[2021] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO 24/2014

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA (AG)

EASTON BLAKE v R

Robert Fletcher and Ms Nancy Anderson for the appellant

Mrs Sharon Millwood-Moore and Ms Cindi-Kay Graham for the Crown

13, 14, 15, 16, 27 July and 29 October 2021

FOSTER-PUSEY JA AND BROWN JA (AG)

[1] This is the judgment of the court.

[2] The appellant was summarily convicted on 29 August 2014 by the learned Senior Resident Magistrate (now Judge of the Parish Court) for the parish of Saint Ann, at the end of a trial which commenced on 22 November 2012, and continued on divers dates, for possession of and dealing in ganja. On the information charging him with possession of ganja, he was sentenced to pay a fine of $15,000.00 or, in the alternative, serve a sentence of six months' imprisonment. On the information which charged him for dealing in ganja, he was ordered to serve a sentence of six months' imprisonment. The appellant paid the fine the same day and, on that day as well, he was released on bail pending the hearing of his appeal.

[3] The appellant filed his notice and grounds of appeal on 4 September 2014. The sole ground was "[t]hat the verdict is unreasonable and cannot be supported having

regard to the evidence. In due course, further supplemental grounds were filed and permission sought, and was granted to argue them. These will be set out below. Before doing so, it is useful to provide the background against which those grounds will be argued.

The prosecution's case

[4] The case for the prosecution may be summarized as follows. On Tuesday 20 October 2009, at about 9:50 pm, Corporal Devon Sterling ('Cpl Sterling') was on mobile patrol in Claremont in the parish of Saint Ann. He was driving a marked Hilux pick-up and accompanied by three other policemen. They were all dressed in blue denim and wearing ballistic vests marked 'police'. Whilst on mobile patrol, they heard a radio transmission which caused them to be on the lookout for a burgundy Toyota Corolla motor car registered 8919 EZ.

[5] This burgundy Toyota Corolla motor car was observed in the vicinity of the Ferncourt High School, travelling in the opposite direction. Consequently, Cpl Sterling turned around the police vehicle and went in pursuit of the burgundy Toyota Corolla motor car but lost sight of it. He next saw the burgundy Toyota Corolla motor car stationary at a service station some distance from the Claremont Square. He drove past the motor car and stopped.

[6] Cpl Sterling and his party alighted from their vehicle and walked towards the burgundy Toyota Corolla motor car. As they did so, he noticed the burgundy Toyota Corolla motor car being turned, going back onto the main road and towards the Claremont Square. From a distance of about 30 feet away, Cpl Sterling saw four occupants in the burgundy Toyota Corolla motor car, equally distributed between the front and the rear of the vehicle. As Cpl Sterling and his team continued their approach to the target vehicle, loud explosions sounding like gunshots came from the driver's side and the passenger seated behind the driver. Cpl Sterling and his party took cover and returned the gunfire. The burgundy Toyota Corolla motor car was then driven away in the direction of the Claremont square.

[7] Following that encounter, Cpl Sterling and his companions re-boarded the police vehicle and a hot pursuit commenced. They lost sight of their target. However, Cpl Sterling later received information which led him to Ferncourt Street. Travelling along Ferncourt Street, he came upon a knitted bag in the middle of the road. He stopped, disembarked, and retrieved the knitted bag. He opened it and found it to contain five rectangular parcels wrapped in masking tape with vegetable matter resembling ganja. He placed the knitted bag with its contents in the police Hilux pick-up and drove to the end of Ferncourt Street.

[8] At the end of Ferncourt Street, Cpl Sterling came upon a track. He drove onto this track. At the end of the track, he saw the burgundy Toyota Corolla motor car registered 8919 EZ, abandoned. Cpl Sterling searched this vehicle and, in its trunk, he found four knitted bags, three of which contained five rectangular parcels while the other had four rectangular parcels; two large travelling bags (which resembled tote bags), each containing two rectangular parcels; and one white bucket with loose vegetable matter resembling ganja. All the parcels were wrapped with masking tape. He cut one of the parcels and saw that it contained vegetable matter resembling ganja. Corporal Sterling took possession of all the containers.

[9] Sometime after the containers with the ganja had been removed from the burgundy Toyota Corolla motor car, on the night of the incident, the car was towed to the Claremont Police Station. It was there that Detective Constable Kevon Daniels processed the car on 22 0ctober 2009, sometime after 4.30 am when he was summoned by Det Sgt Brady. During that exercise, Detective Cons Daniels noticed a pay advice slip (exhibit 1), dated 25 June 2009, on the back seat of the car, among other papers. This pay advice slip bore the name of the appellant and was inscribed, "Police Department". He handed over the pay advice slip to Inspector Minto, who was in charge of the Claremont Police Station.

[10] Later that day, about 4:45 pm the appellant was questioned by Deputy Superintendent of Police Mevarol Smith ('DSP Smith') in the presence of two senior

officers, one of whom was the appellant's immediate supervisor, at the Major Investigation Taskforce ('MIT'). DSP Smith questioned the appellant about the duties he performed on 20 October 2009. His answers led to DSP Smith asking the appellant if he knew why all those questions were being asked. The appellant responded in the affirmative and said he realized his documents, including his pay slip, fell in the car. Asked which car, he replied the burgundy car in Claremont. Asked what he was doing in the car, he replied, "a mi friend Omar ask mi fi pilot him. Mi should a get a next vehicle but mi neva get it so mi travel inna di car wid him". The cross-examination of DSP Smith at the trial, by defence counsel, concentrated on his understanding of the word "pilot". He never asked the appellant what he, the appellant, meant by the word "pilot".

[11] No other questions were asked of the appellant save two concerning legal representation. Once he gave the last answer, DSP Smith asked the appellant if he had an attorney-at-law. Upon receiving an answer in the negative, the appellant was next asked if he wanted a good lawyer who practised in the parish. He answered yes, at which time DSP Smith dialled the telephone number for Mr Oswest Senior-Smith and handed the telephone to the appellant. After that, the appellant was taken into custody.

[12] While he was in custody, on 27 October 2009, the appellant gave a statement under caution in the presence of his attorney-at-law, Mr Oswest Senior-Smith. Two days later, on 29 October 2009, the appellant was the subject of a question and answer session, again in the presence of Mr Oswest Senior-Smith. Both documents were admitted in evidence (exhibits 2 and 3 respectively).

[13] The cautioned statement turned out to be, in some sense, an abbreviated version of the appellant's sworn testimony.

[14] A file was prepared and submitted on 3 November 2009 to the Director of Public Prosecutions for a ruling on whether the appellant should be charged. The ruling was handed down the same day. Upon receiving that advice, Det Sgt Brady informed the appellant of the ruling, and then charged him for the offences.

The case for the defence

[15] The appellant gave sworn testimony and called four witnesses. His primary defence was a denial of knowledge of the ganja found in the trunk of the motor car. The main planks of his testimony were an explanation of his presence in the motor car, his conduct inside the motor car during the encounter with the police, his conduct after that encounter and his effort to speak with a senior member of the constabulary. The appellant's evidencewill be summarized below.

[16] The appellant testified that at the time of his trial he had been a member of the Jamaica Constabulary Force ('JCF') for 13 years. Prior to joining the JCF he was a vendor's bailiff. During the execution of his functions as a vendor's bailiff he met Orville Lugg aka Omar. They appear to have struck up a friendship and Mr Lugg would sometimes pick up the appellant at work in his burgundy motor car registered 8919 EZ. He later partnered with Mr Lugg in the running of a bar. That relationship lasted for six months and had come to a close about the time of this incident.

[17] On the 20 October 2009, between 9:30 pm and 10:30 pm, he was aboard the burgundy Toyota Corolla motor car being driven by Omar, as the appellant referred to Mr Lugg in his evidence. He boarded the motor car at his gate. Omar had asked the appellant to accompany him to Saint Ann, saying he got a "roast" to "drop" somebody in Saint Ann. When the appellant boarded the car, he seated himself at the rear of the motor car. On the floor of the car, behind the driver's seat, was a white knitted bag. There was also a white five-gallon plastic bucket on the rear seat.

[18] In the front passenger seat sat a male who the appellant did not know. Omar would later address this unknown male as 'Homeboy'. The appellant said he got into the car as it was his day off and he wished to explain to Omar why he was ending their business relationship and hand over the keys for the bar. He also spoke of a prior arrangement he had with Omar to travel to Saint Ann with him in separate vehicles, which Omar would procure. This was to allow Omar to leave his car in that parish with relatives for repairs. They would then travel back in the vehicle driven by the appellant.

[19] They travelled to Saint Ann without incident until they reached a service station in Claremont. While the vehicle in which he was a passenger was stationary, a marked police vehicle approached from behind. On the approach of the police vehicle 'Homeboy' said to Omar, "police drive". By then the police were on foot. Omar sped off as he was about to tell him no. A hot pursuit ensued during which he heard several gunshots. He opened his door during the chase and told Omar to let him out. Omar refused to do so, asking him if he did not see the police were trying to kill them.

[20] As the police continued their pursuit, Homeboy told the appellant to throw the white knitted bag out of the car. The appellant did as he was told. The appellant, of his own volition, next threw the white five-gallon plastic bucket out of the car. He asserted that this was an impulsive reaction to defend himself, meaning, to slow down his pursuers. Omar eluded the police and stopped at a dead end.

[21] They all then ran from the car and into nearby bushes. Omar said they had to go into the bushes as he knew another way out. Specifically, he followed Omar because he did not want to again encounter the police as he was fearful of them. They all spent the night in the bushes.

[22] In the morning Omar chartered a motor vehicle. They all travelled in the vehicle and the appellant disembarked in Spanish Town. He went home, then to his doctor as he was experiencing a panic attack, together with chest pains from the night before. He testified that he was a lifelong asthma sufferer. Dr Adolfo Mena one of the appellant's witnesses, confirmed that he saw and treated the appellant on 21 October 2009, sometime in the afternoon. In essence, the appellant presented with symptoms that were consistent with an asthma attack. That attack could have been triggered by extreme distress. Dr Mena placed him on five days sick leave.

[23] Later that day the appellant spoke to a Sergeant Porter who advised him to come in on the following day since he could not see the appellant that day. That day he also went to office of the Police Federation and made a report that he had been shot at by

the police. Sergeant Franz Morrison, another of the appellant's witnesses, confirmed this. Sergeant Morrison advised the appellant to make a report at the Inspectorate of Constabulary and to his sub-officer in charge. Under cross-examination, Sergeant Morrison revealed that the appellant never told him he ran from the motor vehicle and hid in bushes with the other persons.

[24] On the following day he went in to see Sergeant Porter. Sergeant Porter assisted him to speak to an officer. He confirmed that he gave a statement and said that was done contrary to his lawyer's advice, and also participated in a question and answer. Those documents represented the truth. He denied making any statement about "piloting".

[25] Detective Inspector Lincoln Bailey also testified on the appellant's behalf. On the night of the incident Detective Inspector Bailey was involved in the investigation of a case of shooting. That took him to Ferncourt in Claremont. He made an entry in the station diary concerning this. The diary entry was admitted into evidence (exhibit 12) through him. In cross-examination, he said both Sergeant Clinton Brady and Deputy Superintendent of Police Callum came on the scene and the investigations were handed over to Sergeant Brady on the instructions of Deputy Superintendent Callum.

[26] The final witness from the JCF to testify on behalf of the appellant was Detective Sergeant David Campbell, one of the appellant's supervisors at MIT in 2009. He gave character evidence on the appellant's behalf, generally. Specifically, he found the appellant to have been a person of the "highest integrity". However, the appellant never reported to him that he had been charged.

The findings of the learned Resident Magistrate

[27] The learned magistrate, after stating that she assessed the evidence led for both the prosecution and the defence, made findings of fact. They are as appear immediately below:

> "1. On Tuesday October 20, 2009 around 9:50 p.m. prohibited substance was found in a burgundy motorcar [sic] licence plate number 8919 EZ parked along a track leading off Ferncourt Street in St. Ann [sic]. The find consisted of knitted bags containing rectangular parcels wrapped in masking tape as also a white bucket containing loose vegetable matter resembling ganja.
>
> 2. That 68 pounds of the substance found was in fact ganja.
>
> 3. That the defendant Easton Blake was at some point present in the said burgundy motor car licence plate number 8919 EZ while the ganja was in the motor [car].
>
> 4. That the defendant Easton Blake was not only present in the motor vehicle but at the time he was present in the motor vehicle he was exercising joint custody and control over the Ganja [sic].
>
> 5. That at the time he was exercising joint custody and control over the ganja he knew that the substance he was exercising joint custody and control over was in fact ganja."

Application to adduce fresh evidence

[28] The appellant applied to adduce fresh evidence in the form of an affidavit sworn to by Mrs Valerie Neita-Robertson QC, who was his defence counsel at the trial. The appellant's application to adduce as fresh evidence information contained in the affidavit of Mrs Valerie Neita-Robertson QC sworn to on 5 May 2021, and later to add ground 8 as an additional ground, stemmed from an affidavit he filed in this court on 19 March 2021. In that affidavit, the appellant complained about the manner in which his then counsel at trial, Mrs Neita-Robertson, conducted his trial. Her conduct, according to the appellant resulted in his trial and conviction being unfair. At paragraph 8 of that affidavit, he stated:

> "…Secondly, during the cross examination of Mr. Brady, the Court ordered the prosecutor to disclose to the defence the Forensic Cds in relation to the alleged ganja which was processed in the trunk of the car on the night in question in relation to Mr. Brady's evidence. Also the statement of photographer Detective Sergeant Fullerton which the prosecutor failed to disclose (**page 40 of the Notes of**

> **Evidence**). I was of the view that my attorney made a big mistake by not using the failure to disclose to my defense [sic], she being practising for over years [sic]." (Emphasis as in the original)

Further at paragraph 13(b), the appellant stated:

> "I am of the opinion that my counsel failed my instruction to have the alleged exhibits packed back in the trunk of the car as in the evidence of Mr. Sterling who gave the exact position he saw them. I was of the opinion that by themselves they could not hold. Secondly, with a standing fan photographed in the trunk of the car, inference could be drawn that the items were not recovered from the car in relation to his case. One fact is that the Trial Court failed to present the mention [sic] car for the reconstruction of the Crime Scene because they had given back the car to my co-accused Mr. Lugg on a bond and he sold the car. Another fact was that in my opinion giving back the car to my co-accused was by itself a demonstration of prejudice against me, holding me to account for another man [sic] possession, me being a passenger of that said car which should have been seized for conveyance until [sic] case was closed. Secondly, he was charged for trafficking the said exhibits that I was before the Court for, he was not tried by the court for what he allegedly had in it only me. Another fact was that the car had evidence of my defence in its trunk. Another fact was that the Reconstruction of the crime scene was scheduled to take place on my counsel's birth day [sic] of 2014. Another fact was that only the ganja exhibits were produced, no fan and no car. I knew of the importance of the reconstruction towards my defence so I had been doing my own investigation. I told my attorney where the car was. She intern [sic] informed the Court where the car was. She knew that Detective Corporal Bucknor had the car seized at the Flying Squad Police Station Orange Street Kingston and could have planned another date for the reconstruction but she failed to do so. This was a paid for procedure, she failed to deliver. It was surprising to know that even at that time in 2014 that the car was still on the Police Control System as stolen. Had she follow [sic] through with the reconstruction of the exhibits it would have been proven that they could not hold in trunk [sic] of the car with a

> standing fan and the Court would thereafter acquit me of all charges."

[29] Mrs Neita Robertson, on 23 April 2021, filed an affidavit in response to the appellant's complaints, in the course of which she, among other things, referred to her efforts to procure a reconstruction of the position of the exhibits in the trunk of the car, and attached a number of letters in proof of her efforts.

[30] Although the court had granted counsel for the appellant permission to file additional grounds of appeal, if this was seen as appropriate, counsel only sought to add and argue ground 8 which states:

> "The state (prosecution/court/agents) failed to effectuate requests for disclosure by the appellant's defence and, the order of the court, of matters pertaining to critical issues in the case, this failure denied the appellant a fair and balanced consideration of his case, a real chance of acquittal and was a miscarriage of justice."

[31] In the end, the appellant did not file a ground of appeal raising an issue of incompetence of counsel.

[32] The appellant, by way of a notice of application for court orders refiled on 8 July 2021, sought permission to adduce fresh evidence on the following grounds:

> "1. That the issue of the request, the order of the court, and the subsequent failure to disclose is omitted from the Notes of Evidence except for a notification on the court file.
>
> 2. That there are documents delineating the request for disclosure and the course of the non-disclosure which, therefore are necessary to give the court a full picture of the complaint and non-disclosure.
>
> 3. That, as counsel who had conduct of the case, this issue is best adumbrated by the affiant.
>
> 4. That the issue is central to the case and critical to the overarching question of a fair trial for the appellant."

[33] The appellant also relied on the affidavit sworn to by Mrs Neita Robertson and filed on 9 July 2021. In that affidavit, Mrs Neita Robertson stated that among the issues which she pursued in the course of the appellant's trial, were the deficiencies in the scene of crime processing, and the absence of photographs of the large amount of ganja said to have been found in the trunk of the car along with a standing fan and a bucket. It was her view that these matters discredited the Crown's case. Mrs Neita Robertson stated that she made an application to the court for disclosure of the car and the ganja, and for them to be brought to court for viewing or demonstration, or at least for her experts to examine, measure and demonstrate that those items could not hold together in the trunk of the subject car. She stated that "[a]pparently the Resident Magistrate made no notifications of these applications in the notes of evidence" (see paragraph 7 of the affidavit).

[34] Mrs Neita Robertson acknowledged, however, that there was a note made on the court file jacket that subpoenas had been issued by the court for the exhibits which she had requested. Queen's Counsel attached as exhibits to her affidavit, letters written to the Clerk of the Courts, the Transnational Crime Division, the learned magistrate, the Commissioner of Police and the police in an effort to have her expert attend at the physical location of the car to examine its trunk, and for the examination of all parcels allegedly containing the ganja found in the car. These efforts continued for a period of eight months. Queen's Counsel then stated at paragraph 12 of her affidavit:

> "Ultimately I recall that I realized the futility of this effort to have the disclosure and to get the examination of the exhibits based on a sense that the court was not proactive in enforcing the order."

[35] Queen's Counsel stated that the demonstration was of even more critical importance after she viewed some compact discs ('CDs'), with pictures of the car showing a standing fan in the trunk as one of the things found, as she realized that the fairness of the trial would be compromised unless the disclosure took place. Queen's Counsel stated that at the appellant's trial she submitted on the issue and effect of the non-

disclosure, but did not see anything in the notes of evidence or the findings of the Learned magistrate to indicate that her submissions were considered.

Submissions

Appellant's submissions

[36] Mr Fletcher, counsel for the appellant, stated that the matter at Bar required careful management in the resolution of several issues which were brought before the court. He referred to his affidavit filed 14 November 2019 in which he indicated that the appellant and his counsel needed to see certain images reflected on some CDs which had been admitted into evidence at the appellant's trial. This court's registry made arrangements for the CDs to be viewed, but they could not be opened. It was later indicated that the particular CDs required, including the Master CD, had been degraded to such an extent that they could not be viewed. He submitted that, if viewed, the CDs would have shown a standing fan in the trunk of the car. This was the subject of significant concern and assertions by the appellant of unfairness in respect of the chain of custody.

[37] Counsel submitted that the application to adduce fresh evidence was "unusual and nuanced". This was because the application was designed to show the failure of the State to effectuate disclosure as required in law. He submitted that the non-disclosure was a fact, but it was not evident in the notes of evidence. There existed, however, subsidiary documentation proving the request for disclosure and the continuing non-disclosure throughout the trial.

[38] Mr Fletcher submitted that without the affidavit from Mrs Neita Robertson, and the potential *viva voce* evidence which she may give to the court, "the fullness of the non-disclosure may not be technically receivable since the evidence is about a request and something which actually was not done". Counsel acknowledged, in response to a query from the court, that all of the letters attached to Mrs Neita Robertson's affidavit were on the trial court's file.

[39] Counsel referred to and relied on section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA') which allows for the enlargement of a record. He submitted that the court can receive fresh evidence and ask for anything that is missing. Relying on the seminal case of **R v Parks** [1961] 3 All ER 633, counsel outlined the four criteria that must be satisfied for this court to allow the appellant to adduce fresh evidence at this stage. He stated that the court must consider:

i. Whether the fresh evidence was available at the trial;

ii. Whether such evidence is relevant to the issues;

iii. Whether the evidence is credible and is well capable of belief; and

iv. Whether the evidence could have caused a reasonable doubt in the minds of the jury as to the guilt of the appellant if the evidence along with other evidence had been given at trial.

[40] In terms of the first limb, whether the fresh evidence was available at trial, counsel argued that the failure by the State to disclose the exhibits amounted to the evidence not being available at trial. He pointed out that material can be present but not available. He submitted that the correspondence between Mrs Neita Robertson and the State, illustrated that the exhibits were not available at trial, and the order of the court to make the exhibits available at court was not adhered to.

[41] In relation to whether the evidence is relevant, counsel submitted that the evidence is relevant as it raises the issue of unfulfilled disclosure by the State and supports the point that the appellant was not afforded a fair trial.

[42] As regards, the third limb, whether the evidence is credible and well capable of belief, counsel noted that Mrs Neita Robertson had conduct of the matter, and therefore her account of what transpired during the course of the trial is well capable of belief. In

support of this submission, counsel referred to and relied on the cases of **Clifton Shaw and Others v The Queen** [2002] UKPC 53 and **Kenneth Clarke v The Queen** [2004] UKPC 5.

[43] In respect of the fourth limb, counsel argued that the demonstration which the defence sought to do with the exhibits would have had a visual impact and would have reasonably cast doubt in the mind of the tribunal of facts, therefore rendering a verdict of acquittal. To bolster this point counsel relied on the case of **Bonnett Taylor v The Queen** [2013] UKPC 8.

The Crown's submissions

[44] Counsel for the Crown opposed the application to adduce fresh evidence on the basis that the appellant had not met the requirements as prescribed by the authorities. Counsel relied on the recent case of **Andrew McKie v R** [2021] JMCA Crim 17 which applied the principles enunciated in **R v Parks**, and rehearsed the well-known criteria for admission of fresh evidence. Counsel also pointed out that this court, in **Andrew McKie v R**, reiterated the principle in **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, Application No 78/2008, judgment delivered on 18 June 2008, that the party seeking the admission of fresh evidence must satisfy the first three requirements in **R v Parks**.

[45] Counsel noted that the appellant's application appeared to be grounded in trying to prove that an application for disclosure was made by defence counsel. The basis for this was that the notes of evidence did not reflect the application made by the appellant's counsel.

[46] Counsel submitted that, the court's file revealed that *subpoenae* were issued for the exhibits. The file also revealed a notation for the release of the motor car, before the endorsement relating to the *subpoenae*, and this request was made after the trial had started in June 2014. Counsel further submitted that the appellant's ground of appeal remained one in respect of disclosure which can be resolved by this court pursuant to

sections 291, 292 and 302 of the Judicature (Parish Court) Act without the need for any fresh evidence.

Analysis

[47] The law governing the admission of fresh evidence on appeal is well established. This court is empowered by virtue of section 28(a) and (b) of the JAJA to admit fresh evidence. It states:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice —
>
> (a) **order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case**; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; …" (Emphasis supplied)

[48] Brooks JA (as he then was) in **Bryan Smythe v R** [2018] JMCA App 3, examining this court's power to admit fresh evidence, cited with approval Lord Parker CJ's judgment in **R v Parks** as follows:

> "[15] The judgment of Lord Parker CJ in **R v Parks** [1961] 3 All ER 633 provides guidance in giving effect to that statutory authority. In construing legislation, similar in terms to section 28, Lord Parker stated at page 634:
>
> > '... As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the

> principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.' (Emphasis as in the original)

[49] The appellant must satisfy the first three criteria in **R v Parks** (see **Mario McCallum v R**).

[50] In **Andrew McKie v R** [2021] JMCA 17, the applicant who was convicted and sentenced for the offences of illegal possession of a firearm and wounding with intent in the High Court Division of the Gun Court, applied to adduce all the statements made by the complainant to the police, and entries made by Detective Sergeant Roy in the Station diary on 20 March 2012. He also urged the court to allow three witnesses to give evidence on his behalf.

[51] Phillips JA commencing her discussion in that judgment at paras [45] - [49] examined the applicable principles of law. In refusing the application to adduce fresh evidence she said:

> "[50] As Lord Parker CJ indicated in **R v Parks**, **the first hurdle that must be crossed is that the evidence which is sought to be adduced must be evidence that was not available at the trial.** The complainant's statement was very much available at the trial. Indeed, Mr Black attempted, incorrectly, to adduce the whole statement into evidence, as

> can be seen in the transcript. Having failed to and or [sic] abandoned his efforts to adduce excerpts of the complainant's statement into evidence to prove inconsistencies with his evidence in court, the complainant's statement could not be adduced into evidence on appeal through an application for fresh evidence or at all. That statement could certainly not be adduced through Dorothea Lynette James, who neither took the statement nor was present when the statement was taken. It was therefore inadmissible hearsay. The application to adduce this statement as fresh evidence was hopeless and failed.
>
> [51] The affidavits that the applicant filed after 28 April 2020 were considered along with the ones filed originally. However, they did not strengthen his application to adduce fresh evidence. **With regard to the evidence of Karen Edwards, Karenna McKie, Sasha McKie and Dorothea Lynette James, these affiants were the girlfriend, daughter, niece and employer of the applicant. They were all available to give evidence at the time of trial** [sic]**. Proper arrangements ought to have been made for any or all of them to attend court and give their respective testimonies. One cannot, with the greatest of respect, claim that evidence is unavailable if one of the persons intending to give evidence on the applicant's behalf, is at the court door knocking, and the others are unaware of the trial date.** There is no doubt that the information disclosed in the affidavits tendered in this court would have been relevant to the applicant's defence of alibi, and prima facie, they may all have appeared plainly or well capable of belief. This is not a case in which, in our view, it would have been necessary to resort to the *de bene esse* powers of the court. **But, as all three requirements set out in the powerful guidance by Lord Parker CJ in R v Parks must be met**, the application to adduce those four witness statements as fresh evidence, failed at the outset." (Emphasis supplied)

[52] Having reviewed the relevant authorities, the first question which this court has to resolve is whether the evidence the appellant has sought to adduce was available at trial. It is important to note that counsel for the appellant, in his arguments, conflated the issues and thereby caused some confusion. What the appellant wished to adduce as

evidence were the letters attached to Mrs Neita Robertson's affidavit and counsel's evidence as to her efforts to gain access to certain exhibits, not to adduce the exhibits themselves. Mr Fletcher's submissions at times, however, referred to the exhibits themselves.

[53] We find that the letters which the appellant sought to adduce as fresh evidence were available at the time of trial. In fact, in his oral submissions, Mr Fletcher acknowledged that he found all of the letters attached to Mrs Neita Robertson's affidavit on the trial court's file.

[54] In so far as counsel's efforts to have the exhibits made available for examination are concerned, it is clear from the endorsement on the court's file jacket that the learned magistrate made an order subpoenaing all exhibits including a fan and the motor car, and that the police ought to have obeyed this order, and ought to have ensured that the exhibits were made available to counsel for the appellant. At page 47 of the notes of evidence, the learned magistrate stated:

> "Counsel wrote to me on 16th August, 2013 asking me [sic] that I write to Narcotics to facilitate her and a team of experts to view exhibits along with other packages alleged to have [sic] taken [sic] from car as also [the] motor car. I wrote to Sub-officer in Charge of Narcotics on the 19th August, 2013 asking them to facilitate Counsel with her request. That letter was faxed to Transnational as also Counsel herself. When I spoke to Counsel on Tuesday she said she was in receipt of the letter. I wrote but certain things should have been done she did not get to do."

[55] It is a matter of concern that the learned magistrate's order was not obeyed. The impact of this failure will be examined later in this judgment.

[56] In passing, we must note that counsel for the appellant acknowledged that there is nothing in the notes of evidence reflecting that a fan was found in the trunk of the car.

[57] Whilst we can accept that the evidence may be relevant and well capable of belief, the appellant has failed to cross the first hurdle, that is, that the evidence must have been unavailable at trial. The application is therefore refused.

The appeal

[58] The appellant was granted permission to file seven supplementary grounds of appeal, which were filed on 2 July 2019. On 24 February 2021, the appellant was permitted to file an eighth supplementary ground of appeal. On 19 March 2021 the appellant filed (refiled, is perhaps more accurate) seven grounds, which were differently ordered and worded and, in the case of ground seven, was a complete substitution. We will now set out the supplementary grounds of appeal as they were filed on 19 March 2021::

> "1. The learned judge erred in failing to assess for herself whether or not the case ought to have been stopped at the end of the prosecution [sic] case. The meagre nature of the case for the prosecution would have justified a decision to stop the case at that point.
>
> 2. The learned trial judge erred in the application of the law relating to custody, control and possession, to the facts of this case and in so doing denied the applicant a fair consideration of his case and a real chance of acquittal.
>
> 3. The learned trial judge erred in failing to direct her jury mind in an appropriate and fair way to the case for the defence. In so doing she denied the appellant a fair consideration of his case and a real opportunity of acquittal.
>
> 4. The Learned Trial Judge [sic] erred in finding that the integrity of the chain of custody was not compromised enough to cast reasonable doubt that the parcels examined at the Forensic Lab [sic] and taken to court were the same as those alleged to have been recovered from the trunk of the motor car on October 20, 2009.
>
> 5. The Learned Trial Judge [sic] unfairly discounted the judicial value of the good character direction.

> 6. The Learned Trial Judge [sic] erred in her summation to herself on joint enterprise/accessory/common design as it was insufficient and incorrect having regard to the decision of the Privy Council in **Ruddock v R** [2016] UKPC 7 and relying on inferences improperly arrived at.
>
> 7. The verdict is unreasonable having regard to the evidence.
>
> 8. The state (prosecution/court/agents) failed to effectuate requests for disclosure by the appellant's defence [sic] and, the order of the court, of matters pertaining to critical issues in the case. This failure denied the appellant a fair and balanced consideration of his case, a real chance of acquittal and was a miscarriage of justice."

[59] Mr Fletcher did not follow the chronology of the supplementary grounds as filed, in his submissions. His submissions under the corresponding ground are reproduced below in the order of his presentation before the court. Ground six was not argued. We will therefore commence with ground four.

Ground four

The Learned Trial Judge [sic] erred in finding that the integrity of the chain of custody was not compromised enough to cast doubt that the parcels examined at the Forensic Lab [sic] and taken to court were the same as those alleged to have been recovered from the trunk of the motor car on October 20, 2009.

Appellant's submissions

[60] In both of his skeleton submissions, Mr Fletcher argued that the chain of custody is a written record of all the individuals who maintain unbroken control over the items in evidence. This, he said, establishes that the items of evidence collected at the crime scene are the same ones that are presented in court. In answer to the court, Mr Fletcher submitted that the integrity of the exhibit is inextricably bound with a paper trail, in the absence of which, its integrity cannot be guaranteed. If the court thinks that that is putting it too high, he asked the court to consider that absence of proper labelling, paper trail, and record keeping is like a spring to a summer of disintegration of exhibits, possible corruption and must have a high alert status for any judge, being the guardian of the standards of fairness and integrity in the trial process.

[61] The rationale for the chain of custody is fairly self-evident, he argued. Quite apart from insuring against errors in the process, the chain of custody guards against fabrication and tampering. To this end, the interests of justice require reasonable sanctity of the evidence brought against an accused man.

[62] According to Mr Fletcher, most of the cases require that something be shown that there was no tampering. In this case, the appellant is saying, apart from gaps in the chain, he does not think any ganja was found at all based on what he saw.

[63] Mr Fletcher submitted that if we are to guard against abuse of the process, one thing we must never do is ignore gaps and discrepancies. To this end, he argued, the prosecution must establish the proper chain of custody so that not only the integrity of the exhibit, but the process is maintained. He submitted that the learned magistrate recognized the importance of this, and he referred this court to pages 4 to 5 of her findings of fact. However, he went on to criticise her reliance on **Alrick Williams v R** [2013] JMCA Crim 13. He submitted that **Alrick Williams v R** cannot be used to reconcile inconsistencies in the evidence of one witness. In this regard, he concluded that the learned magistrate misdirected herself. As examples, he referred to exhibits 10A and 10B and said there is no evidence of who did the labelling of those exhibits.

[64] He submitted further that, while it was open to the learned magistrate to accept that no entry was made in the diary at the Ocho Rios Police Station because the items should have been handed over to Sergeant Thompson, the learned magistrate should show that she was sensitive to proper procedure. He argued that the learned magistrate raised inconsistencies concerning the journey of the exhibits to and from the laboratory but dismissed them. In other words, procedure is irrelevant once she finds that the appellant was in custody and control. This submission appears to be an enlargement of the skeleton submission in which he complained that the learned magistrate accepted the evidence of Sergeant Thompson, without any reference to three things: the lack of proper practice in respect of labelling; the absence of a signature in the GPB indicating that the

items were returned to the storeroom after having been taken to the forensic laboratory; and the letter 'Q' on each parcel.

[65] In Mr Fletcher's opinion, these defects in the chain of custody were not soluble by an assessment of the credibility of the prosecution witnesses. The simple test is whether the chain of custody is intact. Evidence of mistakes cannot improve it. The learned magistrate's reliance on credibility to resolve the acknowledged weaknesses in the chain of custody was therefore misplaced.

[66] In concluding his skeleton submission, counsel referred the court to **Chris Brooks v R** [2012] JMCA Crim 5, paras. [45] and [46], where this court set out the law in relation to the significance of the integrity of the chain of custody.

The Crown's submissions

[67] In their written submissions, counsel for the Crown argued that the learned magistrate acted within the law in assessing the accepted discrepancies in the evidence concerning the chain of custody. In this regard, reliance was placed on **Steven Grant v R** [2010] JMCA Crim 77, **R v Lloyd Chuck** (unreported) Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 23/1991, judgment delivered 31 July 1991 and **William Francis v Regina** [2010] JMCA Crim 39. Relying on **R v Grazette** (2009) 74 WIR 92, counsel further submitted that the presence of gaps or discrepancies in the chain of custody is not necessarily fatal to the case for the prosecution, as long as the integrity of the exhibits has not been compromised. In oral submissions, Mrs Millwood-Moore added that the persons who interacted with the exhibits testified.

[68] In addition to these written submission, Mrs Millwood-Moore, in her oral submissions, argued that the overall integrity of the exhibits remained intact, notwithstanding the issues and incompleteness of some of the evidence. That evidence, she argued, would have provided a sufficient evidential basis for the verdicts.

[69] Mrs Millwood-Moore contended that the lack of proper practice in respect of labelling was adverted to, considered and reconciled by the learned magistrate. The

absence of complete records, she advanced, was not synonymous with an absence of integrity.

[70] It was her submission that the assessment of credibility was at the heart of the matter. When the evidence of Corporal Sterling and Sergeants Thompson and Brady is examined, it is clear that the description of the evidence is not homogenous. The learned magistrate upheld the objection to the admission into evidence of the bags which did not accord with the descriptions previously given by Corporal Sterling. The court's attention was then drawn to the section of the findings where the learned magistrate dealt with the exclusion of some of the bags.

[71] Responding to the appellant's submission concerning the lack of documentary proof that the items taken to the forensic laboratory were returned to the storeroom, Mrs Millwood-Moore argued the following. The forensic certificate (exhibit six) shows who took them to the forensic laboratory. In answer to the court, Mrs Millwood-Moore accepted that **R v Francis Jadusingh; R v Norma Jadusingh** (1963) 6 WIR 362 ('**R v Jadusingh**') provided an answer to this contention but wished to also rely on **R v Larsen** 2001 BCSC 597 for the proposition that proof of continuity is not a legal requirement.

Ground five: The Learned Trial Judge [sic] unfairly discounted the judicial value of the good character direction.

The appellant's submissions

[72] Mr Fletcher commenced his oral submissions on this ground with an acknowledgement that character is never a defence to a charge. He argued, however, that when good character is raised before verdict, it is something to be used as part of a process of mind to assess the evidence in the case, in deciding whether the person is guilty. The complaint here was, in saying good character inures to the benefit of the appellant but is not a defence, as the learned magistrate did, signifies an inversion. It indicates the possibility that guilt had been arrived at before the character evidence had been considered. Therefore, the statement that good character is not a defence signals a weakening of the methodology.

[73] In his skeleton submissions, Mr Fletcher cited **Christopher Thomas v R** [2018] JMCA Crim 31 for the proposition that a defendant's good character supports his credibility and lack of propensity to commit the offence. He charged that the learned magistrate's statement that good character is not a defence suggests that the conclusion as to guilt was settled and his good character could not change that. Therefore, he submitted, although the learned magistrate referred to the law, real consideration was not given to it.

[74] The learned magistrate was required to direct herself in affirmative terms, not just as an argument but as a matter of law. This was a case, he argued, in which the credibility was relevant to both sides. Therefore, the learned magistrate's failure to consider what was termed the 'judicial value' of the appellant's good character amounted to a miscarriage of justice.

The Crown's submissions

[75] The Crown took no issue with Mr Fletcher's statement of the law concerning the two limbs of the good character direction, citing **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241 and, **R v Aziz** [1995] 3 All ER 149 as an example of cases which applied the principles in **R v Vye**.

[76] In oral argument, Miss Graham, who submitted on this ground on behalf of the Crown, argued that the learned magistrate correctly stated the law on good character and considered both limbs. To this end, the court's attention was drawn to pages 1 to 2 and 9 of the learned magistrate's findings. It was Miss Graham's position that it was for the learned magistrate to decide how the good character directions were tailored.

Ground three: The learned trial judge [sic] erred in failing to direct her jury mind in an appropriate and fair way to the case for the defence. In so doing she denied the appellant a fair consideration of his case and a real opportunity of acquittal.

The appellant's submissions

[77] The complaint under this ground was that the learned magistrate did not fairly assess the evidence of the defence. Mr Fletcher submitted that a fair consideration of the appellant's case is critical to a fair trial. He acknowledged that the learned magistrate can have a different approach as she is sitting alone. Consequently, she needs only deal with issues she finds important. However, none of those things justifies a trial which does not give a fair assessment of the defendant's case. In this case, the learned magistrate did not do that. At no time did she do anything but interpret his evidence as supportive, inferentially, of the prosecution's case.

[78] Mr Fletcher stated that the learned magistrate saw the pictures of the holes in the car. There was therefore no doubt that the car was shot up. He complained that in assessing the appellant's response to being shot at, there was no effort by the learned magistrate to draw any inference that his behaviour would have been consistent with a reasonable response to being shot at. He charged that she did not deal with what he said in a fair way as to whether what he said could be true: did that happen and was the appellant's response appropriate? He argued that the response of the appellant, in a measure, resonated with "it could have happened".

[79] Learned counsel criticised the learned magistrate for rejecting the appellant's evidence that he told Omar to let him out. He said it was unreasonable for her to have rejected that he was in fear for his life. He submitted also that the learned magistrate's use of the appellant's reference to the occupants by the collective "we" was unreasonably interpreted as a statement of joint enterprise.

[80] Mr Fletcher submitted that he saw no fair and balanced assessment of the appellant's case. The way it was presented, he argued, indicates that all her findings concern what the appellant said and did after the incident. Mr Fletcher contended that the learned magistrate expanded the story imaginatively, extended the story into some construct that is not only unreasonable but still does not show that she gave any consideration to the appellant's case.

[81] He drew the court's attention to the learned magistrate's treatment of the evidence of the questioning of the appellant by DSP Maverol Smith (at page 7 of the findings, second paragraph). He submitted that if there was a problem with the questioning, the learned magistrate resolved it by equating their ranks. He argued that the appellant's evidence was never sufficiently isolated and assessed for its truthfulness outside of the construct of the narrative which the magistrate inserted.

[82] In his written submissions, Mr Fletcher listed aspects of the defence which he categorized as "omissions of consideration" which, he asserted, "give the inescapable impression of an apparent imbalance" in the learned magistrate's directions to herself. These are the aspects Mr Fletcher highlighted:

> "I. The background relationship between the appellant and Lugg (Omar) which included the fact that they were in partnership in a business.
>
> II. That following on that the appellant at that time had a reason for going into the car even though the original two car plan was not operative. He wanted an opportunity to discuss ending the business with Omar.
>
> III. That he was picked up by his friend, Omar, and thereafter, the car did not stop until they arrived at the gas station. There is thus no evidence of any opportunity for him to have had contact with anything in the trunk of the car.
>
> IV. The car was fired on by the police. Interestingly, no shooting charges were ever brought against Omar or the appellant. The learned trial judge never averted her mind at all [to] whether the experience of being shot at could make the account of the appellant during that experience credible."

The Crown's submissions

[83] In her oral submissions, Mrs Millwood-Moore submitted that the learned magistrate approached the evidence in a fair and balanced manner. It was her contention that the learned magistrate did not deal with the defence in one isolated section. The learned

magistrate examined the defence in light of the case for the Crown. This is apparent from a reading of the findings as a whole. At different sections of her analysis, the learned magistrate considered the defence.

[84] Mrs Millwood-Moore directed the court to the penultimate paragraph on page one of the findings of fact. She then submitted that at the heart of the case was the resolution of the credibility of the various witnesses. The appellant was not treated as if he had a burden but whether his evidence cast doubt on the case for the Crown. The court was then referred to the learned magistrate's findings at pages 7 and 9 of her reasons. These, Mrs Millwood-Moore submitted, demonstrate the learned magistrate's keen analysis of the case for the defence.

[85] On the question of the appellant saying he did not know why the police were shooting at him, she submitted that it was reasonable that he would have called his superiors. The learned magistrate would have had to consider whether his conduct was reasonable against the background of what he was saying. Learned counsel argued that there was an evidential basis for the findings of facts and the verdict, and relied on **R v Joseph Lao** (1973) 12 JLR 1238.

Ground two: The learned trial judge [sic] erred in the application of the law relating to custody, control and possession, to the facts of this case and in so doing denied the applicant a fair consideration of his case and a real chance of acquittal.

The appellant's submissions

[86] Mr Fletcher submitted that in all the decided cases: **Thompson**, **Brooks** and **Livingston**, the person tagged with possession of the ganja was in charge. He contrasted this case. Here, the appellant was neither the owner nor the driver of the motor vehicle. In addition, there is no evidence of handling; no direct evidence that he knew of the parcels in the trunk; no evidence of smell.

[87] In this case, Mr Fletcher submitted, custody and control boils down to a reconstruction of what the learned magistrate thought of actions subsequent to the

appellant's presence in the car. He was sharply critical of the use the learned magistrate made of the word 'pilot'. He argued that the learned magistrate treated the use of the word as a fact not contested. However, he pointed out that, counsel appearing for the appellant at the trial cross-examined the police officer with a view to weaken any inference that the word 'piloting' drew. He further submitted that the learned magistrate said the admissibility of the statement was not challenged.

[88] Mr Fletcher argued that in her acknowledgement that the case required 'something more' for the proof of the mental element, the learned magistrate used what was said about 'pilot'. It was Mr Fletcher's contention that if that is the something more, it is not enough. It is strained. He argued that by placing the emphasis on the chase, it is hard to escape the conclusion that the burden rested on the appellant from the outset.

The Crown's submissions

[89] It was submitted that the appellant's defence and his account was thoroughly examined by the learned magistrate.

[90] The learned magistrate it was argued consistently referred to the appellant's case at the trial throughout her reasons. And, that this would suggest that she did assess the defence and the court's attention was drawn to a number of instances in her reasons where she addressed the appellant's account.

[91] In addition, counsel for the Crown argued that it cannot be reasonably said that the appellant was denied a fair consideration of his case.

Ground one: The learned judge [sic] erred in failing to assess for herself whether or not the case ought to have been stopped at the end of the prosecution [sic] case. The meagre nature of the case for the prosecution would have justified a decision to stop the case at that point.

The appellant's submissions

[92] This ground, in Mr Fletcher's submissions, concerns the admissibility of the "admission" and touches and concerns: (a) whether the person ought to have been

cautioned; (b) the power relations between the parties; and (c) sometimes it is a combination. He recited a quotation of Lawton LJ in **Regina v Osbourne and Virtue** [1973] QB 678 that was cited by this court in **Merrick Miller v R** [2013] JMCA Crim 5, at para [10].

[93] It was Mr Fletcher's submission that by the time DSP Smith came to interview the appellant, he must have been a suspect. For the foundation of this submission, Mr Fletcher chronicled the activities from the processing of the motor car by the scenes of crime personnel and the subsequent information sharing, up to the time of the questioning by DSP Smith. By virtue of the activities and flow of information, at the time DSP Smith spoke to the appellant, he must have been a suspect. Counsel therefore challenged the credibility of DSP Smith's evidence that the questions he put to the appellant were administrative in nature. Consequently, the decision to ask the appellant if he wanted a lawyer was an afterthought, Mr Fletcher argued, in his written submissions.

[94] He argued that in the context of a military or quasi-military organization, rank is critical. So that, the finding by the learned magistrate that in the circumstances DSP Smith and the appellant were of "equal rank" is unreasonable.

[95] Given these two characteristics, being a suspect and the unequal ranks, that evidence ought not to have been admitted. If it had not been admitted, then the court would have been left with evidence of too slender a thread; a paucity of information which could not survive a submission of no case to answer.

Respondent's submissions

[96] In her oral submissions Mrs Millwood-Moore argued that while it may be said that the appellant had different legal representation when DSP Smith testified, the constant was the appellant himself. He would have instructed that the word 'pilot' was not used. From the cross-examination of DSP Smith, the focus was on the meaning of the word 'pilot'. The learned magistrate, she contended would have had the opportunity to assess the credibility of DSP Smith.

[97] Mrs Millwood-Moore accepted that the use of the word 'pilot' was extremely important as it imports knowledge and is capable of being the 'something more'. She submitted that there was no fact or circumstance that would be inconsistent with knowledge.

[98] In her response to Mr Fletcher's submission that in the decided cases the person charged was in charge of the conveyance or container, Mrs Millwood-Moore argued that that does not mean that it has to be the driver, who is charged. A passenger, if proven to have the requisite knowledge and custody, can be found to be in possession.

Ground 8: The state (prosecution/court/agents) failed to effectuate requests for disclosure by the appellant's defence [sic] and, the order of the court, of matters pertaining to critical issues in the case. This failure denied the appellant a fair and balanced consideration of his case, a real chance of acquittal and was a miscarriage of justice

Appellant's submissions

[99] Counsel submitted that failing to effectuate the disclosure meant that:

i. The appellant was denied a fair trial.

ii. His constitutional right enshrined in section 16(6)(b) of the Charter of Fundamental Rights and Freedoms which provides that every person charged with a criminal offence shall have adequate time and facilities for the preparation of his defence were contravened. The failure of the prosecution to disclose the motor car for inspection has caused prejudice to the appellant in preparing his defence.

iii. Other aspects of the deficient chain of custody asserted by the defence could not have been properly assessed by the court.

[100] In support of his contention counsel relied on the English Court of Appeal case of **R v Ward** [1993] 2 All ER 577 which enunciated principles governing disclosure in criminal cases. He submitted that these principles were adopted and applied in this court in the case of **Willard Williamson v R** [2015] JMCA Crim 8 (see para [45]). Counsel also highlighted that, although that case dealt with the failure of a trial judge to make an order for disclosure, the case provides guidance in relation to the prosecution's duty to disclose.

[101] Counsel submitted that the duty of the prosecution and the police to obey the orders of a trial judge require no authority. In the instant case the disclosure of the exhibits in question were necessary for the defence's case. This was in light of the fact that the appellant had maintained that, as a passenger he was picked up last, and had no knowledge of the ganja being in the trunk of the motor car. Therefore, he was not involved in any illegal activity. In his defence the appellant also questioned whether ganja was found at all.

[102] The Crown having failed to disclose, counsel urged the court to apply the consequences as outlined in the cases of **Harry Daley v R** [2013] JMCA Crim 14 and **Anne Rita Maguire and Others** (1992) 94 Cr App R 133 which are to quash the convictions, set the sentences aside and enter a verdict of acquittal.

The Crown's submissions

[103] Counsel for the Crown contended that the appellant's application was misguided and in error, as the principles in **Harry Daley v R** did not come into play in the case at Bar. Counsel argued that the so called "fruits of their investigations", that is, the forensic certificate speaking to testing done by the government analyst, and the scene of crime CDs showing the photographs taken regarding the exhibits, were already disclosed to the defence and in its possession at the time. The CDs, counsel highlighted, were not only disclosed, but were relied on and tendered into evidence on the defence's case.

[104] Furthermore, counsel for the Crown submitted, an attempt to carry out a re-enactment cannot properly be considered as fruit of the investigation. Counsel submitted that the defence had the opportunity to re-enact the fitting of the bags in a similar model car as part of the preparation of the defence after the disclosure of the forensic certificate speaking to the number of bags, parcels and weight. Therefore, it was for the defence to put those findings and suggestions to the Crown's witnesses in cross-examination.

[105] Alternatively, counsel argued that the appellant did not make an application to visit the *locus in quo* which would indicate to the court that it was necessary to see the actual motor car with the bags as it existed at the time. It was of significant note, counsel highlighted, that prior to the request for 'disclosure' of the motor car, it was released to its owner, Omar Lugg, the friend and business partner of the appellant.

[106] If, however, the court considered that what the appellant sought and failed to accomplish could be deemed non-disclosure on the part of the prosecution, counsel submitted that the issue to be determined by this court is whether the purported non-disclosure affected the fairness of the trial and caused a miscarriage of justice. Essentially, an examination is needed as to whether the non-disclosure adversely affected the appellant in the preparation of his defence. In setting out the prosecution's and the court's duties as regard the need for disclosure, counsel also relied on the seminal case of **R v Ward**.

[107] Counsel noted that, unlike the circumstances in **R v Ward,** the learned magistrate did not fail to make an order for disclosure. Counsel highlighted that there was evidence indicating that the exhibits were brought to court on several occasions, and that the court file conveyed some evidence that the court's processes were contemplated regarding the motor car, among other things. Counsel drew the court's attention to page 47 of the notes of evidence where the learned magistrate recorded the prosecution's efforts to give effect to a request of the defence regarding the exhibits. In light of the foregoing, counsel submitted that this court is empowered pursuant to section 304 of the Judicature (Parish Court) Act to address any deficiencies in the notes of evidence in this regard.

[108] Another issue which arose from this ground, according to counsel, was whether any disclosure requested, if made, would have reasonably affected the decision of the learned magistrate to convict. Counsel outlined that in the instant case, the focus of the court should be whether there has been a miscarriage of justice. Counsel relied on the dictum of Lord Hope in **Bonnett Taylor v The Queen** at para 13 and which was adopted by this court in **Willard Williamson v R** in which McDonald-Bishop JA (Ag) wrote the judgment of the court. McDonald-Bishop JA (Ag) noted that at para 20 of **Bonnett Taylor v The Queen**, their Lordships outlined that the relevant test to determine whether there has been a miscarriage of justice is that the court should carry out an examination of all of the circumstances of the trial and consider if there was a real possibility of a different outcome. Applying this test counsel submitted that in all the circumstances the outcome relating to the finding of the learned magistrate would have been the same had the disclosure been done.

[109] Counsel concluded that, based on the circumstances of the case and the totality of the evidence, the learned magistrate had before her evidence from the Crown's witnesses of a bag being thrown from the motor car containing ganja and ganja being found in other bags, along with a bucket in the trunk of the motor car. As regards whether the bag contained ganja counsel argued that that was a matter of credibility taking into account all the evidence, including the images on the scene of crime CDs. Therefore, the learned magistrate was entitled in the circumstances to accept the Crown's evidence as truthful in the exercise of her discretion in relation to the findings of fact.

[110] Additionally, the learned magistrate in her assessment of the issue relating to the chain of custody, being a matter of weight was correct in her application. The learned magistrate correctly resolved the doubt as to the quantum of ganja in favour of the appellant by not allowing into evidence some of the bags containing the parcels for which the chain of custody could not be properly established.

Discussion and analysis

[111] In our view, the several grounds of appeal resolve themselves into five discrete issues, the resolution of which, are dispositive of the appeal. Firstly, was the chain of custody of the vegetable matter, allegedly found in the trunk of the Toyota Corolla motor car registered 8919 EZ, irretrievably broken? Secondly, was the evidence of DSP Smith, which contained an admission of the appellant, admissible? Thirdly, if the answer to issue number two is in the affirmative, was the learned magistrate at liberty to treat it as the 'something more' required to ground legal possession in the appellant? Fourthly, did the learned magistrate err in her application of the law in relation to evidence of the good character of the appellant? Fifthly, whether or not there was a miscarriage of justice due to non-disclosure?

Issue number one: was the chain of custody of the vegetable matter allegedly found in the trunk of the motor car irretrievably broken?

[112] This issue springs from the complaint encapsulated in the fourth supplementary ground of appeal. The essence of the appellant's complaint was that there were gaps and inconsistencies in the evidence relating to the chain of custody. In answer to the court, Mr Fletcher submitted that the integrity of the exhibits is inextricably bound with the paper trail, in the absence of which, the integrity of the exhibits cannot be guaranteed.

Evidence of the chain of custody

[113] Corporal Devon Sterling was the first witness to come in contact with the five knitted bags, two large travelling/tote bags, all containing parcels wrapped in masking tape with vegetable matter resembling ganja and the white five-gallon bucket with loose vegetable matter resembling ganja. All these items, including the knitted bag which was retrieved from the roadway, he placed in the back of the police pick-up and drove to the Ocho Rios Police Station on the night of 20 October 2009.

[114] Deputy Superintendent Callum and his team, as well as Detective Sergeant Clinton Bailey travelled behind the service vehicle transporting the items to the Ocho Rios Police

Station. On the instructions of Deputy Superintendent Callum, Corporal Sterling handed over all the items to Detective Sergeant Clinton Brady.

[115] There was no evidence that Corporal Sterling labelled or marked any of the containers before handing them over to Detective Sergeant Calvin Brady. He did not consider marking the items as something falling within his remit, since he was not the investigating officer. He admitted to having made a mistake with the colour of the bags which he had said were all red. Therefore, at the trial, the prosecution only succeeded in having three of the items marked, alphabetically, for identity, through Corporal Sterling: the white plastic bucket ('A'); white "Nutre Mix bag" from the trunk with five rectangular parcels ('B'); and white "Miracle rice bag" removed from the trunk of the motor car, containing five rectangular parcels ('C'). The objection to the others was upheld for lack of accord with the description given.

[116] Detective Sergeant Calvin Brady, the investigating officer, testified that he went on the scene that night (this was contested) and was shown the burgundy motor car and the contents in the trunk, as well as a large, knitted bag on the ground beside the car. He inspected the contents of the bags and noticed that all the rectangular parcels were inscribed with the letter 'Q'. After that inspection, the items were transported to the Ocho Rios Police Station, as indicated above. There he took possession of them, inscribed his initials 'CB' on each parcel and placed them in the storeroom.

[117] Aside from his initials, Detective Sergeant Calvin Brady made no notation of the items he received from Corporal Sterling. He did not make an entry in the station diary at the Ocho Rios Police Station. Although he was required to do so, he made no entry of the items in the exhibit book at that police station either. However, he asserted that he would not have taken exhibits to the Ocho Rios Police Station and not enter them in the exhibit book.

[118] In setting out the proper procedure concerning the labelling and storage of the ganja that was seized, Detective Sergeant Calvin Brady evidence was as follows. It is to

be labelled by the person who seizes it and that is to be done as soon as possible. The relevant information for the label includes, the date and time of the seizure, the name of the accused/suspect, the place where it was seized and the name of the person seizing it. The importance of this labelling is to distinguish it from similar items stored in the same storeroom. He agreed that neither he nor Corporal Sterling complied with this procedure.

[119] Although he did not follow this procedure, the evidence disclosed that Detective Sergeant Calvin Brady next handled the items on 22 October 2009. On that day, he removed them from the storeroom and handed them over to Sergeant Patrick Thompson ('Sergeant Thompson') who was accompanied by Detective Constable Kirk Lawrence. Both then transported the items received to the Transnational Crime and Narcotics Headquarters ('TC&N HQ'), 230 Spanish Town Road, Kingston.

[120] On his arrival at the TC&N HQ, Sergeant Thompson placed a label on each of the six knitted bags and the plastic five-gallon bucket. Sergeant Thompson did not conform in every particular to what was outlined by Sergeant Brady as proper procedure. Each label was alphabetized 'A' to 'H', described its contents and named the investigator (Sergeant Brady). Sergeant Thompson then placed each labelled item in a separate transparent plastic bag. Each transparent plastic bag was then sealed with evidence tape, which Sergeant Thompson signed. After doing that, he handed over all the items to the storekeeper (unnamed).

[121] Sergeant Thompson was taxed on his account of the labelling of the exhibits. He labelled the items twice; on 22 October 2009 and again on 21 July 2010. Neither his assertion that he labelled the items twice nor that he had done so on 22 October 2009, was recorded in his statement. He attributed the omission of the reference to his label of 22 October 2009 to a mistake. His explanation for the double labelling of the items was that when they were first labelled, no one had been arrested so they were labelled as seizures. His second labelling was done on the day he took the items to the forensic

laboratory (21 July 2010). On that occasion, he broke the seal of each bag (transparent plastic) inserted the label then resealed the bag.

[122] Between 22 October 2009 and 21 July 2010, the sealed items remained in the storeroom at TC&N HQ. Although Sergeant Thompson testified to handing over the sealed items to the storekeeper, it was the assistant storekeeper, Corporal Alrick Honeygan ('Corporal Honeygan') who testified to receiving them. Corporal Honeygan confirmed that the seven transparent plastic bags were sealed when he received them. Corporal Honeygan recorded the receipt of the sealed transparent plastic bags in the GPB and invited Sergeant Thompson to sign the GPB. Corporal Honeygan marked each sealed transparent plastic bag with the unique exhibit number from the GPB, "GPB 257/2009" (exhibit 4).

[123] When the GPB was produced in evidence, it did not corroborate Corporal Honeygan's testimony that it was Sergeant Thompson who signed as delivering the sealed transparent plastic bags to him. The relevant column bore the number "10316" and the abbreviation "Cons". Even though Corporal Honeygan did not know the signature of Constable Kirk Lawrence ('Constable Lawrence'), the latter gave evidence that it was he who signed the exhibit book at item "#257/09". He also confirmed that the number "10316" was assigned to him. It will be recalled that Constable Lawrence was the person who accompanied Sergeant Thompson for the collection and transportation of the items to the TC&N HQ on 22 October 2009. It was also his evidence that it was he, Constable Lawrence, who actually handed over the sealed transparent plastic bags to Corporal Honeygan, but that he did so in the presence of Sergeant Thompson.

[124] Sergeant Thompson next handled the sealed transparent plastic bags on 21 July 2010, as was said above. On that day, at his request, the storekeeper handed him the transparent bags, stilled sealed with the evidence tape he had placed on them on 22 October 2009. After breaking the seals and labelling them alphabetically, 'A' to 'H' as previously described, he resealed the transparent bags and took them to the government forensic laboratory.

[125] At the government forensic laboratory, he handed over the sealed transparent plastic bags. The analyst broke the seals of each, took samples from each, resealed the transparent bags and handed them back to Sergeant Thompson, together with a receipt. With that accomplished, Sergeant Thompson returned the sealed transparent plastic bags to the storekeeper at the TC&N HQ. There was, however, no signature in the exhibit register (exhibit 5) confirming that they were returned as Sergeant Thompson testified. That said, there was no column for the signature of the person returning the items from the forensic laboratory. The name "P. Thompson" however, appeared in the column of the exhibit register for the person who takes the items from the storeroom for conveyance to the forensic laboratory.

[126] At the trial, only the items previously marked 'A', 'B' and 'C' were shown to Sergeant Thompson. He identified each by the label he had placed on each. The analyst's certificate in relation to these and the other items submitted by Sergeant Thompson was admitted in evidence, through Detective Sergeant Brady, as exhibit six. The certificate corroborated Sergeant Thompson's evidence that the items were received sealed at the laboratory; declared the vegetable matter was ganja and the total weight as "248 lb 11.92 oz". The items previously marked 'A', 'B' and 'C' for identity were opened and Detective Sergeant Brady identified the plastic bucket and the contents of the two knitted bags by his initials "CB" and these were accordingly admitted into evidence as exhibits 7, 8 and 9 respectively. The weight of the ganja in exhibits 7, 8 and 9 was ascertained in the presence of the appellant, his then attorney-at-law and the prosecutor as 2½, 30½ and 44½ pounds respectively.

[127] The rationale for the requirement to establish a chain of custody, for biological or, what may be termed generic crime scene evidence, by the party desiring to adduce that evidence, is the preservation of the integrity of the item. In **Chris Brooks v R**, this court accepted and adopted, the following declaration of the law by Baptiste JA in **Damian Hodge v R** (unreported), Court of Appeal, British Virgin Islands, HCRAP 2009/001, judgment delivered 10 November 2010):

> "The underlying purpose of testimony relating to the chain of custody is to prove that evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to production in court. The law tries to ensure integrity by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibits integrity."

Romilly J in **R v Larsen**, at paras 61 to 66, which was cited in both **Chris Brooks v R** and **R v Grazette**, makes the same point.

[128] The more important, or rather, indispensable, part of the chain of custody is from collection to transportation to the forensic laboratory. This much is clear from the language of Romilly J in **R v Larsen**, at para 62. After commenting on the burden on the prosecution to prove that the substance alleged to be in the possession of the accused, is the same charged in the information, he said:

> "… Undoubtedly, then, continuity of possession of the substance from the accused to the law enforcement officer to the analyst is crucial ..."

Equally, Morrison JA (as he then was) in **Chris Brooks v R,** intimated a similar position when, at para [46], he said:

> "… the purpose of establishing the chain of custody of the envelope containing the swabs taken from the appellant was to demonstrate its integrity, so that the court could be satisfied that the sample which was examined by the analyst was that which was taken from him..."

[129] Therefore, if, subsequent to its testing, the item is destroyed or otherwise lost, the probative value of the evidence obtained is not, by that token, whittled away. In **R v Jadusingh** after the analyst issued his certificate attesting that the vegetable matter resembling ganja, recovered from the home of the appellant, was in fact ganja, skulduggery substituted ordinary grass. In face of that "rascality", relying on the

appellants' admission that the vegetable matter was ganja and the chain of custody, this court held that there was sufficient evidence to support the magistrate's finding that the vegetable matter was ganja.

[130] When this ground of appeal is viewed against the background of the authorities referred to above, with all due deference to Mr Fletcher, it becomes clear that, as framed, it is misconceived. What the interests of justice demand is preservation of the integrity of the exhibits and not so much the integrity of the chain of custody. Hence, the presence of gaps or imperfect recordkeeping, characterized as "continuity" in **R v Larsen**, do not result in an automatic acquittal of the accused. Therefore, we find ourselves quite unable to agree with Mr Fletcher that the integrity of the exhibit is inextricably bound with the paper trail, in the absence of which, the integrity of the exhibit cannot be guaranteed.

[131] Our assessment of the evidence of the chain of custody, which we endeavoured to set out at length above, reveal no gaps in the chain of custody. The criticism that there are inconsistencies, to which we will revert shortly, appears to be fair, but that there are gaps, is not. The passage of all the containers with ganja, from the motor car to the government forensic laboratory, was along an unbroken, easily discernible path.

[132] Although it was Corporal Sterling who seized the items, he had shared custody with Detective Sergeant Brady from the scene to the Ocho Rios Police Station, where the items were formally handed over. Having formally received the items, Detective Sergeant Brady initialled the plastic bucket as well as each of the rectangular parcels in the six knitted bags before placing them in the storeroom. In our judgment, that was not standard, but sufficient labelling to guard against intermingling, which was never alleged. This position was fortified when the items were handed over to Sergeant Thompson two days later. Nothing transpired between Sergeant Thompson's labelling, sealing and handing over of the items into storage and their eventual removal and transportation to the forensic laboratory to suggest any interference with the items. The learned magistrate accepted all this evidence, as she was entitled to do as the tribunal of fact.

[133] The question of whether the chain of custody was intact, which Mr Fletcher suggested is the simple test, was a question of fact for the learned magistrate. Hence, the position advanced by the appellant, that defects in the chain of custody cannot be resolved by an assessment of credibility is without authority. According to Romilly J, at para 65 in **R v Larsen**:

> "… If there is a gap in continuity and if the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were the substances analysed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected ..."

Separate from the clear reference to "the trier of fact", there is evidently no path to a decision on applicable weight which does not go through an assessment of credibility.

[134] In the vein of the assessment of credibility, is a consideration of inconsistencies. In this regard, we agree with the submissions of Mrs Millwood-Moore that the learned magistrate acted within the law in assessing the discrepancies in the evidence concerning the chain of custody. A view amply supported by **Steven Grant v R** and **R v Lloyd Chuck**, on which Mrs Millwood-Moore relied.

[135] In **Steven Grant v R**, at para [69], Harris JA said:

> "It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of the witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as the they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony".

The learned magistrate demonstrated, correctly in our view, an awareness of the centrality of resolving issues of credibility, which manifested in the inconsistencies and discrepancies. In a fact-sensitive case, such as this, with multiple witnesses, uniform testimony would have been apt to attract suspicion of the veracity of the witnesses. The

inconsistencies and discrepancies having arisen, it was the duty of the learned magistrate, the arbiter of the facts, to identify and resolve them.

[136] Mr Fletcher complained that the learned magistrate raised the inconsistencies concerning the journey of the exhibits to and from the laboratory but dismissed them. It is trite that not all inconsistencies and discrepancies are material (see for example **Steven Grant v R**, at para. [68]). In our view, as the trier of fact, the learned magistrate was entitled to decide the materiality of the inconsistencies, and finding them to be immaterial, to disregard them.

[137] A part of the complaint that the learned magistrate dismissed the inconsistencies in relation to the chain of custody, is the charge that in so doing she demonstrated little or no regard for proper procedure. The learned magistrate admitted into evidence only those items which accorded with the descriptions previously given in examination-in-chief and for which a proper foundation had been laid. The appellant's trial was therefore concerned with the contents of only two of the knitted bags and the plastic five-gallon bucket. These had been previously marked for identity through Corporal Sterling and admitted through Detective Sergeant Brady. This, in our opinion, is a demonstration of adherence to proper procedure in so far as the admission into evidence of exhibits go.

[138] If we understand correctly the submissions of Mr Fletcher, the complaint could only be a reference to the absence of labelling by the person who made the seizure, Corporal Sterling. As we said above, it is the integrity of the exhibits themselves that is of the first importance and, in the circumstances of this case, Detective Sergeant Brady's initialling of the packages and plastic bucket has adequately met the requirement of labelling. The charge that the learned magistrate was not sensitive to proper procedure is therefore without merit.

[139] And so we come to the criticism of the learned magistrate's reliance on **Alrick Williams v R**. Mr Fletcher complained that this case cannot be used to reconcile inconsistencies in the evidence of one witness. That reliance came at the end of the

learned magistrate's explanation for admitting some, while excluding others of the knitted bags. It is perhaps instructive to extract the relevant section of the learned magistrate's reasons where the case was cited. I quote:

> "… Officer Sterling gave a reasonable explanation on cross examination [sic] that he made a mistake with regards to the description of these items. The fact that a witness makes a mistake or omissions in his evidence does not destroy the witness' credibility or render his evidence completely unreliable where reasonable explanation is given for these mistakes or omissions. (See Alrick Williams vs R, 213 [sic]) …"

[140] In **Alrick Williams v R**, two police witnesses gave conflicting testimony of the circumstances in which a firearm was found. The trial judge ultimately preferred the evidence of one witness over that of the other, in a crucial area of the case, setting out his reasons for doing so. This court, applying the learning in **R v Lloyd Chuck**, upheld his approach. Strictly, **Alrick Williams v R** did not establish any principle to guide a tribunal of fact in the treatment of inconsistencies in the evidence of one witness. The learned magistrate's reliance on this case was therefore misplaced. Mr Fletcher's observation has much to commend it.

[141] The misplaced reliance on **Alrick Williams v R**, however, does not render the proposition of law preceding it incorrect. A reference to the dictum of Carey P (Ag) in **R v Andrew Peart and Garfield Peart** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986 delivered 18 October 1988, at page 5, makes this clear:

> "We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies ..."

Another statement of the principle appears in **Dwight Kirkaldy v R** [2014] Crim 13. At para [32] Mangatal JA (Ag) said:

> "… Whilst there were a number of inconsistencies in the evidence of the complainant, … the nature and level of the inconsistencies when taken together, were not of such a material nature or of such severity as to render the evidence of the complainant manifestly unreliable or the conviction unsafe..."

So, while the criticism of the authority relied on by the learned magistrate is fair, her statement and understanding of the law cannot be faulted. This ground of appeal accordingly fails.

Issues numbered two and three: whether the evidence of Deputy Superintendent Smith that the appellant said he was there to pilot his friend was admissible, and, if it was, was the learned magistrate at liberty to treat it as the 'something more'?

[142] The issue which arises from grounds one, two, three and seven which, in our opinion, all challenge the sufficiency of the evidence to, first, find knowledge in the applicant; second, find that there was a case to answer; and third, ground the convictions. In our view, the pivotal point in the case is the admissibility of the evidence of DSP Smith, which was tantamount to an admission by the appellant.

(a) The law on possession

[143] The succeeding discussion and analysis is best backgrounded by a statement of the law on possession of ganja. There are two ingredients in the concept of unlawful possession of a banned substance such as ganja, under Jamaican law. Firstly, there must be proof that the substance was either in the person's physical custody or under his control. Secondly, the person charged must be shown to have knowledge that what he had either in his physical custody or under his control was the prohibited substance, in this case, ganja.

[144] In **Bernal (Brian) and Moore (Christopher) v R** (1997) 51 WIR 241 ('**Bernal and Moore'**), the Judicial Committee of the Privy Council applied the law as laid down in its earlier decision in **Director of Public Prosecution v Brooks** [1974] AC 862 and **R v Livingston (Cyrus)** (1952) 6 JLR 95, a decision of this court. Sir Brian Neill, who

delivered the judgment on behalf of the Board in **Bernal and Moore**, declared, at page 251:

> "The *actus reus* required to constitute an offence under section 7C of the Dangerous Drugs Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The *mens rea* which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof of this knowledge will depend on the circumstances of the case and on the evidence and any inferences which can be drawn from the evidence. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases ..."

[145] These principles have been repeatedly restated and applied by this court, and most recently in **Allan Neil Gardner v R** [2021] JMCA Crim 16. At para [56] of that judgment, Simmons JA referred to **Heron Plunkett v R** [2015] JMCA Crim 32 in which Phillips JA not only quoted the above passage from **Bernal and Moore**, but referenced the application of the principles in **Patricia Henry v R** [2011] JMCA Crim 16 and **Courtney Thompson v R** [2015] JMCA Crim 18.

[146] In seeking to support the ground that the learned magistrate misapplied the above principles to the facts of this case, Mr Fletcher canvassed the authorities appearing in the preceding paragraph, excepting **Allan Neil Gardner v R**, to distinguish this case. He listed five indicia which he termed "significant and uncontested": the appellant was neither the owner nor driver of the motor car; the absence of any evidence of the appellant handling the exhibits; no direct evidence that the appellant knew there were packages in the trunk of the motor car; and no evidence relating to odour or that the items were transparently packaged. He submitted that in the cases cited an important factual element was that at some point the party was in visible control of either the vehicle or container in which the substance was found. Mrs Millwood-Moore's rejoinder was that a passenger proven to have the requisite knowledge and custody could also be liable.

[147] **R v Haye and Hamilton** (1972) 18 WIR 360 provides some support for the Crown's position. Haye was the driver of a motor car in which Hamilton, the owner, was a passenger in the front seat. Three other men, Nation, Thompson and Ashley, occupied the rear seat. The vehicle was stopped and searched and ganja was found in a travelling bag on the floor of the rear passenger compartment and in a crocus bag in the trunk. No one answered when the police asked to whom the items belonged. At the trial, the three passengers at the rear were discharged upon a submission of no case to answer. Haye and Hamilton were convicted and appealed.

[148] On its way to upholding the convictions, the court observed that it was an error to have discharged the three passengers at the close of the Crown's case. The court was of the view that all five were in joint control of the ganja, in the circumstances where there was no disclaimer from anyone. According to Fox JA, at page 362:

> "… The police were presented with an entirely passive reaction on the part of the five occupants of the car. In this negative situation the only reasonable inference which is capable is that all five were in joint control of the ganja. For this reason, we agree with the contention of Mr Edwards that the magistrate should not have discharged Nation, Thompson and Ashley at the close of the Crown's case. Mr Edwards described this as a tactical error. We think the mistake more fundamental. It was a failure in the magistrate to perceive that in the particular circumstances, the proper inference of fact which arose with respect to the purely physical situation of control was that all five persons were *prima facie* jointly concerned and answerable. All five should therefore have been called upon for a defence …"

Although this was *obiter*, it seems to us sound law that circumstances may prevail which could make a passenger, other than an owner/driver, be in factual possession of ganja found in the car, whether in the passenger compartment or its trunk.

[149] In this case, the learned magistrate had more evidence than just passive conduct. There was evidence of the flight, abandonment of the car, secreting in the bushes overnight and escaping from the parish together the following morning. All of this was

evidence upon which the learned magistrate could, as she ultimately did, find that the applicant was in joint possession with the other occupants of the car. There was, therefore, no misapplication of the law as it relates to factual possession.

(b) Whether there was a breach of the Judges' Rules

[150] And so we come to the admissibility of the evidence of DSP Smith. The question raised here is whether there was a breach of the **Practice Note (Judges' Rules)** [1964] 1 WLR 152 ('Judges' Rules'). Mr Fletcher's contention is that, at the time DSP Smith questioned the appellant, there was sufficient information available to have made the appellant a suspect. Therefore, the effect of the submission is, the appellant being a suspect, he ought not to have been questioned by DSP Smith. The respondent countered that, based on **Merrick Miller v R**, the appellant was not a suspect at the material time.

[151] In **Merrick Miller v R**, the appellant made an oral report concerning his missing licensed firearm, as he was required to do under the Firearms Act. That oral statement was admitted in evidence at his trial for the offence of losing a firearm through negligence. On appeal, it was contended that the admission into evidence was an error. This court accepted that at the time the oral report was made the appellant was not a suspect.

[152] Panton P, cited the Judges' Rules Nos 1 and 2 then, at para. [15], and disposed of the issue in this way:

> "In the instant matter, the oral report by the appellant to the officer was not even as a result of any questioning by the officer. It was in keeping with an obligation that the law imposed on the appellant, and was made without prompting or urging by the officer. For it now to be argued on behalf of the appellant that the content of the report ought not to have been admitted in evidence is fallacious, to say the least".

It is clear that the Judges' Rules were not engaged in **Merrick Miller v R** and is therefore distinguishable on its facts from this case. However, the reference to the Judges' Rules by the learned President is rather appropriate for present purposes.

[153] In seeking to discover if a crime has been committed and by whom, a police officer is permitted to question anyone, whether or not that person is a suspect. This is made clear by the Judges' Rules. Rule number one is in the following terms:

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it".

[154] At the time DSP Smith questioned the appellant, he was neither charged with the offences nor had been informed that he may be prosecuted for them. Therefore, there was no breach under Judges' Rule No 1 when the appellant was questioned by DSP Smith. That is so even if Mr Fletcher is correct that the appellant by then was a suspect. In our view, at that time there was, at the very least, a dark cloud of suspicion hovering above the appellant's head.

[155] The real question is, in our opinion, whether DSP Smith should have cautioned the appellant at some point during his interrogation before he obtained the answer which amounts to an admission. This only received an oblique reference from Mr Fletcher when he deployed his arguments about the failure of the learned magistrate to consider the appellant's evidence in a fair and balanced way. His complaint then concerned the learned magistrate's equivalence of the rank of with that of constable. It is, however, appropriate to address it here as it invokes questions directly relating to Judges' Rule No 2.

[156] Judges' Rule No 2 circumscribes the apparent *carte blanche* of Judges' Rule No 1. The former rule requires the questioner to refrain from asking further questions once he has obtained evidence which has reached the threshold of reasonable suspicion that the person has committed an offence. The questioner is at this point obliged to administer the prescribed caution before asking any, or any other questions. We quote the relevant part of Judges' Rule No 2:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."

The norm, which this rule seeks to enforce, emanating from the common law, is the rule against inducing someone to self-incrimination. Therefore, from the moment it becomes clear that a suspect or person of interest has transitioned into a person to be accused, he should not be encouraged to add to the weight of evidence against him through the agency of questions which invite incriminating answers. This would amount to unfair questioning, which the judiciary has firmly set its face against, from time immemorial (see **Ibrahim v R** [1914] AC 599).

[157] The learned magistrate was clearly aware of the right against self-incrimination. It appears she sought to resolve the issue of the absence of a caution by reliance on the appellant's awareness of this right. She considered that an eight-year veteran of the JCF would have been aware of his right against self-incrimination and, as a corollary, therefore was to be regarded "on equal level with Superintendent Smith", in spite of their difference in rank.

[158] Notwithstanding his years in the JCF and imputed awareness of his right against self-incrimination, that did nothing to blunt the glaring fact that the appellant and DSP Smith shared a superordinate/subordinate relationship. Consequently, we disagree with the learned magistrate that they stood on the same plain. This would make the deputy superintendent a person in authority vis-à-vis the appellant, both on the basis of being the appellant's superior officer, and the fact that he was playing a part in the investigations. In this regard, their relationship will bear directly on the ultimate question of the admissibility of the statement.

[159] And so we return to the question of whether a caution should have been administered before the "admission" was obtained from the appellant. It will perhaps

prove instructive to reproduce the evidence of the deputy superintendent up to the point when the impugned answer was given. The transcript of the evidence, at page five reads:

> "… I started questioning Mr Blake. I asked him in the presence of the two (2) officers what took him so long to come to me. He replied 'he was dropping off the car'. I asked him what duty he performed on 20.10.09. He said it was his day off however, he had a matter in court and he attended court. I asked him what he did after court. He said he was having a drink with a friend. I asked him what is the name of the friend. He said Omar Lugg. I asked him if he know [sic] why I am asking him all these questions. He said yes. He said he realized his documents fell in the car including his pay slip. I asked him which car. He said the burgundy car in Claremont.
>
> I asked him if he was in the burgundy car in Claremont with the compressed ganja. He said he was sitting on the back seat. I asked him what he was doing in the car. He said, 'a mi friend Omar asked mi fi pilot him. Mi shoulda get a next vehicle but mi neva get it so mi travel inna di car wid him'..."

In our opinion, the questions and answers given preceding that which elicited the "admission", all merely confirmed the appellant's presence in the motor vehicle. Nothing in those answers suggested more than the appellant's mere presence in the motor car. In short, since possession of ganja connotes both the fact of possession and knowledge of what one is possessing, confirmation of presence could not have caused mere suspicion to ripen into reasonable suspicion. Hence, no caution was required before continuing with the questioning. Therefore, there was no breach of Judges' Rules No 2.

[160] The next question, concerning his presence in the car, was open-ended and could have been met by any of a number of responses. In keeping with the appellant's case, one possible reply could have been that he was there to discuss the dissolution of his partnership with Mr Lugg. In other words, it is demonstrable that the question was not one that was designed to entrap the appellant into giving a particular answer. More to the point of the power dynamics between the appellant and DSP Smith, is that there was neither fear of consequences nor hope of benefit held out to the appellant during this session. There was no complaint of overbearing conduct by the deputy superintendent

towards the appellant, as was the case in **R v JT Smith** (1959) 43 Cr App R 121; [1959] 2 QB 35. In that case the regimental sergeant-major told the company, "I am not leaving, I am staying here until you give me an answer about the fight". The confession that came after that was held to be inadmissible. Put another way, in contrast to the overbearing conduct in **R v JT Smith**, the cross-examination of DSP Smith did not seek to dispute either the fact that the statement was made or that its making was voluntary.

[161] When a challenge came, it was in the form of a denial from the mouth of the appellant, during his testimony. That made the issue one of credibility and it was open to the learned magistrate to prefer the evidence of the prosecution over that of the appellant. Equally, the interpretation the learned magistrate placed on the word 'pilot' was not strained. Against the background that Mr Lugg hailed from the parish of Saint Ann, the appellant's function as a 'pilot', as a matter of common sense and logic, was reasonably explainable by reference to his office.

[162] It was, therefore, but a short step from there to the reasonable and inescapable inference that the appellant knew that there was compressed ganja in the car and was involved in transporting it. The learned magistrate was perfectly correct in viewing the evidence of piloting as the 'something more', prescribed in **R v Monica Williams** (1970) 16 WIR 74, which the learned magistrate cited. In our opinion, this was the axis upon which the case against the appellant turned. Once this evidence was accepted it was fatal to the appellant's denial of knowledge of the ganja and involvement in its possession and transportation.

[163] The learned magistrate did not leave her findings on the proof of the mental element of the offence at something more. She went on to rely on wilful blindness, which provided fodder for Mr Fletcher's next line of attack. He submitted that the learned magistrate made a grave error in her finding that the appellant asked no questions about the contents of the plastic five-gallon bucket (exhibit 7), as this item was found in the trunk of the motor car. The learned magistrate grounded this finding in **R v Forbes** [2001] 4 All ER 97.

[164] The phrase, 'wilful blindness' has attached itself to what O'Connor CJ in **R v Cyrus Livingston** (1952) 6 JLR 95 referred to as "the second degree of knowledge", at page 99 of the judgment. In the absence of actual knowledge, a tribunal of fact will look to see if the defendant has deliberately shut his eyes to an obvious means of knowledge, refraining from asking questions the answers to which he would prefer not to have. To quote O'Connor CJ, at page 99:

> "… if the magistrate feels that the evidence falls short of actual knowledge, he has then to consider the second degree of knowledge, whether the defendant was, as it has been called, deliberately shutting his eyes to an obvious means of knowledge, whether he deliberately refrained from making inquiries the results of which he might not care to have. Either of these two degrees of knowledge would be sufficient to support a conviction, though mere neglect to make such enquiries as a reasonable and prudent person would make, would not be sufficient..."

[165] Whereas the learned magistrate correctly stated the principle of 'wilful blindness', her application of it was misplaced. The case for the prosecution was that the five-gallon plastic bucket was found in the trunk of the motor car. The appellant said there was a similar plastic bucket on the back seat but he threw it from the vehicle during their flight from the police and it was never recovered. Therefore, there was no evidential basis upon which to make this finding.

[166] Further, it suffices to say that **R v Forbes** is not authority for the proposition of wilful blindness. **R v Forbes** dealt with what the prosecution had to prove in a charge of being in any way knowingly concerned in any fraudulent evasion of any importation of goods under an English statute. It was held that it was sufficient for the prosecution to prove that the defendant had known that the goods were subject to a prohibition on importation and knew he was engaged in an operation to evade that prohibition.

[167] Although this point has to be decided in the appellant's favour, it does not render the conviction unsafe. The learned magistrate clearly made wilful blindness an alternate finding. This was what the learned magistrate said, at pages 8-9 of the transcript:

> "… I find based on his conduct that he knew **or in the alternative** deliberately shut his eyes not only to the contents of the bucket but also the contents of the bags found in the trunk of the car ..." (Emphasis supplied)

The primary finding of knowledge emanated from the learned magistrate's acceptance of the evidence that the appellant's role was to pilot the transportation of the ganja. The challenge to this principal finding has already foundered.

(c) No Case Submission

[168] Coming back, as we have, to the question of the admission of the evidence of piloting, it will be recalled that Mr Fletcher submitted that if this evidence had not been admitted, the court would have been left with a paucity of evidence, warranting a decision not to call upon the appellant to answer. Turned on its head, this submission implies that the acceptance of the evidence of piloting fortified the case against the appellant.

[169] The circumstances in which it would be appropriate for a trial judge to uphold a submission of no case to answer have been settled for some time. From the recap of Mr Fletcher's submission in the preceding paragraph, the challenge appears to raise the question of a *prima facie* case. It is therefore sufficient to refer to the first limb only of Lord Lane's oft cited guidance in **R v Galbraith**, [1981] 2 All ER 1060. At page 1062 he said:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case".

No evidence that the crime has been committed, would embrace the situation implicit in Mr Fletcher's submission. That is, without the acceptance of the evidence of 'piloting', the crucial ingredient of knowledge would have been absent. And if that were the circumstance facing the learned magistrate, she would have had no choice than to stop the case.

[170] However, that was not what confronted the learned magistrate. She accepted and interpreted that evidence in a manner that was detrimental to the appellant; a position we find eminently justified on the evidence. The inevitable consequence of our acceptance that this evidence was rightly admitted is that the complaint that the learned magistrate should have stopped the case, at the close of the case for the prosecution, is without merit.

(d) Unreasonable Verdict

[171] The challenge to the appellant's conviction did not end there. It was further argued that the verdict is unreasonable having regard to the evidence. Mr Fletcher cited **Alrick Williams v R**, referred to above, for the proposition that the appellant must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable. The following areas were isolated by Mr Fletcher as the basis of his challenge under this ground:

> "I. Underappreciation [sic] by the judge of the weaknesses in the prosecution's case. In particular relying on a particular admission as uncontested when in fact it was a fact in issue as to whether it was actually said.
>
> II. Relying on evidence provided by the appellant to convict him.
>
> III. Failure of the judge to give a balanced consideration to the appellant's case.
>
> IV. Stark confusion and irregular chain of custody integrity."

[172] The proposition advanced by Mr Fletcher has its roots in **R v Joseph Lao**. In that case as in the present, the complaint was that the verdict of the jury was unreasonable and could not be supported by the evidence. The additional contention was that the verdict was unsafe unsatisfactory and, based on the state of the evidence, the case ought to have been withdrawn from the jury at the close of the case for the prosecution. The court was guided by two principles in coming to its decision. The first, correctly cited by Mr Fletcher, is that to succeed under this ground it must be demonstrated that the "[t]he

verdict must be so against the weight of evidence as to be unreasonable or insupportable", per Henriques P at page 1240. Secondly, quoting a passage from Archbold, at page 1241 of the judgment, it was held that the court will set aside a verdict on a question of fact, "only where the verdict was obviously and palpably wrong".

[173] The learning, accepted and applied in **R v Lao**, has been followed by this court without any dilution of the principles. More recently, **R v Lao** was applied in **Lescene Edwards v R** [2018] JMCA Crim 4, **Chadwick Blissett v R** [2020] JMCA Crim 49 and **Joseph Williams v R** [2020] JMCA Crim 50. Although the court in **R v Lao** was concerned with the verdict of a jury, it has been explicitly laid down that the principles apply with equal force to a judge sitting alone, as the learned magistrate in this case was (see **Willard Williamson v R**).

[174] All the questions raised under this ground are rooted in the learned magistrate's treatment of the evidence before her. That is, questions of fact, which stood to be resolved by reference to the credibility of the witnesses. In relation to the specific complaint that the learned magistrate relied on the admission as uncontested, we have not found that to be a fair criticism. The learned magistrate correctly stated that the admissibility of the admission was not in dispute before her. The learned magistrate then demonstrated her appreciation that the fact of making the statement was in issue. At page seven of her findings the learned magistrate said:

> "… I accept the evidence of Superintendent Smith that his response to whether he was in the car with the compressed ganja was that, 'he was sitting on the back seat', that 'his friend Omar asked him to pilot him', that 'he should have gotten a next vehicle but he did not get it so he travelled in the same car with him'."

The learned magistrate also demonstrated that the fact of whether the statement was made was in issue and that she resolved it in favour of the Crown. In accepting that the Crown had to establish 'something more' before she could convict the appellant, the learned magistrate showed that she assessed DSP Smith's evidence and pronounced upon

his credibility and reliability. Having satisfied herself in relation to those factors, the learned magistrate declared that she accepted his evidence.

[175] In like fashion, the learned magistrate addressed her mind to the inconsistencies in the evidence. We find no fault with her treatment of them. It was within her purview to accept the explanations given for the inconsistencies, where these were tendered. Neither can we fault her in finding that whatever inconsistencies there were did not go to the root of the case. The main issues in the case were whether ganja was found in the car and if the appellant was culpable. There was no inconsistency on the evidence concerning the first issue. The inconsistencies related to the chain of custody which, she found, were not material. Therefore, the learned magistrate was not in error in finding that the inconsistencies did not go to the root of the case.

[176] That takes us to the complaint that the learned magistrate relied on evidence provided by the appellant to convict him. While we are in sympathy with Mrs Millwood-Moore's response that the learned magistrate was at liberty to use all the evidence in a balanced way, we do not think the assertion entirely fair. Having expressly accepted the evidence for the Crown, it was open to the learned magistrate to find both the *actus reus* and the *mens rea* proved. The later references to the conduct of the appellant were more demonstrative of the reasons the appellant's account was not believed, rather than her reasons for arriving at an adverse verdict. In any event, it would have been legitimate for the learned magistrate to assess the evidence of the appellant to see whether it undermined the case for the Crown and to say if it in fact had the opposite effect.

(e) The learned magistrate's consideration of the defence's case

[177] And so we come to the complaint that there was a failure to give a balanced consideration to the appellant's case. Respectfully, and hopefully without oversimplification, the submissions under this ground were more stylistic or formulaic than substantive. The charge that there was no fair and balanced assessment of the appellant's case rested on the absence of the learned magistrate saying, as Mr Fletcher expressed it, "the appellant said this but I find that". However, as this court said in **R v**

Lloyd Chuck, the law requires from a magistrate only a statement in summary form of the findings of fact. The articulation of those findings should reflect that the relevant legal principles were applied. In this case, the learned magistrate showed that the evidence was assessed against the backdrop of the incidence of the burden and standard of proof, in respect of both the prosecution and the defence. It certainly was not her function to list all the minutiae in the appellant's evidence then say she rejected them.

[178] In our opinion, the complaint about the chain of custody was sufficiently addressed earlier in this judgment.

[179] We are in agreement with Mrs Millwood-Moore's submission that the verdicts had an evidentiary foundation. Accordingly, the appellant has failed to show that the verdicts are so against the weight of the evidence as to be unreasonable or insupportable. In the same vein, it cannot be seriously maintained that the learned magistrate was obviously or palpably wrong in either her treatment of the evidence or application of the law.

Issue number four: did the learned magistrate err in her application of the law in relation to the evidence of the good character of the appellant?

[180] This issue is raised by ground five of the supplementary grounds of appeal which complains that the learned magistrate unfairly discounted the judicial value of the good character directions. Mr Fletcher's complaint is not that the learned magistrate failed to give both limbs of the good character directions. His complaint is grounded in the statement of the learned magistrate that good character is not a defence. In our understanding of Mr Fletcher's submissions on the point, stripped to its core, the impugned remark of the learned magistrate betrayed a misapplication of the directions. That is to say, the directions were not applied in either the assessment of the appellant's credibility or his propensity to commit the offences, rather, to first find him guilty then look to see whether he could be exonerated. Is this a fair criticism of the learned magistrate? Before seeking to answer that question, we will set out a statement of the law on good character.

[181] A trial judge's obligation to give standard directions on good character in a case where the defendant gives evidence and raises the issue of his good character, has been settled since the decisions of the English courts in **R v Vye**, **R v Aziz** and **R v Hunter (Nigel)**; **R v Saruwu (Joseph)**; **R v Johnstone (Ian)**; **R v Walker (Alan)**; **R v Longsdale (Paul)**; and Practice Note [2015] 1 WLR 5367 ('**R v Hunter'**).

[182] The law as laid down in these cases has been accepted and applied by this court in several cases (see, for example, **Chris Brooks v R**). In **Chris Brooks v R**, the appellant both testified and called a witness to speak to his good character, thereby putting his character in issue. At para [50] of the judgment, Morrison JA (as he then was), said:

> "In such circumstances, ... it is beyond controversy that he was entitled to a direction from the judge as to the relevance of his good character to (a) his credibility, and (b) to the likelihood of his having committed the offences for which he was charged ..."

[183] In this case, after stating that she had assessed the evidence for both the prosecution and the defence, against the backdrop of the burden and standard of proof, the learned magistrate directed herself in the following terms:

> "I have taken into consideration the fact that the defendant having given sworn evidence and having adduced evidence of good character that these factors which are relevant not only to his credibility but are also probative in relation to issues of guilt are factors in his favour ...
>
> "Therefore [sic] I warn myself that a person of good character is less likely to commit these offences ..."

Although the articulation was not textbook perfect, which is not required, the learned magistrate demonstrated here that she had both the credibility and propensity limbs of the standard directions in mind.

[184] However, as was said above, the brunt of Mr Fletcher's complaint is not a failure to direct herself but the apparent use that was made of the evidence of good character.

The remarks which attracted criticism and imputation of misapplication came towards the end of the learned magistrate's reasons for her findings. To give the remarks context, we extract the paragraph in which the remarks appear:

> "I have considered the character evidence given by Detective Sergeant David Campbell that he knows the accused for seven (7) years. That he found him to be of highest integrity. I have examined this evidence against the principle that a person of an honest character is less likely to commit an offence. However, I do not find that conduct of the accused on the night of October 20, 2009 into the morning of October 21, 2009 demonstrates that he is an officer of high integrity. In fact [sic] evidence of good character while it enures to the benefit of the defendant does not amount to a defence of the charges".

[185] It is plain that this was a concluding remark of the learned magistrate, coming as it did, after a thorough review and analysis of the evidence before her. Having given herself the standard direction before commencing the review and analysis, it is palpable that the import and impact of the appellant's good character was at the fore of the learned magistrate's mind during her deliberations.

[186] Contrary to the imputation levelled at the learned magistrate by Mr Fletcher, the concluding comment was well within the bounds of authority. The obligation to give the standard good character direction in cases like the appellant's, retains a residual discretion to tailor the directions according to facts of the case. One case may call for an emphasis of the credibility limb, while another may demand a stress of the propensity limb. I quote Lord Taylor in **R v Vye**, at page 247:

> "Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. **He would**

> **probably wish to indicate, as is commonly done, that good character cannot amount to a defence**. In cases such as that of the long serving employee exemplified above, he may wish to emphasise the 'second limb' direction more than in the average case. By contrast, he may wish in a case such as the murder/manslaughter example given above, to stress the very limited help the jury may feel they can get from the absence of any propensity to violence in the defendant's history. Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case." (Emphasis added)

[187] Our reading of the learned magistrate's findings and reasons therefor, disclose that she chose to emphasise the propensity limb of the direction. This, we believe, was justified by the case presented by the appellant. There were two material points of departure on the question of credibility between the case for the prosecution and the appellant. The first, and more significant of the two, was whether the magistrate believed that the appellant told DSP Smith that he was there to pilot his friend. That the statement was made by the appellant was never disputed when DSP Smith was cross-examined. The appellant's denial of that statement only came when he testified. Otherwise, this was not a case of a contest of credibility between the witnesses for the prosecution and the defence. In the light of his primary defence, that he did not know that ganja was contained in the trunk of the motor car, the relevant use of evidence of his good character was whether a person situated as he was, was likely to commit the offences for which he was charged. Upon the authority of **R v Vye**, the learned magistrate's treatment of the evidence of the appellant's good character was well within the ambit of the law.

[188] The criticism of the learned magistrate's concluding remark that "good character … does not amount to a defence to the charges" is, therefore, demonstrably unfair and, eminently without merit.

Issue number five: whether or not there was a miscarriage of justice due to non-disclosure?

[189] The unsuccessful attempts which Mrs Neita Robertson made to have access to the exhibits for the purposes of a demonstration, however, lead to a consideration of an additional ground of appeal which the appellant received permission to pursue. It is reflected as ground of appeal 8 in which the appellant has submitted that the prosecution failed to disclose material to the defence and that this resulted in a miscarriage of justice.

Analysis

[190] The principles outlined in **R v Ward** on the issue of the prosecution's duty of disclosure were outlined by McDonald-Bishop JA in **Willard Williamson v R** at para. [45] as follows:

> "(i) The prosecution has a duty at common law to disclose to the defence all relevant material. Relevant material is evidence which tends either to weaken the prosecution's case or to strengthen the defence. This duty of disclosure requires the police to disclose to the prosecution all witness statements in their possession and for the prosecution to supply copies of such statements to the defence or to allow them to inspect them unless good reason exists for not doing so.
>
> (ii) The prosecution is also under a duty, which continues during the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it would strengthen or weaken the prosecution's case or could assist the defence and whether or not the defence made a specific request for disclosure. Pursuant to that duty, the prosecution is required to make available the records of all relevant experiments and tests carried out by expert witnesses.
>
> (iii) The common law has always recognised that the public interest might require relevant evidence to be withheld from the defendant. Obvious examples are evidence

dealing with matters of national security or disclosing the identity of an informant.

(iv) If the prosecution wishes to claim public interest immunity for documents which would be helpful to the defence they are obliged to give notice thereof to the defence…"

[191] What if non-disclosure has occurred? In dealing with this issue in **Willard Williamson v R** at para[81] McDonald-Bishop JA (Ag) cited the following passage from **Bonnett Taylor v The Queen**:

> "But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for having not made use of it, it would not be enough to justify a finding that there has been a miscarriage of justice. **The focus must be on the impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or defence counsel were at fault:** *Teeluk v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, para 39, , per Lord Carswell. **The court must have material before it which will enable it to determine whether the conviction is unsafe**." (Emphasis as in the original)

[192] We are also reminded that if the prosecution failed to disclose it does not mean an automatic acquittal (see **Bonnett Taylor v R**). The critical issue for the court's consideration therefore is whether the non-disclosure resulted in a miscarriage of justice.

[193] The case of **Nickoy Grant v R** [2013] JMCA Crim 30 is instructive. The applicant in that case complained that the prosecution's non-disclosure of the medical certificate which was material evidence, prejudiced the preparation of his defence and consequently deprived him of a fair trial resulting in an 'unsafe and unsatisfactory' verdict. In that case, counsel contended that the provision of the medical report would have been helpful to the jury in assessing the credibility of the complainant who had insisted that he was unable to see, and the medical report did not convey that he was blind.

[194] In arriving at a decision, Lawrence-Beswick JA (Ag) in that case applied the principles in **Bonnett Taylor v R**. She said:

> "[29] The matter of non-disclosure was one of the principal issues discussed by the Judicial Committee of the Privy Council in the Jamaican case of **Taylor**. In that case the prosecution had in its possession the statement of a witness who had not been called to testify at either of the two trials which had been held. The defence had the statement but it was not clear as to how or when they had come into possession of it. **The question to be determined by the Board was the effect of the late disclosure/nondisclosure of the statement**."
>
> [30] In **Taylor,** the evidence was that the deceased had been shot dead at his home in Portland by the appellant and that a witness, Mr Grey, was present throughout the killing and thereafter ran to the yard of neighbours, Mr and Mrs Hartley, and gave an account to them of what he had seen. The neighbour, Mr Hartley, testified at the trials, supporting Mr Grey's evidence of having reported to him, Mr Hartley, as to what he said he had seen. At the first trial the jury failed to arrive at a verdict. At the second trial, the appellant was convicted of murder. Mrs Hartley, however, had given a different account of Mr Grey's whereabouts at the time of the murder. Her statement was on the prosecution's file but she had not been asked to testify. In her statement she said that Mr Grey had been at her house throughout the night and in fact had remained there until the next morning. The Board recognised that Mrs Hartley's evidence might suggest that Mr Grey had not been present at the shooting next door and would therefore not have witnessed it, but said that that must be balanced against the weight that there were elements of Mr Grey's evidence that he could have only known if he had been present at the killing. The nature and direction of the injuries present on the deceased's body formed one such element. In addition, there was the evidence of Mr Hartley supporting Mr Grey's testimony. The Board found that the balance lay so far in favour of accepting Mr Grey's account as being true and that there was no reasonable possibility that the jury would have arrived at a different verdict. **Lord Hope, in delivering the majority judgment, stated that the relevant test as to the effect of the non-disclosure of**

> **a statement was whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome – that the jury might reasonably have come to a different conclusion as to whether the appellant was guilty of murder.**" (Emphasis supplied)

In **Nickoy Grant v R** that case the appeal was allowed and a retrial ordered. Lawrence-Beswick JA (Ag) concluded that the applicant' had been deprived of the opportunity to properly prepare his case and to challenge the complainant's credibility.

[195] Turning to the case at Bar, in the first place, we agree with the submissions of the Crown that this matter is distinguishable from **Harry Daley v R** in which critical information was not disclosed to the appellant. In that case, although the credibility of Tafari Clarke was of critical importance, and there was evidence that he had made an application for asylum in the United Kingdom, which was denied, the defence's application for disclosure of the file with the statements that Mr Clarke made in support of his application was denied. The appellant's house was searched in his absence, documents were removed and no list was made of them. The appellant was unable to produce a document critical to his defence due to the removal of documents from his home. This court concluded that Mr Daley was not treated fairly by the police as their conduct had hampered his defence.

[196] The circumstances in this case also differ significantly from those in **Maguire and Others v R**. In that case the appellants were convicted of possessing an explosive substance contrary to section 4 of the Explosive Substances Act 1883. The case for the prosecution mainly depended on scientific evidence that the substance found on the hands and gloves of the appellants was an explosive substance, nitro-glycerine, and that there could be no reasonable explanation for it. One of the grounds on which the appellants appealed their convictions was that the prosecution failed to inform the defence of relevant material known to the Crown's expert witnesses, and this constituted a material irregularity in the course of the trial. Unknown to the Crown's attorneys, tests

had been conducted by its expert witnesses which revealed that it was possible for persons' hands to be contaminated with the substance by contact with a towel in which they dried their hands. As a result, innocent contamination could not be excluded. The court concluded that on that issue alone, the convictions of the appellants were unsafe and unsatisfactory. As a result, their appeals were allowed and convictions quashed.

[197] In the instant case the appellant was deprived of an opportunity to carry out a demonstration with the various exhibits and the car. We note that at the time of his request the car had already been released. Although the defence ought to have been facilitated in their desire to carry out a demonstration with the various exhibits and the car, we agree with the submissions made by the Crown that this does not fall within the legal understanding of non-disclosure by the prosecution. We also agree with the submissions made by the Crown that the appellant could have attempted a demonstration with a car of a similar type.

[198] If we were, however, to conclude that the prosecution failed to disclose, we must now determine whether based on the circumstances there was a real possibility of a different outcome, in that, the learned magistrate might have reasonably come to a different conclusion as to whether the appellant was guilty. Again, we are not of the view that the demonstration that the appellant had sought to carry out would have caused the learned magistrate to arrive at a different outcome. The appellant wished to argue that the exhibits purportedly found in the trunk of the motor car were physically impossible to all be accommodated in its trunk, therefore supporting his case that no ganja was found in the motor car in question. In pursuance of this line of argument, one of the matters which the appellant was emphasizing was the presence of a fan in the trunk of the car. As indicated earlier, however, there was nothing in the notes of evidence about a fan in the trunk of the car.

[199] We accept the submission of counsel for the Crown that it was open to the learned magistrate to assess the credibility of the witnesses' evidence. We do not believe that the

failure of the prosecution to facilitate the demonstration which the defence counsel sought, resulted in a miscarriage of justice. As such, this ground fails.

Sentence

[200] There was neither a ground nor oral submissions which specifically addressed the question of sentence. In his written submissions, one sentence appeared which alleged the sentence to be manifestly excessive. It was the appellant's prayer, in the alternative to a setting aside of the verdict, that the sentence be adjusted and reduced. In passing sentence, the learned magistrate took into consideration the character evidence given on the appellant's behalf. It was her belief that as a member of the constabulary, the appellant "was vested with a fiduciary responsibility to uphold the law and not succumb to the temptation to break the law". Viewing the matter from that perspective, the learned magistrate considered that a fine, together with a short custodial sentence, was warranted.

[201] The appellant was exposed to similar penalties for both offences. That is a fine of $100.00 for each ounce of ganja, up to a maximum of $15,000.00 or imprisonment for a term not exceeding three years or to both such fine and imprisonment (see the Dangerous Drugs Act, sections 7C(1)(b) and 7B(a) and (e) respectively). The learned magistrate therefore had the option of fining and confining the appellant on both charges.

[202] The parcels admitted into evidence weighed 77.5 pounds or 1240 ounces. For the purpose of the fine imposed for possession of ganja, the statutory cap of $15,000.00 would apply. In respect of sentence of six months imprisonment imposed for the offence of dealing, we share the sentiments expressed by the learned magistrate. Notwithstanding the appellant's previous good character, the circumstances justified the imposition of a custodial sentence. A sentence of six months on the evidence in this case is, if nothing else, condign. We do not regard the sentence imposed on either count to be manifestly excessive.

Summary and conclusion

[203] The evidence presented against the appellant was sufficient for the learned magistrate to return the verdicts she ultimately did. The evidence of the witnesses that there was ganja in the trunk of the abandoned vehicle was not frontally challenged at the trial. Even if it was, the witnesses were not discredited on the point. The questions that arose concerning the chain of custody of the ganja were not sufficient to destroy the integrity of the items seized. Although the labelling was below the standard that was customary, at the end of the day there could be no doubt that the vegetable matter found in the trunk of the motor car was that which was submitted to the government analyst for testing; testing which found the vegetable matter to be ganja.

[204] That left the question of knowledge in so far as the ingredients of possession of ganja are concerned. The acceptance of DSP Smith's evidence, together with the interpretation placed on the word 'pilot' by the learned magistrate, was sufficient to clothe the appellant with the requisite knowledge. The learned magistrate assessed the evidence of the appellant, bearing his good character in mind, and rejected his evidence.

[205] On the subject of evidence, the appellant complained of non-disclosure in relation to the prosecution's failure to facilitate a demonstration involving the seized items and the motor car from which the items were recovered. We have concluded that even if the appellant had been facilitated to carry out the demonstration he desired at the trial, that demonstration would not have resulted in a different verdict. Hence, our conclusion that there was no miscarriage of justice.

[206] Therefore, finding no fault with the verdicts, the appeal against conviction and sentence is dismissed.

Order

1. The appeal against conviction and sentence is dismissed.
2. The convictions and sentences are affirmed.

3. The sentence of six months imprisonment is to commence on 29 October 2021.