a jury properly to convict. The statement that the Crown had failed to prove that the applicant was in any way concerned with harbouring or keeping or concealing the firearms adopts

the wrong test. Mr Richardson suggests that paragraph 31 needs to be looked at as a whole and that this sentence was shorthand for what was said in the last sentence. I cannot be sure that that is so and the first sentence (contained in a paragraph which sets out the Court's finding) tends to suggest that the judge was focussing on what the evidence proved to her rather than what it could properly prove to a jury.

44. The second sentence of paragraph 31 appears to adopt the correct test provided at any rate that the judge meant "prove to a jury". But I do not accept that the Crown had not produced sufficient evidence upon which a jury could properly convict the Respondent, much less that it had failed to present any evidence that the Respondent had knowingly handled the firearms and the ammunition. The judge appears, in my view, simply to have assumed the role of the jury.

45. When Mr Richardson for the Respondent came to address us, he drew to our attention to certain aspects of the hearing below (where Mr Richards did not appear for the Crown) which were not apparent to us from the papers. The Crown had produced further particulars of the Indictment. These included 9 points, of which numbers 8 and 9 were the following:

> "8 *The firearm (shotgun) was large and wrapped in transparent cling wrap and obvious to any person with custody of the suitcase that it was a firearm.*
>
> *The packages containing the other firearm and several hundred rounds of ammunition were not concealed inside the suitcase"*

46. Mr Richardson pointed out that the officer who opened the suitcases was DC Smith, who has left the Police Service of Bermuda without providing any statement or notes (as the judge noted at paragraph [14]). He told us that Counsel for the Crown was obliged to recant from the particulars in 8 and 9 above and to accept that the firearms and ammunition in the suitcases were not obvious but buried under other things. Further, although there are a number of photos on the record, none appear to have been taken when the suitcases were first opened. Thus, the shotgun wrapped in cellophane was revealed after the removal of objects from the black suitcase. The judge recorded at [15] that the shot gun was found wrapped in layers of cellophane and the revolver wrapped in a tee shirt and the ammunition in trash bags.

47. Mr Richardson said that the Respondent regularly resided at the house of her boyfriend, which is why her boyfriend's house was also searched that day; and that her car was registered there; and that 36 Railway Trail was her mailing address, it being, he submitted, very common for children in Bermuda to use their parent's address for that purpose. Your "current address", he submitted, is where your mail goes. (In his written submission to the judge he did, however accept that the fact that the Respondent provided that address to the police was a fact from which a jury might be invited to infer that she "lived" there). He told us that her brother had said (when being interviewed by the police under caution of which there was a video) that his sister had only been at 36 Railway Trail for a week or a few days and that he was only there that night because he was drunk; and that her mother had told the police (again when interviewed) that she herself was the last person who used the suitcases and since then they had been used for storage. The bedroom where the suitcases were found was not, according to the Respondent's mother, a room lived in but just used for storage. Accordingly, the room could not, Mr Richardson submits, be regarded as one which was

lived in by the Respondent. There was apparently discussion between the judge and counsel in which Mr Ricketts for the Crown confirmed that the mother and the brother had made these statements.

48. There are problems inherent in addressing these submissions. First, the Court does not have a record of the proceedings below and, therefore, of exactly what was accepted by Counsel for the Crown. Secondly, what the Respondent's mother and the brother said in interviews to the police was (a) not contained in a witness statement and not part of the record; (b) not material upon which the Crown could rely as against the Respondent; and (c) may or may not have been correct. (Mr Richards told us that counsel for the Crown's position below had been that what the brother and mother had said at interview was inadmissible on the application).

49. If the mother and brother were to give evidence they would no doubt be cross examined as to the extent to which the Respondent stayed at the house (how the brother could know how much time she had spent there when he was only at the house on the day because he was drunk is unclear); and what at the relevant time the suitcases were used for; and how they came to be in the bedroom. Whether or not the evidence against the Respondent was sufficient to convict her must depend on the evidence of the Crown and not on evidence that might not be, but has not yet, been given. The only evidence in the record in the categories referred to by Mr Richardson was that the Respondent had reregistered the address for her vehicle as that of her boyfriend on 29th October 2014, it having previously been registered at 36 Railway Trail from 10 October 2005.

50. I do not regard what are said to have been the statements of the mother and the brother as relevant for present purposes and, even if I were wrong on that, I do not regard them as having the effect, taken with the evidence relied on by the police, that no jury could properly convict the Respondent.

The Presumption

51. The operation of the section 31 (1) presumption is, itself, not without complication. The offence with which the Respondent was charged was that of "*knowingly*" handling the firearms and ammunition. The mens rea of the offence is, therefore, that she knew that what was in her suitcase was firearms and ammunition. The actus reus is handling and handling is defined so as to include "*harbouring, keeping or concealing*", which were the three aspects of "*handlin*g" on which the Crown relied. In the circumstances of the present case those actions would, in my view, require the firearms and ammunition to be in her possession or custody or under her control. Possession would involve, first, her knowing that there was something in her suitcases, which turned out to be firearms and ammunition. As Lord Hope pointed out at [61] of *R v Lambert* (the approach in which was adopted for Bermuda in *R v Darrell and Medeiros* [2006] Bda.L.R.20) there is a physical element and a mental element to possession of something. The physical element involves proof that the thing is in the custody of the defendant or subject to his control. The mental element involves proof of knowledge that the thing exists and that it is in his possession. But proof of knowledge that the thing is an article of a particular kind, quality or description is not required for the thing to be in his possession. See also Lord Clyde at 122 [122].

52. I would accept that there is a similar mental element to "*handling*" in the sense that, in a case such as the present, to be a handler the defendant must be shown to have known that her suitcases

contained something that turned out to be firearms and ammunition. The presumption in 31 (1) (b) seems to me to proceed on the basis that you do not handle something which contains a firearm if you do not know that the thing contains something which turns out to be a firearm. If having in your possession something that contained a firearm meant that you were automatically a handler of the firearm, there would be no room for proving the contrary of the presumption. You would automatically be a handler whatever you said about your state of knowledge about the contents. To this limited extent "*handling*", as defined, like possession, has a mental element. Some parts of the definition would appear to call for more than mere possession.

53. Thus, in the present case the Crown, if it was to secure a conviction for "knowingly handling" would have had to prove at trial (a) that the suitcases were in the Respondent's possession or custody or subject to her control, which they could do, at least prima facie, by showing that they were her suitcases in her bedroom or, at the lowest, the room that she was sleeping in when the police attended the property; (b) that she knew that there was something in her suitcases which turned out to be firearms and ammunition; and (c) that she knew that the things which were in her suitcase actually were firearms and ammunition. Although in practice the critical matter is the last, and items (b) and (c) are often elided, there is a real distinction between the three probanda. A defendant may not be in possession or control of something, in which case it does not matter whether she knew that there was something in it or what it was. Or she may be in possession or control of something and know that there is something in it; but not what it is. Or she may know that there is something in it and what it is.

54. The complication arises because, although in the case of importation of something containing a firearm or ammunition, the presumption in section 31(1) (a) is that the importer knew that such firearm or ammunition was contained in such thing, the statutory presumption in 31(1) (b) is not expressed as a presumption of knowledge but a presumption that, if the defendant had possession or custody or control of something containing a firearm, he was in possession of or handled the firearm. As discussed above, there is a mental element to possession or handling. The Respondent cannot, I think, be treated as possessing or handling the firearms and ammunition if she did not know that items which turned out to be those things were in her suitcases. But, as appears from what I have said above, you can possess something that you have but not know what it is. A common instance in which this issue arises is when someone is given drugs in a packet, and keeps them in a bag or other receptacle but says that she never knew what it was she was given. This is the line that the appellant took in *Lambert*.

55. In the light of the way in which the presumption has been drafted, it appears to me that it operates so as to create a presumption that the Respondent was in possession of or handled what turned out to be the firearms and ammunition which were in her suitcases; but not that she knew that that was the nature of what was in them. If, of course, the presumption was not defeated, it would be unnecessary for the jury to consider whether the Respondent knew that the items which turned out to be firearms and ammunition were in her suitcases. But it would still be necessary to determine whether she knew that that was what they were.

56. I have considered whether this is far too recondite an analysis and whether the presumption in 31 (1) (b) should be regarded as a presumption of knowledge such that if it is proved that the Respondent had in her possession or custody suitcases which contained firearms and ammunition,

it was to be presumed, until the contrary was proved that she handled those items, i.e. handled them knowing that that is what they were. I am conscious that, if the presumption is limited in the way in which I think that it is, it is of limited practical utility.

57. I do not, however, think it possible to take that view for a number of reasons. First, there is obviously a difference, contemplated by the Firearms Act itself, between "*handling*" and "*knowingly handling*". The difference is apparent, not just as a matter of language but from the fact that section 19A (2) provides a definition of "*handle"* which does not include any reference to knowledge and 19A (1) makes it an offence *knowingly* to handle – not just to handle.

58. Second, the presumption in section 31 (1) (a) is a presumption of knowledge; but the presumption in 31 (1) (b) makes no mention of knowledge, when it could easily have done so. That it could easily have done so is apparent from the fact that in section 32 (c) of the Misuse of Drugs Act 1972 the Legislature provided that "*where it is proved that a person handled, within the meaning of section 7, anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing*". Section 7 is in essentially the same terms, in relation to controlled drugs, as section 19A (2) of the Firearms Act 1973.

59. Third, I am concerned here with the application of a criminal statute and should more readily adopt a construction which is more favourable to the accused.

60. I regret the need to have devoted quite so much space to the operation of the presumption, not least because Mr Richards for the Crown told us that the prosecution did not need it. It is, however, clear, that considerable attention was given to the presumption below and it is necessary to address its extent for the future.

61. In paragraph 17 of her judgment the judge said that the Respondent's "*denial*" was sufficient to displace the section 31 "*presumption of knowledge*.". There are, in this respect, three problems. The first is that, in my view, the presumption is not accurately described as a presumption of knowledge, if by that is meant knowledge that what the bags contained was firearms and ammunition.

62. The second is that, whether or not what the Respondent said was sufficient to rebut the presumption, was itself a matter for assessment by the jury, and should, in my view, have been left for them to determine, particularly because the response "*I don't know*" in response to a question as to what items were in the brown suitcase (she does not appear to have been asked the same question in relation to the black suitcase) is not in fact a denial, or at any rate a clear one, of the presence of the objects in the suitcases, whether she knew what they were or not.

63. The third is that, even if the presumption were rebutted, it would still be for the jury to decide whether the Crown had made out its case. The effect of the presumption is to create an evidentiary burden. It is such that the accused must give sufficient evidence to raise the issue as to whether she knew that the items which turned out to be firearms and ammunition were in her suitcases. If she does not do that, it is to be presumed that she knew that the items which turned out to be firearms and ammunition were in her suitcases, and it will then be for the Crown to prove beyond reasonable doubt that she knew what the items were. If she does give sufficient evidence to rebut

the presumption, that is not the end of the matter, the jury must then determine whether the Crown has proved that she knew both that the items which turned out to be firearms and ammunition were in her suitcases and also that she knew that that was what they were.

64. As to that the police found, at what the Respondent described on three occasions as her current address, and in her bedroom, two suitcases which belonged to her, both of which contained guns and large amounts of ammunition. Neither of the suitcases were in a cupboard or closet, but placed by a wall in the room opposite the bed. Even if the presumption of possession/handling of the contents was rebutted, I cannot accept that it would not be open to a jury to conclude (without any presumption) that she knew that there were items in her suitcases and, also, what they were; or that it would be precluded from doing so by her exculpatory statements of ignorance of the contents of one of the suitcases. What she said gave no indication of how it was, or how it could be, that her suitcases came to be in her bedroom, fully or pretty fully packed and including those items. In the absence of any further explanation it would be open to a jury to conclude that she must have known what was in her own suitcases in her own bedroom, at what she gave the police as her current address, and that such a substantial quantity of firearms (one of which was a fairly bulky shotgun) and ammunition could not have got into her suitcases and remained within her suitcases in her bedroom without her knowing it.

65. The judge said at paragraph 16 of her judgment that it was for her to assess the evidentiary value of what the Respondent said. That observation is not without ambiguity, since it could mean that it was for her to determine what she thought of that evidence rather than what view a jury could properly take of it (even if it was not her own). In any event she appears to have regarded the first response of the Respondent as of preponderant significance, and as precluding any possible conclusion by the jury that the Respondent must have known what was in her suitcases. I regard this as misplaced. In the third sentence of that paragraph she said that statements by an accused when first taxed "*have historically been held to carry evidentiary weight whether they cut for or against a defendant*". That may be true up to a point; but purely exculpatory statements are intrinsically less likely to carry weight than culpatory ones: *R v Aziz* [1996] 1 AC 41, 49; and the weight to be given to a purely exculpatory statement is a matter for the jury.

66. I therefore conclude that, whether the defence application had been made pre-arraignment under section 31 of the CJPA or subsequently on a non-statutory basis, it ought to have been rejected.

67. I shall, therefore, allow the appeal, set aside the decision of the judge, and remit the matter to the Supreme Court for trial.

SMELLIE JA:

68. I agree.

GLOSTER JA:

69. I also agree.