JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 82/2018

ALBERT PAULTON v R

Miss Samoi Campbell instructed by Peter C Champagnie QC for the appellant

Adley Duncan and Miss Monique Scott for the Crown

22 September 2021 and 14 January 2022

BROOKS P

[1] On 22 September 2021, having considered Mr Albert Paulton's appeal from his conviction for illegal possession of firearm and ammunition, and having heard submissions from his counsel and counsel for the Crown, this court ordered as follows:

> "1. Appeal against conviction is dismissed.
> 2. The convictions and sentences are affirmed.
> 3. The sentences shall be reckoned as having commenced on 14 September 2018."

The court promised, at that time, to put its reasons in writing. This is a fulfilment of that promise.

[2] On 8 June 2018, Mr Paulton was convicted in the High Court Division of the Gun Court for two offences against the Firearms Act ('the Act'). On 14 September 2018, the

learned trial judge ('the learned judge') sentenced him to 12 months' probation in respect of the offence of illegal possession of firearm and two months' probation in respect of illegal possession of ammunition, and ordered that the sentences were to run concurrently. Mr Paulton applied for leave to appeal against his conviction. A single judge of this court granted him that leave, mainly on bases of the unusual nature of the defence and the manner in which it had been treated by the learned judge.

[3] The matter is unusual because there was little challenge to the prosecution's case. Mr Paulton accepts the facts advanced by the prosecution; however, his defence was one of duress of circumstances. His case was that he was forced, out of fear for his life, to take the subject firearm and ammunition into his custody. He said that he, therefore, had no intention to possess them. The learned judge was wrong, he says, to have found otherwise.

[4] One of the main issues that this court had to determine was whether Mr Paulton exercised dominion over the firearm and ammunition so as to satisfy the requirements of the definition, in law, of possession. Before conducting that analysis, it is necessary to outline the respective cases of the prosecution and the defence.

The prosecution's case

[5] The prosecution led evidence that on 3 July 2013 at approximately 6:00 am, Corporal Dwight Bissick (now Sergeant Bissick) was among police officers, who entered a house at 8 Modyford Road Kingston 11, in the parish of Saint Andrew. Sergeant Bissick was armed with a search warrant. He executed the warrant on the person named therein, one "Zeeks", who afterward gave his correct name as Oneil Wallace. Zeeks was coming from a room inside the house when Sergeant Bissick first saw him. The Sergeant took him back into that room.

[6] On entering the room, Sergeant Bissick saw Mr Paulton, whom he did not know before. Mr Paulton immediately told Sergeant Bissick that Zeeks had just given him a gun to "lock up". Mr Paulton pointed to a "sweetie pan" on a "whatnot". The Sergeant

said that he opened the pan and saw a silver and black firearm. It was eventually found to contain 16 rounds of ammunition. He cautioned both men but neither said anything. He took them both into custody. On the way to the police station, Mr Paulton told Sergeant Bissick that he was in fear of Zeeks.

[7] At the police station, Mr Paulton gave a cautioned statement detailing what, he said, had occurred at the house, and repeating what he had told Sergeant Bissick. Mr Paulton said that he had obeyed Zeeks' direction, about the firearm, out of fear. He said, in part, "'true' me 'fraid a him, mi tek it and put it inna di sweetie pan and same time him step out, mi see di police bring him back in…."

The defence

[8] After an unsuccessful submission that he ought not to have been called upon to state his defence, Mr Paulton gave sworn testimony. He said that he knew Zeeks to be a gunman, but had never spoken to him before the day in question. He said that Zeeks did not live at that premises. Mr Paulton said that on that day, Zeeks rushed into his (Mr Paulton's) room and said, "Lock this". He was shouting. He gave the gun to Mr Paulton, who understood the command, "Lock this", to mean that he should put away the firearm.

[9] Mr Paulton said that he was fearful that Zeeks would kill him if he did not follow his directions. He put away the gun, but as soon as Zeeks stepped out of the room, the police came back with him and he, Mr Paulton, told the police what had happened. He said five – 10 seconds had elapsed between the time that Zeeks left, and the time that the police brought him back into the room.

[10] In cross-examination, Mr Paulton said that Zeeks threatened that "things" would happen to him, if he didn't "lock" the weapon. When counsel for the Crown enquired further, he said Zeeks said that things would happen to his family if he did not comply with the direction.

[11] One of Mr Paulton's character witnesses described him as being, 'coward'. Another described him as 'accommodating'.

The grounds of appeal

[12] Miss Campbell, on behalf of Mr Paulton, with permission of the court, argued three grounds of appeal:

> "a. Ground 1
>
> The learned trial judge erred in not upholding the no case submission[.]
>
> b. Ground 2
>
> The learned trial judge erred in her finding that the defence of duress of circumstances was not raised by the evidence of [Mr Paulton], particularly that he was not in fear and that his response to the circumstances was not reasonable[.]
>
> c. Ground 3
>
> The learned trial judge erred in her finding of fact that there was a major inconsistency in [Mr Paulton's] case in relation to the time given in his caution statement and the time given in his viva voce evidence[.]"

[13] The grounds will be assessed in turn.

Ground 1- The learned trial judge erred in not upholding the no-case submission

[14] Miss Campbell submitted that there was nothing on the prosecution's case that supported an inference that Mr Paulton intended to possess either the firearm or the ammunition. She contended that in the circumstances of the case, the issue of Mr Paulton being in fear, that is, Mr Paulton was not acting on his own volition, arose on the prosecution's case, and had not been disproved by the prosecution. Accordingly, learned counsel argued, the prosecution had failed to prove the element of intention to possess, which is an essential element in proving the offences, with which Mr Paulton was charged.

[15] It would be easy to say that learned counsel's submissions are plainly wrong, for if she were not, all that would be necessary for a person found in possession of a firearm to be discharged at the end of the prosecution's case, is to say, when found with the item, "I was forced to carry it by So and So". The answer to Miss Campbell's submissions is not complex, but it does require the reiteration of some basic principles.

Analysis

[16] The first basic principle is identifying the elements of the offences. Section 20(1)(a) and (b) of the Act provides that it is an offence to possess a firearm or ammunition, respectively, without having the requisite licence. In charging an individual for an offence under that section, the prosecution has to prove physical custody or control of the item and that that person knew that he or she had custody or control of the item. The knowledge may be inferred from the circumstances in which the item was found.

[17] The definition of possession in law, has long been established in this jurisdiction. It may be distilled from the decision of the Privy Council in **Director of Public Prosecutions v Wishart Brooks** (1974) 21 WIR 411 ('**DPP v Brooks**'). In that case, their Lordships dealt with the physical and mental elements of possession separately. At page 415, they stated the elements:

> "In the ordinary use of the word 'possession' one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs."

[18] The Law Lords also dealt with the mental element by approving the reasoning in **R v Cyrus Livingston** (1952) 6 JLR 95, where it was held that in addition to the physical possession, it must be further shown that the person had knowledge that the thing which he had was ganja (see page 414 of **DPP v Brooks**).

[19] Those elements of possession, although set out in the context of the possession of substances contrary to the Dangerous Drugs Act, have been held to apply to the illegal possession of firearms and ammunition. In **R v Rupert Johnson** (1980) 31 WIR 297 at page 303, Kerr JA, in delivering the judgment of this court referred to the principles concerning possession, as set out in **R v Cyrus Livingston** and **DPP v Brooks** and said:

> "A similar reason would support a liberal interpretation of possession in section 20 of the Firearms Act, a firearm being so lethal a weapon…."

[20] The principles governing possession were analysed by their Lordships in the decision of the Privy Council in **Bernal (Brian) and Moore (Christopher) v R** (1997) 51 WIR 241 ('**Bernal and Moore v R'**), where, using broadly the terms *mens rea* for the mental element of knowledge and *actus reus* for the physical circumstances of the control of the item, their Lordships said, in part, 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. **It will be for the tribunal of fact to investigate these circumstances to decide whether or not the accused had knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance**." (Italics as in original, emphasis supplied)

[21] The Queen's Bench, in **Jenkins v Director of Public Prosecutions and Another** [2020] EWHC 1307 (Admin), dealt with a provision of legislation, which was differently worded from the Act but similar in its effect. In that case, Mr Jenkins gave a woman a ride in his car. She put a stun gun in the glove compartment of his motor vehicle. He drove with it there for approximately 10 minutes before the police ordered him to pull over. They found the weapon and charged him with illegal possession of it. On appeal from his conviction, Carr LJ, with whom Saini S agreed, noted at paragraph 16 that illegal possession of a weapon is a strict liability offence and that *mens rea* is only required to prove that the defendant was in possession of a weapon. It should also be noted that possession may be proprietary and/or custodial. Carr LJ in **Jenkins v Director of Public Prosecutions and Another** distilled this principle, at paragraphs 17-20, of the judgment, as follows:

> "17. **Whether a person is in possession of a weapon is a question of fact**; **possession can be proprietary and/or custodial** (see *Hall v Cotton* [1987] QB 504 at 509C and 510C). It is not confined to physical possession. As the Magistrates were advised, there is no need for the prosecution to prove a conscious decision to be the possessor. **What is required are words or actions revealing power or control, even if only for a very short period, such as fairly amount to possession; the prosecution must prove that an accused was knowingly in control of something in circumstances in which he was assenting to be in control of it.…**
>
> 18. In *Warner v Metropolitan Police Commissioner* [[1969] 2 AC 256] Lord Pearce when referring to physical possession said this:
>
> > '**By physical possession or control I include things in his pocket, in his car, in his room and so forth.** That seems to me to accord with the general popular wide meaning of the word 'possession' and to be in accordance with the intention of the [Firearms] Act.'
>
> 19. …mere knowledge of the existence and presence of the gun would not by itself establish possession on the part of Mr Jenkins. Nor did the Magistrates proceed on that basis. Here, as the Magistrates found, **there was more than mere knowledge; there was at least a degree of control** on

> the facts as expressly found by them: the presence, to Mr Jenkins' knowledge, of the stun gun in the glove box of his car which he was driving when stopped by the police.
>
> 20. Even on the basis that the Magistrates accepted all of Mr Jenkins' oral evidence, the stun gun was, to Mr Jenkins' knowledge, in his car which he chose then to drive. Despite initially objecting to its presence, he then allowed the stun gun to be placed and remain in his car which he then drove away (for some 10 minutes), controlling its location. He could have insisted Ms Price leave the car with the stun gun; he could have left the car in the event that she refused. Whilst Mr Jenkins may have expressed concern at the outset, any objection did not prevent him from voluntarily continuing on his way with the stun gun in place. The fact that the period of possession was short-lived did not afford Mr Jenkins any defence." (Italics as in original, emphasis supplied)

[22] The second basic principle, which is relevant to this case, is that where a person makes a statement admitting the elements of the prosecution's case but, in it provides an explanation for the circumstances, the prosecution may apply, during its case, for that statement to be put into evidence. The exculpatory aspects, however, do not trump the admission elements. The ordinary rule is that "an exculpatory or, as it is sometimes called, a self-serving statement made by the accused to a third party, usually the police, is not admissible as evidence of the truth of the facts it asserts" (see **R v Sharp** [1988] 1 All ER 65 at page 68).

[23] In **R v Sharp**, the House of Lords dealt with a statement that had both admission and exculpatory elements, called a "mixed statement" and explained that it only became admissible in evidence because of the admission of damning aspects of the prosecution's case. If the prosecution wished to use the statement, it was obliged to use the whole statement. Their Lordships, in this regard, approved the statement of the law in **R v Duncan** 73 Cr App R 359 at 365, where Lord Lane CJ said:

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, **is for the jury to be**

> **told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies.** It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. **Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight.** Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence." (Emphasis supplied)

[24] The rest of their Lordships in **R v Sharp** agreed with Lord Havers, who approved of the reasoning in **R v Duncan**, and said, in part, at page 71 of the report:

> "My Lords, the weight of authority and common sense lead me to prefer the direction to the jury formulated in *R v Duncan* 73 Cr App R 359 to an attempt to deal differently with the different parts of a mixed statement. **How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation?** It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that it should be considered by the jury." (Italics as in original, emphasis supplied)

[25] The third basic principle is that, as can be noted from the above extracts from **Bernal and Moore v R** and **R v Sharp**, it is the tribunal of fact which evaluates the explanation by the defence.

[26] In applying these three fundamental principles to this case, it must be held that the prosecution having produced evidence that Mr Paulton had a loaded firearm in his room, concealed in a pan, and that he admitted that he had put it there, had satisfied the requirements of proving a *prima facie* case against him. It was for him, if he so chose (which he in fact did, by giving sworn evidence) to advance to the tribunal of

fact, any further explanation that he had for the presence of the loaded firearm in those circumstances.

[27] It must also be pointed out that section 20(5)(b) of the Act stipulates that once a person is proved to be in possession or control of a vehicle or other thing, in which a firearm is found, that person is deemed to be in possession of the firearm unless he provides a reasonable explanation for his possession. Carberry JA, in delivering the judgment of the court in **R v Smith and Jobson** (1981) 18 JLR 399, at page 403F, pointed out that, in that situation, an onus is placed on the person in possession to provide a reasonable explanation to disprove the presumption. The principles set out in **R v Smith and Jobson** were applied in **Albert Allen and Maurice Williams v R** [2011] JMCA Crim 52, in respect of a person, who was in control of a motor vehicle, and was convicted of illegal possession of firearms that were found inside that vehicle. In the latter case, Harris JA pointed out that the burden that is placed on an accused in such circumstances, is an evidential burden, with the standard of proof being "on a balance of probabilities" (see paragraph [23]).

[28] The learned judge was correct in rejecting the no-case submission, and finding that Mr Paulton's explanation was a matter for her jury mind.

[29] The case of **Janvo Sutherland v R** (1991) 28 JLR 518, which Miss Campbell cited, cannot assist Mr Paulton. In that case, the police noticed a man with a bulge in his pocket, entering a house. They followed him and there saw the man standing by a bed, and Mr Sutherland lying on the bed with a gun in his hand. Mr Sutherland immediately told the police that the man was showing him the gun. Importantly, the man confirmed this in evidence, in his defence, at the trial. There was, therefore, evidence, for the consideration of the tribunal of fact, other than the bare exculpatory statement by Mr Sutherland.

[30] On appeal, this court found that the trial judge, sitting alone, seemed to have "expected the appellant to prove his case" (page 519 C). Although the language of the

court was not specific in that regard, it does not seem that it had opined that Mr Sutherland ought not to have been called upon to answer the prosecution's case.

[31] This ground hopelessly fails.

Ground 2-The learned trial judge erred in her finding that the defence of duress of circumstances was not raised by the evidence of Mr Paulton

[32] The basis for Mr Paulton's complaint in this ground is a portion of the learned judge's summation in which she rejected his evidence that he acted out of fear of Zeeks. Miss Campbell argued that the rejection was not consistent with the evidence. The impugned portion of the summation appears at pages 120-122 of the transcript:

> "…On the defence[']s own evidence, he knows of 'Zeeks' as a gunman. He witnessed Mr. Zeeks in handcuff [sic], in police cars before. Why then was Mr. [Paulton] not afraid of 'Zeeks' who, at that point, was in his usual habitat, which was the company of the police. Why would he not be afraid to tell the police where the gun was if 'Zeeks' was standing there? The fear he had of 'Zeeks' did not prevent him then from making the report then to the police.
>
> I can infer from the making of the report to the police that, on the Prosecution's theory of the case, Mr. [Paulton] was not afraid of 'Zeeks' when he took the firearm nor was he afraid of 'Zeeks' when he told the police where it was. I can also infer on the Defence's theory of the case that Mr. [Paulton] wanted to report his possession of the firearm and he did so as soon as the police arrived…."

[33] Learned counsel submitted that the learned judge misquoted the evidence when she reported that Mr Paulton had said that he had, on prior occasions, seen Zeeks in police cars and stated that he was used to seeing him around police. Miss Campbell pointed out that that evidence was not given by Mr Paulton, but was given by one of Mr Paulton's witnesses. That error, Miss Campbell submitted, assisted in the learned judge arriving at a conclusion that was not supported by the evidence.

[34] Learned counsel argued that the circumstances in which Mr Paulton told the police about Zeeks having given him the firearm, would not have been intimidatory for him, as Zeeks was then in police custody. It was a different situation, Miss Campbell submitted, when Zeeks was demanding that Mr Paulton hide the firearm. At that time, she contended, Mr Paulton did not know that the police were on the premises. It was not unreasonable, she submitted, for Mr Paulton to be afraid at that time as Zeeks was holding the firearm. Miss Campbell argued that the learned judge erred when she found that a reasonable person, placed in the same situation as Mr Paulton, would not have acted as he did. She further argued that the reasonable thing to do in the circumstances, which Mr Paulton did, was to follow Zeeks' instructions to avoid being harmed and, to, as soon as possible thereafter, inform the police about the firearm.

[35] Mr Duncan, for the Crown, argued that there was no evidence of objective danger associated with Zeeks handing over the firearm to Mr Paulton. Learned counsel contended that the learned judge, although she said "I find that in this case, the defence of duress in the circumstances was not raised on the evidence", should be taken to mean that the defence was not raised in those circumstances.

Analysis

[36] Simon Brown J, in writing for the Court of Appeal of England and Wales, in **R v Martin** [1989] 1 All ER 652 at page 653 described the defence of duress of circumstances, He said:

> "The [relevant] principles may be summarised thus: first, English law does, **in extreme circumstances**, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
>
> Second, **the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury**…." (Emphasis supplied)

Simon Brown J, went on to delineate the questions that the tribunal of fact should be asked to decide, when the defence of duress of circumstances is raised. He continued at pages 653-654:

> "…Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established…."

If the jury accepts this defence, the result is that the accused must be acquitted.

[37] This court, in **R v Rhone Warren** (2000) 59 WIR 360, has approved the guidance given in **R v Martin**. The defence, however, has advanced since **R v Martin**. Although it was first applied, in English law, in relation to road traffic offences, the defence is now being applied to other offences including cases involving the possession of firearms (see **Regina v Pommell** [1995] 2 Cr App Rep 607; (1995) Times, 22 May).

[38] In **R v Safi and others** [2003] All ER (D) 81 (Jun), the Court of Appeal of England and Wales held that there need not be any actual threat before the defence could be invoked; it would be sufficient if the defendant genuinely believed that there was a threat.

[39] The learned editors of Halsbury's Laws of England, Volume 25 (2020), also opine that a defendant's reasonable belief is an important consideration. They state at paragraph 49:

> "The defence of duress of circumstances is concerned with the situation where the defendant acts to avert what **he reasonably believes to be a threat of death or serious**

> **physical injury to himself** (or to another person for whom he is, or for whom he would reasonably regard himself, as responsible), whether from another person or from a natural cause." (Emphasis supplied)

[40] It therefore means that Mr Paulton, in raising the defence of duress of circumstances, must provide material to show that he reasonably believed that Zeeks had threatened him and/or his family with death or serious physical injury and that he acted reasonably and proportionately in the circumstances. It would be for the tribunal of fact to determine, on a balance of probabilities, whether:

a. he or his family was actually threatened, or he believed that he or they had been threatened with death or serious bodily injury;

b. he hid the firearm because, based on the threat or his belief there was a threat, there was pressure on his will that if he did not hide it, Zeeks would have killed, or seriously injured, him and/or his family;

c. the action he took was reasonable and proportionate to the threat, and a reasonable person sharing his characteristics would have acted as he did.

All the ingredients of the defence must be present for it to be successfully raised.

[41] The learned judge, at page 117, line 13 to page 118, line 11 reminded herself of the defence of circumstances.

> "I remind myself that the defence of duress of circumstances arises where there is pressure on the accused man from the wrongful threat of violence to another. It can also arise from other objective dangers… threatening the accused or others. The defence is available only if, from an objective standpoint, the accused man can be said to have been acting reasonably and proportionately in order to avoid a threat of death or serious injury.

> **In the exercise of my jury mind I have to determine**; firstly, what impelled the accused man to act as he did, and whether or not it is because of what he reasonably believed the situation to be, that he has the cause to fear that otherwise death or serious physical injury would result.
>
> Second, if so, whether a sober, reasonable person, sharing the characteristics of the accused man, would have responded to the situation or acted as the accused man did. **If the answer to both of these questions is yes, then the defendant would have raised the defence of duress of circumstances**." (Emphasis supplied)

[42] Miss Campbell is correct that the learned judge misquoted the evidence in the manner described above, but the learned judge, analysed the evidence, beyond the misquoted evidence, and determined that the defence was not raised by the evidence, in the sense that it had not been successfully raised. She is reported to have said, at pages 126, line22 to page 127, line 15 of the transcript:

> "The defence advanced a two-prong [sic] defence challenging evidence adduced by the Prosecution; in that, Mr. [Paulton] places before this Court sworn evidence to explain his actions. He has been cross-examined by the Prosecution and by his evidence placed before this Court, material which he has asked the Court to examine whether or not his defense [sic] of duress of circumstances is a live issue and therefore one which should be left to my jury mind.
>
> If he has done this it is then for the Crown to destroy his defence in a manner which would leave me with no reasonable doubt that Mr. [Paulton] cannot be absolved on the grounds of the alleged facts constituting his defence.
>
> I find that in this case, the defence of duress in the circumstances was not raised on the evidence."

[43] It is apparent that when the learned judge used the term, "raise the defence", she meant "successfully raised the defence" since she has said the answer to both questions must be yes for the defendant to raise the defence. Additionally, although the learned judge did say that the defence is not raised on the evidence, she clearly

considered the defence, in relation to the evidence. The learned judge commenced her analysis by considering Mr Paulton's reasonable belief. She discussed this at page 118, lines 12-17:

> "On the first question as to whether the accused man was impelled to act as he did because of what he reasonably believed to be the situation; he had cause to fear that otherwise death or serious physical injury would result."

[44] She next considered the evidence in relation to the question of "whether a sober, reasonable person, sharing the characteristics of [Mr Paulton] would have responded to the situation, or acted as [Mr Paulton] did".

[45] After considering those questions, the learned judge found that "Mr Paulton was not afraid of 'Zeeks' when he took the firearm nor was he afraid of 'Zeeks' when he told the police where it was".

[46] The learned judge also considered Mr Paulton's evidence in relation to the threats to his family. She did not accept his evidence in this regard. The learned judge, at page 123, line 16 to page 124, line 13 dismissed the evidence in this way:

> "…In fact, [Mr Paulton] was said to be a coward by Mr. Ergas, his witness, who said that Mr. [Paulton] don't like to speak the truth sometimes. This accords with [Mr Paulton's] evidence, in cross-examination, when he was asked, 'Did he say he was going to kill you if you didn't put it down?' The answer was 'No'. 'He never told you he was going to do anything to you if you didn't?' The answer was, 'No'. 'All 'Zeeks' said to you was, 'lock dis' and gave you the gun?' The answer was, 'Yes'.
>
> Again, in cross-examination, he was asked by prosecuting counsel, 'In-chief, you were asked what 'Zeeks' said to you. You said he said, 'Lock dis'. Now, you are saying that that is not all he said. Explain.' [Mr Paulton] answered saying, 'Zeeks' said, 'Lock dis or you know what I will do to your family.' 'You know what I will do to your family,' was not said to the police when they arrived in the room. This was not said to the police in the giving of the caution

> statement. This was not said in evidence-in-chief before this Court. This evidence beyond the word, 'Lock dis' I find to be a recent concoction and I reject the explanation given, that it was not asked by Defence Counsel."

[47] The learned judge, again, referred to her rejection of the evidence that Zeeks threatened Mr Paulton. She said, at page 125, line 25 to page 126, line 13:

> "Additionally, the case for the defence as regards the sworn evidence of Mr. [Paulton] failed to raise the fact of which an inference can be drawn that he was threatened with violence or that threats were made to his family unless he complied with 'Zeeks' demand.
>
> Though he gave evidence in the witness box to this effect, I find that it was not true. The firearm in question was never pointed at [Mr Paulton] to intimidate, nor was it used by 'Zeeks' in [any way]. In fact, Mr. [Paulton] appeared to have inspired the trust of this alleged gunman who simply handed over his firearm to him without more."

[48] The learned judge considered if a reasonable person, sharing Mr Paulton's characteristics would have acted as he did. She resolved this question in the negative. She added that this was not a case where Mr Paulton went to the police to report the firearm, instead, the police came upon him. She said this at page 125, lines 2 to 14:

> "**So to answer the second question, whether a sober reasonable man with the same characteristics as [Mr Paulton] in the circumstances of the case, would not have acted as [Mr Paulton] did. I find that it was therefore [Mr Paulton's] decision to conceal the firearm in the sweety [sic] pan on a whatnot, inside the room he occupied**. This is evidence from which an inference can be drawn that the defendant intended to possess the firearm as he knew the firearm was there and was in control and custody of it without the direction of 'Zeeks' or anyone else.
>
> It is also telling that the evidence of Corporal Bissick was that he took 'Zeeks' back to the room from which he had seen him come out of. This is not evidence of Mr. [Paulton] going to the police with the firearm and making a report. It is evidence that the police, having apprehended

> 'Zeeks', the man for whom they had come, and by taking 'Zeeks' back to the room, happened upon [Mr Paulton] who told them where to find the firearm." (Emphasis supplied)

[49] She then said, at page 135, lines 5-10 that he did not satisfy the evidential burden of proving that he or his family was threatened and that he was fearful:

> "…I find that [Mr Paulton] failed to discharge his evidential burden in that, on the evidence, there was no threat to him or his family and that he failed to establish fear of which he testified. In all the circumstances of the case, he's found guilty on count[s] one and two of this indictment."

[50] The learned judge's conclusions were, therefore, that:

a. Zeeks did not threaten Mr Paulton or his family if he did not comply with his demands and that Mr Paulton fabricated the evidence to that effect;
b. Mr Paulton did not establish that he was in fear;
c. Mr Paulton inspired Zeeks' trust;
d. Mr Paulton decided to conceal the firearm.

[51] The learned judge, therefore, considered the ingredients of duress of circumstances, assessed the evidence in that regard, and was guided by the test in **R v Martin**. She considered Mr Paulton's explanation, which was required by section 20(5)(b) of the Act, and rejected it. That rejection meant that Mr Paulton had not advanced any reasonable explanation for his possession of the firearm and so had not discharged the presumption of possession imposed by the statutory provision. The learned judge's finding of fact that the defence had not been made out, cannot, therefore, be disturbed.

[52] This ground also fails.

Ground 3- The learned trial judge erred in her finding of fact that there was a major inconsistency in [Mr Paulton's] case in relation to the time given in his caution statement and the time given in his viva voce evidence

[53] The learned judge found that there were inconsistencies in relation to time in Mr Paulton's cautioned statement, when compared to his evidence in court. In Mr Paulton's cautioned statement, he indicated that Zeeks entered the room at 5:45 am. During the trial, Mr Paulton testified that five to 10 seconds passed between the time Zeeks left the room and when the police returned with him. The learned judge found that this conflicted with Sergeant Bissick's evidence that he served the search warrant on Zeeks at 6:00 am. The learned judge relied on the time set out in Mr Paulton's cautioned statement and concluded that he possessed the firearm for 15 minutes. She made this observation at page 122, line 13, to page 123, line 13. She said:

> "…The caution statement of [Mr Paulton] says it was a quarter to 6:00 when 'Zeeks' came into his room on the morning of July 3rd, 2013. I looked at that against the evidence of Mr. [Paulton] that about five to ten seconds passed between 'Zeeks' going out and the police coming in on that same morning. This is a conflict in the evidence of Mr. [Paulton] which I resolve in the favour of the caution statement taken on the day of the operation at a time when his memory would not have suffered from the passage of time. This means that the police came into the room, it would seem, 15 minutes after 'Zeeks' had gone out. [Mr Paulton's] caution statement dove tales [sic] the evidence of Corporal Bissick whose evidence was that the police arrived at 6:00 am. This also reveals the [s]earch [w]arrant endorsed as having been executed at 6:00 a.m. This 15 minutes [sic] time span has not been controverted. I find that it is a major inconsistency in [Mr Paulton's] case, it has weakened it and it goes to the [root] of the defence.
>
> Having accepted the time given by Mr. [Paulton] in his caution statement which was a quarter to 6:00 when 'Zeeks' came into the room, it means that there was a time span of 15 minutes in which [Mr Paulton] had the firearm and 'Zeeks' was not present in the room with him. There was no evidence that Mr. [Paulton] had left that room before the police arrived."

[54] Miss Campbell argued that the learned trial judge, in her calculation of the time Mr Paulton was alone with the firearm, failed to consider that there was no evidence as to the time that Zeeks was in the room with Mr Paulton. Learned counsel contended that the learned judge erred when she concluded that Mr Paulton was in the room for 15 minutes alone as there was no evidence of this. In the absence of such evidence, Miss Campbell submitted that the learned judge erred in making a finding that was not in favour of Mr Paulton.

[55] Mr Duncan argued that the learned judge made a finding of fact, which she was entitled to make. It, therefore, he submitted, ought not to be disturbed. Learned counsel submitted that custody and control for even a short period can constitute possession. He relied, for this submission, on **Jenkins v Director of Public Prosecutions and Another**. Miss Campbell sought to distinguish that case from the present case on the basis that Mr Jenkins' possession was voluntary.

Analysis

[56] As trial judges often inform jurors, inconsistencies are common occurrences in trials. Some inconsistencies may be material while others may not be. Undoubtedly, inconsistencies can impact a witness' credibility. Harris JA in **Steven Grant v R** [2010] JMCA Crim 77 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 that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony."

[57] In this case there was a question of fact for determination by the learned judge's jury mind. Her decision had to be based on the evidence that she believed. It is therefore for her, in the exercise of her jury mind, to resolve inconsistencies, which were before her.

[58] Miss Campbell is correct in submitting that there is no evidence of the time that Zeeks and Mr Paulton were in the room together. Mr Paulton, in his cautioned statement said that Zeeks entered the room at 5:45 am but there is no direct evidence as to the period of time he remained in the room with Mr Paulton. Based, however, on Mr Paulton's evidence of what had transpired in the room, the period of time could not have been long. Mr Paulton stated that Zeeks rushed into the room, shouted "lock dis", gave the firearm to Mr Paulton, who took it and threw it in a sweetie pan which was on a whatnot, right at the door, then Zeeks stepped outside. That interaction could not have been long. Although there was no evidence of the time Zeeks and Mr Paulton were together in the room, based on Mr Paulton's evidence, he would not have been alone in the room with the firearm for more than five to 10 seconds.

[59] Sergeant Bissick testified that he executed the search warrant on Zeeks at 6:00 am, and then entered the room. There seems to have been very little time between Sergeant Bissick's execution of the warrant and entry to the room. The sequence is described in the examination-in-chief of Sergeant Bissick, at page 6 of the transcript:

> "Q. Now, after you handed [Zeeks] the Search Warrant, yourself and Constable Brown took him back to a room?
>
> A. Yes, ma'am.
>
> Q. And this is the room you observed him coming from?
>
> A. Yes, ma'am"

[60] Although Mr Paulton, in his cautioned statement, puts Zeeks as entering his room at 5:45 am, his testimony as to the time that Zeeks spent outside of the room, before the police brought him back in, seems to accord with Sergeant Bissick's evidence, set out above. This evidence undermines the learned judge's finding, that there is a conflict between Mr Paulton's cautioned statement as to the time that Zeeks enters his room and Mr Paulton's evidence as to the time between Zeeks leaving the

room and being brought back in by the police. The learned judge states that at page 122, lines 19 to 24:

> "…This is a conflict in the evidence of Mr. [Paulton] which I resolve in the favour of the caution statement taken on the day of the operation at a time when his memory would not have suffered from the passage of time. This means that the police came into the room, it would seem, 15 minutes after 'Zeeks' had gone out…."

[61] There is, respectfully, a gap in the learned judge's logic in drawing that conclusion. She relied on that conclusion to reject the "Defence's theory of the case, that Mr. Paulton wanted to report his possession of the firearm and he did so as soon as the police arrived". That rejection is, therefore, based on a flawed analysis.

[62] This ground has merit but does not undermine the validity of the learned judge's finding of culpability. Considering that which is to follow, this ground is not fatal to the conviction.

An important finding of fact

[63] The learned judge made another important finding of fact, which is unassailable. She found that Mr Paulton's testimony that Zeeks threatened his family was a recent concoction. She so stated at page 124 of the transcript:

> "Again, in cross-examination, [Mr Paulton] was asked by prosecuting counsel, 'In-chief, you were asked what 'Zeeks' said to you. You said he said, 'Lock dis'. Now, you are saying that that is not all he said. Explain.' [Mr Paulton] answered saying, 'Zeeks said, 'Lock dis or you know what I will do to your family.' 'You know what I will do to your family,' was not said to the police when they arrived in the room. This was not said to the police in the giving of the caution statement. This was not said in evidence-in-chief before this Court. This evidence beyond the word, 'Lock dis' I find to be a recent concoction and I reject the explanation given, that it was not asked by Defence Counsel."

[64] The learned judge sat as the judge of the law and the facts. She found that Mr Paulton's evidence lacked cogency and reliability. She was therefore entitled, in the application of her jury mind, to find, as she did, that "Mr Paulton failed to raise the fact of which an inference can be drawn that he was threatened with violence or that threats were made to his family unless he complied with 'Zeeks' [sic] demand".

[65] It is well known that this court will not overturn findings of fact unless they are against the weight of the evidence so much so that they are "obviously and palpably wrong" (see **Alrick Williams v R** [2013] JMCA Crim 13). Based on that analysis, it cannot be said that the learned judge was "obviously and palpably wrong" in arriving at the conclusion that "it was [Mr Paulton's] decision to conceal the firearm in the sweety [sic] pan on a whatnot, inside the room that he occupied".

[66] On that basis, Mr Duncan's submission concerning culpability, taking into account **Jenkins v Director of Public Prosecutions and Another**, is valid. Mr Paulton's taking of the firearm from Zeeks, based on the learned judge's finding, would have been voluntary.

Conclusion

[67] Mr Paulton has failed to demonstrate that the learned judge erred in refusing his no-case submission, rejecting his defence of duress of circumstances or assessing the evidence as to the elements of possession. It is for these reasons that this court made the orders at paragraph [1].