[2013] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 32/2012

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

CLEMENT REID v R

Debayo Adedipe for the appellant

Mrs Andrea Martin-Swaby and Mrs Tracy Ann Robinson for the Crown

8 May, 31 July and 27 September 2013

MORRISON JA

[1] This is an appeal from a conviction entered and sentences imposed in the Resident Magistrate's Court for the Corporate Area on 21 May 2011 for the offences of possession of ganja and dealing in ganja. The appellant was sentenced to a fine of $3,000.00 or 30 days' imprisonment for possession of ganja and $6,400.00 or 30 days' imprisonment, in addition to six months' imprisonment for dealing in ganja. These sentences were ordered to run

concurrently, but, in the event that the fines were not paid, consecutive to the term of six months' imprisonment. The appellant appealed against his conviction and sentence and, on 31 July 2013, the court having heard submissions from counsel on 8 May 2013, it was announced that the appeal would be dismissed, and the conviction and sentence affirmed, for reasons to be given at a later date. These are the promised reasons for the court's decision.

[2] At his trial, the appellant did not deny having had ganja in his possession. However, the evidence was that, almost from the very moment when he was found with the substance, he stated that he was acting under duress, a position he maintained throughout and the primary issue raised by this appeal is whether the learned Resident Magistrate erred in rejecting this defence. The appellant also raises three subsidiary issues, *viz*, whether the conviction for dealing in ganja is sustainable in the light of the evidence in the case; whether the evidence relating to the custody of the substance found in his possession was reliable; and whether the sentence of imprisonment, in addition to the fines imposed, was disproportionate in the circumstances.

[3] The facts of the case are as follows. At the material time, the appellant was a correctional officer stationed at the South Camp Adult Correctional Centre ('the correctional centre'). At the time of trial, he had been a correctional officer for 23 years. His particular assignment was as a medical orderly, in which capacity he worked alongside or under the instruction of the medical doctors assigned to

the facility. The officer in charge of the facility was Superintendent Olga Bailey-Campbell.

[4] On the morning of 24 November 2009, Superintendent Bailey-Campbell observed the appellant on the premises of the correctional centre. He was wearing his regular uniform, but there appeared to be "a bulge in his pants and around his waist". When she enquired of him "how he looked so bulgy", the appellant took a black 'scandal bag' from his pocket and showed it to her. In the bag were three packs of cigarettes which, the appellant said, he was taking for his orderly. But despite the removal of the bag from his pocket, the superintendent noticed that "there was still a heavy weight around [the appellant's] crotches", leading her to make a further enquiry of him. The appellant's response was to ask her to come with him to her office. At this point, she invited her second in charge, Superintendent Anthony Stewart, to accompany them. Once in the office, the appellant pushed his hand in his waist, "pulled out a round circular package with brown masking tape" and put it on the desk. When asked what was in the package, the appellant said that "he was under duress somebody from Down Town gave him to take it in" [sic].

[5] Superintendent Bailey-Campbell immediately called the Commissioner of Corrections by telephone and was instructed to notify the Cross Roads Police Station, which she did. As they awaited the arrival of the police, the appellant then proceeded to pull out some other packages, some from "between his crotches" and some from "below his pants foot". In all, there were a total of five

packages, all of the same circular shape, wrapped with brown masking tape, as the one that the appellant had first removed from his waist. In due course, two police officers, Constable Jackson and Sergeant Jones arrived. When asked "if the stuff belonged to him", the appellant's answered yes. Superintendent Bailey-Campbell then travelled with the appellant and the police officers to the Cross Roads Police Station, where the packages were cut open and seen to contain vegetable matter resembling ganja. The superintendent saw when Constable Jackson put all five packages in an envelope, which she also saw him sign and seal.

[6] Constable Damian Jackson confirmed that, in response to a call while on guard duties at the Cross Roads Police Station on the morning in question, he and Sergeant Jones had gone to the correctional centre, where they met Superintendent Bailey-Campbell and the appellant. After being shown five "oval shaped parcels", Constable Jackson conducted a search of the appellant's locker, revealing nothing, at which point the group repaired to the Cross Roads Police Station. His account of the events of the morning differed from Superintendent Bailey-Campbell's in one respect, in that while she was insistent that the packages produced by the appellant were only opened after they had arrived at the police station, Constable Jackson was equally emphatic that he had opened one of the packages with a knife at the correctional centre and then opened the others at the police station.

[7] This is Constable Jackson's account of what happened next:

> "At the station I opened all five parcels where I showed Mr Reid the contents that came from them. I informed him of the offences of Possession of Ganja, Dealing in Ganja. After that I sealed the packages in a brown envelope that was there I write on it one brown envelope marked 'A' containing five oval shaped parcels with vegetable matter resembling Ganja in case Mr Clement Reid for offence of Possession of Ganja and Dealing in Ganja, also my signature. I also sealed it in his presence.
>
> When cautioned he said – Mr Reid said – I was forced to take it. It was given to me by a man down town. They know my family and where my children go to school. I did not have a choice."

[8] Some two weeks later, the packages were taken to the Government Forensic Laboratory for analysis and, after samples were taken from them, they were resealed, placed in an envelope and delivered to the Cross Roads Police Station. The packages, which were identified by Superintendent Bailey-Campbell as the same packages which the appellant had produced on the morning of 24 November 2009, were tendered in evidence at the trial without objection. So was the Government Analyst's certificate dated 8 December 2009, which confirmed that the vegetable matter which they contained was ganja. In the certificate, the analyst described the packages which she received from Constable Jackson for analysis as follows:

> "One sealed envelope marked 'A' containing one black plastic bag with five circular parcels numbered '1-5' respectively, '1-3' each made from black plastic material and brown masking tape and '4-5' each made from transparent plastic material and brown

> masking tape, all containing compressed vegetable matter resembling ganja."

[9] When he was cross-examined at the trial by the appellant's counsel, Constable Jackson confirmed that, upon being cautioned and charged, the appellant said that (i) "he was given the goods down town by a man…[h]e knows where he lives and where his children go to school and he never had any choice; (ii) he had received telephone calls, from a person he did not know, telling him, that "he was required to take something into correctional institution" [sic]; and (iii) if he did not do so, "they would have his family".

[10] In his defence, the appellant gave evidence to which it is necessary to refer in some detail. On 24 November 2009, he had been a correctional officer, in the rank of staff officer, for 23 years, during which period he had twice received awards for outstanding service to the department from the Commissioner of Corrections. His evidence was that, a couple weeks before that date, he had received a number of telephone calls from an unidentified caller on his mobile telephone. In the first call, the caller, who told him that he knew him well, directed him to pick up a package that would be given to him at some point and that "everything would be ok" if he followed instructions. After the appellant told him that he would be unable to assist, the caller hung up. After that, the appellant said, he received a number of calls ("about 6-7") from the same caller. This was his recollection of what happened on the next occasion that he was able to remember:

> "The person saying big man what's happening I know you and I know where you live and where your children go to school [sic]. It is a simple thing. It's not anything to kill anybody. I asked the person why me. He said not to worry all I had to do was to work with the situation and everything would be alright.
>
> He said I would have to collect something and somebody would take it from me. When I make enquiry of what the something was I was told not to worry everything would be alright. He said all I had to do was take it to my work area and somebody would take it from me. What was happening [sic]. I had not decided to do what the person was requesting so I did not think it was necessary to tell anybody."

[11] On another occasion, the caller made reference to the appellant's son, who was then a student at high school and an active participant in his school's athletic programme, particularly on weekends. The caller mentioned some of the appellant's son's weekend activities and asked him how he would feel if his son went out one weekend "and did not come back". The appellant again told the caller that he could not assist, but he did not know "how to deal with the situation". To get out of it, he applied for leave from work, which was overdue, but the application was not granted and he remained in a state of indecision: "I did not know what to say and who to say it to". He did, however, attempt to discuss his concerns with a pastor at his church, but, he said, "I did not put it to her fully…[and]…I did not like the response I was getting". In one of the telephone calls, the caller had said to him that "it would not make any sense I run the risk of hurting my family" and "they can make things happen to me or

my family". He felt "fearful and quite confused", because he knew that police officers had been killed and correctional officers threatened. He was not aware that he was to get any money for delivering the packages to the correctional centre. After one or two more calls, the appellant received a final call late in the evening of 23 November 2009, in which the caller said, "big man the money a bun up wheh you a do mi serious".

[12] On the following morning, 24 November 2009, the appellant continued, he set out for work, intending to travel by way of public transportation, as usual. In the vicinity of North Parade in downtown Kingston, as he was about to board a taxi headed in the direction of South Camp Road, the following happened:

> "I was about to go into the taxi one of my feet was in the taxi a young man about 25 years or mid twenties thrust package in my hand he said big man Mr. Reid the boss said someone will take it from you."

[13] The appellant then continued on his way to work in the taxi. He did not know what was in the small, plastic bag which he had been given. After a 10 minute ride, he came out of the taxi at the correctional centre and entered the facility, still undecided as to what to do, by passing the gate lodge where the names of persons entering are recorded by the guards at the gate. The appellant said that he was aware that it was not permitted to take packages into the facility and that if one knowingly had something which was contraband one should declare it. Asked if he considered himself to have had contraband with

him that morning, his reply was "I was unsure if I had contraband" and he did not declare the black bag, because he was, he said, "afraid of what might happen". Further, he was "not thinking straight". While he did not know what the bag contained, he thought that whatever it was "could have been illegal".

[14] Once inside the facility, he went to the changing room where he changed out of his civilian clothes and into his uniform. It was at that point that, for the first time, he became aware that there were five "semi-circular containers, packages" in the black bag. He removed them from the bag and put them around the waist of his pants, which kept the packages in place. He did this because he feared that, if he had continued to carry the packages in the black bag, he might have been asked what was in it. He thought that an inmate would be collecting the items from him. However, he changed his mind after putting the packages in his waist and actually turned back to return to the changing area, which was when he encountered Superintendent Bailey-Campbell. He told her that he had to talk to her and asked her to accompany him to the office, which she did "reluctantly". He placed the packages on her desk and told her that he had been given them to take into the correctional centre. His actions were, he told the court, "propelled by the fear".

[15] Lieutenant Garfield Prendergast, who was at the time of trial the acting Commissioner of Corrections, was called as a witness for the defence. His evidence was to the following effect. Over the past 10 years, there had been a number of incidents in which members of the correctional services had been

injured on the job (as, for instance "in confrontations being either with inmates or in seeking to stop confrontations with inmates"). However, he had only been able to locate the records of three cases in which correctional officers returning home from duty had received serious injuries. Of the three, one had died as a result of the injuries he had received. There was nothing to link these three cases to "prior threats". The instant case was the first case of an officer claiming that "he was forced to smuggle contraband because of threats" and the department had no record of the defendant having made "any report of these threats to the organization". Further, if members of the department were threatened, there was "a mechanism" and the department "has the capacities [sic] to improve the security arrangements to our officers".

[16] In her findings of fact, after detailed consideration of the law relating to duress, the learned Resident Magistrate found that "[a] reasonable person of the defendant's age and background would not have been forced and driven to act as the defendant did as there was evasive action reasonably open to him to take in order to avoid committing the crime". She found that the appellant, who was not a credible witness, "gave evidence in a manner that was less than convincing", and stated that she disbelieved him on a number of points in respect of which his evidence differed from the evidence given for the Crown. This is how the Resident Magistrate concluded her analysis of the evidence:

> "I find that the accused was not driven or forced to act as he did by threats which he rightly or wrongly genuinely believed if he did not take the bag he and his family would be seriously harmed or killed. The defence of duress in any event has failed, for lack of immediacy, since there was no indication of when the threat was to be executed and therefore the defendant had the opportunity to take evasive action."

[17] In the result, the learned Resident Magistrate concluded that "a reasonable person would not have been forced to act as the defendant did" and that the prosecution had established beyond reasonable doubt that the appellant had had ganja totalling 924.93 g or 2 lbs 0.62 oz in weight in his possession.

[18] In grounds of appeal filed on 19 May 2011, the appellant challenged his conviction on the following grounds:

> "1. The verdict is unreasonable having regard to the evidence.
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> 2. The learned Resident Magistrate erred in that although she did state that the burden of proof in duress is on the Crown she plainly dealt with the evidence as if the burden of proof was the defence, saying inter alia:
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> 'Having rejected you as a witness...untruthful, unreliable, manifestly untruthful, I reject your defence out of hand'
>
> 3. The learned Resident Magistrate failed to appreciate the nature of the threat to the safety of the defendant and his family and that his fear was triggered by the delivery of the package to him by a man he did not know before at a stage in his journey to work.

> In particular, the learned Resident Magistrate made no mention of the fact that the accused testified that he was also told by one of the callers that they can make things happen to him and his family.
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> 4. The learned Resident Magistrate erred in her conclusion that the Appellant's response to the threat(s) was not reasonable.
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> 5. The learned Resident Magistrate erred in her assessment of the evidence as to the threat to the Appellant's family and its imminence.
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> 6. The conviction for the offence of dealing in ganja is not supported by the evidence having regard to the Appellant's uncontroverted explanation for his possession of the ganja.
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> 7. The imposition of a custodial sentence was disproportionate and excessive in the circumstances of the case having regard to the only factual explanation of the circumstances in which the Appellant came to be in possession of the ganja."

[19] When the appeal came on for hearing before this court on 8 May 2013, Mr Adedipe, who appeared for the appellant, as he had also done at the trial, sought and was given leave to argue an additional ground as follows:

> "The exhibit (ganja) ought not to found a conviction. There is serious doubt as to whether was analysed [sic] was the same as that which was taken from the appellant and put in an envelope. There was no mention of them being put in a black plastic bag before being put in an envelope and sealed. The sealed envelope that the analyst open [sic] had a plastic bag containing five packages. There is no explanation for this."

[20] Taking grounds one to five together, Mr Adedipe argued that the learned Resident Magistrate erred in her approach to the defence of duress. He submitted, in reliance on the decision of the House of Lords in ***R v Hasan*** [2005] 4 All ER 685 that the defence of duress is available where the will of an accused person is overborne by threats of imminent harm to himself or members of his family and that, once there is evidence of duress, the burden of disproving it is on the Crown. In the instant case, the appellant's evidence made it clear that his fear stemmed both from the anonymous telephone calls and the delivery of the parcel to him by an unknown person while he was on his way to work, which would have made it clear to him that the caller who professed to know him, his family and their movements also knew his route to work and how to find him. This would in turn have pressed home to him that potential danger that faced him if he did not comply, a fear made more real by the violent society in which we live. In these circumstances, the appellant's response to the parcel having been put in his hand was "altogether reasonable".

[21] As regards ground six, Mr Adedipe submitted that the deeming provision in section 22(7) of the Dangerous Drugs Act was only applicable in the absence of evidence to the contrary and that the appellant's evidence provided an explanation which negated dealing. The sentence of imprisonment was disproportionate in the light of the fact that the learned Resident Magistrate does not appear to have found that the appellant was not threatened, but rather that his conduct was not reasonable. In these circumstances, the sentence imposed

ought to have reflected the fact that, even though the defence of duress was not made out, the appellant's action had been "based on a threat". And finally, on the additional ground filed at the hearing, Mr Adedipe drew our attention to the analyst's record in the certificate of what had been delivered to the laboratory for testing, pointing out a discrepancy in the description of how the parcels received for analysis were packaged which, it was said, raised questions as to whether the substance which was taken from the appellant was the same as had been tested and found to be ganja.

[22] In response to Mr Adedipe's submissions on duress, Mrs Martin-Swaby, who also relied on ***Hasan***, accepted that the onus of disproving duress lay on the Crown. In the instant case, it was submitted, the question of whether the appellant was entitled to rely on the defence was essentially a 'jury' matter, in respect of which the learned Resident Magistrate had reached the correct conclusion on the evidence. It was further submitted that the appellant had not utilised the sufficient opportunities which he had to take evasive action after receiving the alleged threats, which he should also have taken steps to neutralise by seeking police protection immediately upon receipt of the packages. Accordingly, the learned Resident Magistrate's decision was reasonable and in keeping with the evidence.

[23] As regards Mr Adedipe's additional ground, Mrs Martin-Swaby observed that, the packages of ganja having been tendered in evidence without objection at the trial, this was a belated challenge that ought not to be upheld, as the

Resident Magistrate would have viewed the plastic bags and the condition of the exhibit and been able to form her own conclusions on it.

[24] Grounds one to five raise the issue of duress. A defendant who wishes to rely on the defence of duress always has an evidential burden, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, to place sufficient material before the court so as to make duress an issue fit for the jury's consideration. However, once he has done so, "it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion" (***R v Gill*** [1963] 2 All ER 688, 691, per Edmund Davies J, as he then was). In other words, it is not for the defendant, having raised the issue, to prove that he acted under duress; rather, it is for the prosecution, in the discharge of the legal burden, to satisfy the jury so that they can be sure that the defendant did not act under duress.

[25] In the instant case, the appellant placed the issue of duress squarely on the table for the consideration of the learned Resident Magistrate, both by way of his counsel's cross-examination of the prosecution witnesses and by his own evidence. Counsel on both sides rely heavily, as has been seen, on ***Hasan***, in which Lord Bingham said this (at paras [17]-[20]):

> "The commonsense starting point of the common law is that adults of sound mind are ordinarily to be held responsible for the crimes which they commit. To this

> general principle there has, since the fourteenth century, been a recognised but limited exception in favour of those who commit crimes because they are forced or compelled to do so against their will by the threats of another. Such persons are said, in the language of the criminal law, to act as they do because they are subject to duress."

[26] The essential question in ***Hasan***, which the court answered in the affirmative, was whether the defence of duress was excluded when, as a result of his voluntary association with others engaged in criminal activity, the defendant foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence. This question does not, of course, arise on the facts of the instant case, but Lord Bingham's conclusion (at para. [21]) that "the law in this and other jurisdictions…[has]…developed so as to confine the defence of duress within narrowly defined limits" is undoubtedly of general application. The most important limitations on the scope of the defence were summarised as follows:

> "(1) Duress does not afford a defence to charges of murder…attempted murder… and, perhaps, some forms of treason…
>
> (2) To found a plea of duress the threat relied on must be to cause death or serious injury...
>
> (3) The threat must be directed against the defendant or his immediate family or someone close to him…
>
> (4) The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions…

> (5) The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon...
>
> (6) The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take...
>
> (7) The defendant may not rely on duress to which he has voluntarily laid himself open..."

[27] As regards the quality of belief under which the defendant must have acted in order for the defence of duress to succeed, Lord Bingham went on to make the point (at para. [23]) that –

> "[i]t is of course essential that the defendant should genuinely, ie actually, believe in the efficacy of the threat by which he claims to have been compelled. But there can be no warrant for relaxing the requirement that the belief must be reasonable as well as genuine."

[28] In the instant case, there can be no question that the defence of duress was based on threats allegedly made by the unknown caller to cause death or serious injury to him or to members of his family, in particular his children. ("…I know you and I know where you live and where your children go to school. It is a simple thing. It is not anything to kill anybody.") In respect of the correct approach to the further questions which arose for the consideration of the Resident Magistrate, we are content to adopt, albeit in slightly modified form, the

formulations proposed by Mrs Martin-Swaby and Miss Robinson in their very helpful written response to Mr Adedipe's submissions:

> (i) Whether the appellant was driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not carry the black plastic bag into the correctional centre members of his family would be seriously harmed or killed?
>
> (ii) Would a reasonable person of the appellant's age and background have been driven or forced to act as the appellant did?
>
> (iii) Could the appellant have avoided acting as he did without harm coming to his family?

[29] At the outset of her findings of fact, the learned Resident Magistrate reminded herself that the appellant had given evidence of his good character and warned herself accordingly in unexceptionable terms. ("Character evidence speaks to the general reputation and is evidence that goes to the credibility of the accused and is positive evidence that show [sic] that the accused did not have the propensity to commit the offences".) The learned Resident Magistrate also reminded herself (after referring to para. [21] of Lord Bingham's judgment in ***Hasan*** - para. [24] above), that the defence of duress having been raised by the evidence, it was for the prosecution to negative it beyond reasonable doubt.

[30] The learned Resident Magistrate then went on to analyse the evidence in detailed terms which we cannot avoid reproducing in full:

"Superintendent Bailey-Smith testified that after the accused removed one package he told her he was under duress. The arresting officer also testified that the accused told him that he was under duress. However the accused did not at any time give to the superintendent, the police or the family member who he saw the same day of the incident any detail of a threat by anyone to cause death or serious injury to himself and his family. Based on what he said it was a veiled threat made in very general terms by someone unidentified calling his phone from an unknown [sic].

It is accepted that the defence of duress in peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt. In this case the prosecution suggested to the accused in cross examination that he was threatened and was not acting under duress. Based on his conduct, the accused was in control of the situation. He made no attempt to find out who this caller was after the first and subsequent calls or even after he was detected with the ganja. He ended the telephone calls. He hung up the phone when he felt like it. After he was threatened that he and his family would be hurt he told the caller directly that he would not carry the something. He did not even address his mind to questions that would reasonably arise, for example; what was the something and who was to collect it, when he to take it was [sic] and where he was to get it. He just dismissed the caller and treated the calls as a request to do something that he had an option to do or not do. Even after he had the contraband in his possession he decided how he would get it to his work area and who the recipient would be. In short he filled in the blanks. He did not even follow the caller's instructions. By removing the packages from the bag he changed the appearance of the item he got. By doing so the person would not recognise the item he was to collect from him. Not only did the accused not follow instructions he added his creative touch. He was so in control of the situation that at the eleventh hour he changed his mind and simply left it to the caller to do what he wanted to do. The

defence called the head of corrections as a witness who indicated that this is the first case that he has seen where an officer has been threatened and that there is no example of any death associated with any similar situation. Further Mr Prendergast testified that there are security arrangements to deal with the safety of the officers.

After his arrest the accused saw and spoke to a family member and he did not enquire about the safety of his family. In fact at no time before or after his arrest did the accused make any attempt to contact any member of his family either directly or indirectly in circumstances where he had the resources like telephone, police officers, supervisors and the commissioner of corrections at his disposal. The accused did not volunteer any details of the duress to cause the authorities to act. In fact the details are so sketchy that there is nothing to form the basis of a credible investigation.

A reasonable person of a defendant's age and background would not have been forced and driven to act as the defendant did as there was evasive action reasonably open to him to take in order to avoid committing the crime. In addition, I accept the evidence of Mr Prendergast in support of this.

The accused said he put the packages around his waist. I have seen the packages. I do not believe him. I accept the evidence of Superintendent Bailey-Smith that he took items from the area of his crotch. I do not believe the accused when he said he removed all 5 packages at the same time. I accept the evidence of Superintendent that the accused removed the remaining packages while she was waiting for the police to arrive.

I do not believe the accused when he said that he was on his way back when the superintendent stopped him. I find that superintendent stopped him as she said heading in the direction of his work area.

The accused said that he did not know what was in the packages. He hesitated when asked if he thought that the item was contraband. Belatedly he said it could have been something illegal. The superintendent who saw the package formed the view that it contained ganja. I accept her evidence. I do not believe the accused. He handled the packages. He put them around his waist at a time when he was not instructed to do so and walked with them. He is trained and worked at the institution for a long time.

In this matter I find that the accused is not a credible witness. The accused gave evidence in a manner that was less than convincing. In answer to the questions about the details of the phone calls he rambled on, sometimes incoherently and had to be asked to repeat his answers. At times there were long pauses before he gave responses to questions. The responses he gave in his explanation relating to the details of the phone calls were in most cases vague and lacked clarity. The description the accused gave of the man who gave him the bag was very general and vague. Based on the testimony of the accused the man did not drop the item and walk away.

This man spoke to him in circumstances where the accused said he was already aware that his family was in danger. There was the opportunity yet he did not pay careful attention to this man with a view to try and identify him.

I find that the accused was not driven or forced to act as he did by threats which he rightly or wrongly genuinely believed if he did not take the bag he and his family would be seriously harmed or killed. The defence of duress in any event as failed, for lack of immediacy, since there was no indication of when the threat was to be executed and therefore the defendant had to opportunity to take evasive action.

It was argued for the defence that the accused could not have neutralised the threat by seeking police protection, as any such suggestion was failing to

> distinguish between cases in which the police would be able to provide effective protection and those when they would not. Commissioner Prendergast outlined that there is no evidence of this...
>
> I am sure that a reasonable person would not have been forced to act as the defendant did, and the defence fails and he is guilty.
>
> *I find that the witnesses for the crown are credible and I accept their evidence. Further I find that the crown has made out the case against the accused*." (Italics in the original)

[31] In our view, notwithstanding the fact that the burden of disproving duress was on the prosecution, it was entirely appropriate that the learned Resident Magistrate should have devoted as much time and attention as she obviously did to the appellant's credibility, given the need for the court to be satisfied as to the genuineness, as well as the reasonableness, of his belief in the efficacy of the threat by which he said that he was compelled. In this regard, we are of the view that the learned Resident Magistrate's analysis of the appellant's evidence cannot be faulted. It is clear from that evidence that there was at least a two week period over which the appellant was in constant dialogue with the unknown caller. At no time during that period did he take any steps to report the threat that he had received, either to his superiors at the correctional centre or to the police, both steps that, as an experienced correctional officer, he might reasonably have been expected to take. His failure to do anything at all in this regard during that period casts serious doubt, in our view, on the genuineness of his belief that non-compliance with the instructions of the unknown caller would

have resulted in harm to his family and himself. Indeed, it is the very "lack of immediacy", as the learned Resident Magistrate put it, in the threat which the appellant said he had received, that suggests that there would have been more than enough time and opportunity for him to avail himself of the possibility of improved security arrangements for correctional officers of which Lieutenant Prendergast spoke in his evidence. In short, as the Resident Magistrate observed, the appellant "had the opportunity to take evasive action".

[32] Further, in the contest in the evidence between the appellant and Superintendent Bailey-Campbell as to the manner in which the five packages were secured on his person and the precise circumstances in which he was accosted by her, the learned Resident Magistrate, who saw and heard both persons in the witness box, found emphatically against the appellant ("I do not believe the accused"). There is no question that this is a view which the learned Resident Magistrate was fully entitled to take on the evidence, for the reasons so fully stated by her. Superintendent Bailey-Campbell's evidence of the appellant having, after initially attempting to account for the bulge in his waist by showing her three packs of cigarettes, removed the five packages of ganja from his waist, "between his crotches" and some from "below his pants foot", clearly demonstrated that the appellant had made a calculated effort to conceal the five packages on his person. This in turn tended to discredit his evidence of that, after discovering in the changing room that the black bag which had been thrust

in his hand just before he got into the taxi, contained five separate packages, he had "put them around the waist of his pants".

[33] But the learned Resident Magistrate, as was her duty, did not leave the matter there, despite having rejected the appellant's evidence. She went on to make a clear and unequivocal finding "that the witnesses for the crown are credible", a finding which was plainly open to her on the evidence. For these reasons, which are essentially the same as those given by the learned Resident Magistrate in her wholly admirable findings of fact, we are of the view that grounds of appeal two to five, which address the issue of duress, cannot succeed. For the same reasons, we consider that ground one, in which the appellant's complaint was that the verdict of the Resident Magistrate was unreasonable having regard to the evidence, must also fail, it not having been shown that "the verdict is so against the weight of the evidence as to be unreasonable and insupportable" (***R v Joseph Lao*** (1973) 12 JLR 1238).

[35] Section 22(7) of the Dangerous Drugs Act provides that "[a] person, other than a person lawfully authorized, found in possession of more than - …(e) eight ounces of ganja, is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him". The appellant having been convicted of having 2 lbs 0.62 oz of ganja in his possession, he was therefore deemed to have had the ganja in his possession for the purpose of dealing and accordingly convicted of dealing in ganja, in addition to possession.

[36] In ground six, the appellant complains that he ought not to have been convicted of dealing, since he had offered an "uncontroverted" explanation for his possession of the ganja, that is, that he had been forced to carry it into the correctional centre. The ground is, we fear, misconceived. It seems to us to be clearly implicit from the learned Resident Magistrate's clear finding that the appellant "was not driven or forced to act as he did by threats which he rightly or wrongly genuinely believed if he did not take the bag he and his family would be seriously harmed or killed" that, although she did not say so in these words, she equally rejected his story as a sufficient basis upon which to rebut the statutory presumption of dealing triggered by the amount of ganja found in his possession. In these circumstances, ground seven, which complains about the imposition of a custodial sentence as a result of the conviction for dealing, must necessarily also fall away.

[37] The final ground argued by Mr Adedipe arises in this way. Constable Jackson's evidence was that, in the presence of the appellant, he had sealed the five oval shaped parcels containing vegetable matter resembling ganja "in a brown envelope", which he had marked 'A' and delivered to the Government Analyst. However, the analyst's certificate referred to a "sealed envelope marked 'A' containing one black plastic bag with five circular parcels…each made from transparent plastic material and brown masking tape, all containing compressed vegetable matter resembling ganja". The unexplained fact that there had been no mention of the five parcels having been placed in a black

plastic bag before being put into an envelope and sealed, it was submitted, meant that there was "serious doubt" as to whether what was analysed was the same as that which had been taken from the appellant. In short, the appellant contended, the chain of custody of the exhibits may have been compromised.

[38] In answer to this submission, Mrs Martin-Swaby referred us to ***Chris Brooks v R*** [2012] JMCA Crim 5, in which this court stated (at para [46]) that "the purpose of establishing the chain of custody of the [exhibit]…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 [the defendant]" (adopting a dictum of Baptiste JA in ***Damian Hodge v R***, HCRAP 2009/01, judgment delivered 10 November 2010, a decision of the Court of Appeal of the British Virgin Islands). In the instant case, Superintendent Bailey-Campbell's evidence was that she had been present from the time the packages were produced from his person by the appellant through to the moment when they were placed in the envelope and sealed by Constable Jackson. In court, she identified the packages tendered in evidence without objection from the appellant as the same packages which he had produced in her office at the correctional centre on the morning of 24 November 2009. In these circumstances, it seems to us that there can be no serious question, far less a serious doubt, that the parcels delivered to the analyst and examined by her were the same parcels which were placed in a sealed envelope by Constable Jackson in the appellant's presence, despite the fact that there had been no

reference to them having been placed in a plastic bag before being put in the envelope. This ground of appeal must therefore fail.

[39] These are the reasons for the decision of the court referred to at para. [1] above.