JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 18/2010

BEFORE: THE HON. MR JUSTICE HARRISON, JA
THE HON. MR JUSTICE DUKHARAN, JA
THE HON. MRS JUSTICE McINTOSH, JA

NADINE WATSON v R

Sheldon Codner for the appellant

Mrs Ann-Marie Feurtado-Richards for the Crown

20 September and 28 October 2010

HARRISON, JA

I have read in draft the judgment of my sister McIntosh, JA. I agree with her reasoning and conclusion and have nothing further to add.

DUKHARAN, JA

I too have read the judgment of McIntosh, JA and agree with her reasoning and conclusion.

McINTOSH, JA

The Genesis of the Appeal

[1] This is an appeal from the Resident Magistrate's Court for the Corporate Area where on 21 January 2010 the appellant was convicted for the offences of possession of, dealing in and taking steps preparatory to exporting ganja. She was sentenced to pay fines of $9,800.00 for possession of the drug and $29,400.00 for taking steps preparatory to exporting the drug, with alternative sentences of three and six months imprisonment, respectively, to be served consecutively if the fines were not paid. In addition to the fines, the appellant was also sentenced to a term of nine months imprisonment and she was admonished and discharged for the offence of dealing in ganja.

[2] Upon her conviction and sentence the appellant gave verbal notice of appeal and, on 28 January 2010, she filed a written notice giving a single ground of appeal in which she complained that *"the sentence of the court was manifestly excessive given the evidence presented and the circumstances of the case giving rise to the offence"*. She paid the fines imposed on 31 March 2010.

The Trial

[3] Because of the arguments in this appeal, I consider it important to set out the evidence before the learned Resident Magistrate in some detail.

[4] The prosecution's case was simple and straightforward. Its sole witness was Detective Corporal Eunice Crooks, who, in 2009, was stationed at the Transnational Crimes and Narcotics Division, located at 230 Spanish Town Road, Kingston 11 and on assignment at the Norman Manley International Airport in Kingston. She testified that on 11 September 2009, while at the check-in counter in the departure lounge for British Airways she observed the appellant come into the lounge at about 3:10 pm.

[5] The appellant was seeking to check in on a British Airwing (sic) flight destined for Gatwick Airport in England. Corporal Crooks said she approached the appellant, introduced herself and invited her to have her luggage checked at the check-in counter which invitation the appellant accepted, unhesitatingly. With what the officer described as a normal demeanour, the appellant went to the counter and placed her luggage on it for checking. She responded positively to the question as to whether she herself had packed the two bags she was carrying and the officer proceeded to conduct the search of the first bag after the appellant opened it.

[6] Detective Corporal Crooks said in that bag she observed a dutch pot, items of female clothing, some seasoning and a black plastic bag with snacks, namely, banana chips, spice bun and six packs of all natural

whole wheat biscuits with parcels wrapped in masking tape in the middle of them. The appellant also opened the second bag and a similar search was conducted. This bag contained female clothing and two black plastic bags with snacks. Detective Corporal Crooks opened each black plastic bag and observed that each contained banana chips and other snacks including eight packs of all natural whole wheat biscuits.

[7] After each search the officer replaced the items in the bag and then invited the appellant to accompany her to her office which was inside the airport. There she cautioned the appellant and told her that the black plastic bags contained ganja and the appellant started to cry. The parcels with the masking tape contained compressed ganja and there was ganja in the packets of biscuits. She showed the ganja to the appellant and after she was cautioned the appellant said, "Officer these bags were given to me by my son's father, Courtney Dewar otherwise called Jack Palance to give to his brother, Kevin who lives in Canada but he is now in England."

[8] Detective Corporal Crooks then testified that her supervisor who was in the office recorded a statement from the appellant explaining how she came to be in possession of the black bags and their contents. It was Corporal Crooks' evidence that the appellant "was so frightened that she was willing to tell us who had given the bag to her". That statement was

admitted unopposed into the evidence before the learned Resident Magistrate as **exhibit 1**. Thereafter, the substance about which the detective had voiced her opinion to the appellant was tested by the government analyst and confirmed to be ganja.

[9] In cross examination the officer was asked whether the packets of biscuits appeared to have been tampered with and her response was, "Not when I open the bag. They did not appear to be different. All of them appear to be just as how you would find them on a supermarket shelf. There was no odor at all coming from the bags."

[10] The officer's further evidence was that she had started to push up the biscuits in the bag because those biscuits presented problems. There were normal biscuits at the top and at the bottom and the reason that she had pushed up the biscuits in the package is because she had received training to detect these particular biscuits. "An ordinary person would not pick up there was something there, not just looking at it." The appellant had also told the police that had she known that there were drugs in the bags she would not have gone into the airport because she had seen the officer conducting searches. Detective Corporal Crooks said that the appellant did not appear to be nervous when she was confronted but she appeared shocked.

[11] It is fitting to conclude the review of the prosecution's case with the salient points from exhibit 1 – the voluntary statement recorded from the appellant:

i. Courtney Dewar otherwise called Jack Palance was the father of her two sons. He lived in Linstead. They were together for thirteen years and the relationship broke up three years ago. They used to live together in Canada.

ii. He was deported eight years ago after serving

one year in a Canadian prison "for some drug related issue". He is associated with the Shower Posse back in Canada.

iii. She came to Jamaica on 28 July 2009 on a three month vacation and was staying with her boyfriend in Rocky Point Clarendon. She also stayed with an aunt in Linstead, St Catherine.

iv. Jack knew she was in Jamaica and on Thursday 3 September 2009, he told her he wanted her to take some stuff to his brother Kevin, for him. Regular stuff. She had taken stuff for him before "I had taken stuff up for him already, items such as snacks - biscuits, bun, cheese trix, banana chips, seasoning and such the like. He also gave me at times dutch pots and other items. When I took the items I normally give them to Kevin".

v. She had met him on Sunday 6 September 2009 at the May Pen Round-About. He gave her five bags containing snacks, pots and fish. They spoke briefly about the kids and then went their separate ways.

vi. She was going to England for an annual family reunion and should have left on 7 September but, when she got to the airport, due to some misunderstanding with her travel arrangement,

her flight plans were changed. She had spoken to Mr Dewar about missing her flight and he did not seem concerned so she did not suspect anything. She removed only the fish from the bag and refrigerated it.

vii. She returned to the airport on 11 September 2009 and, as she walked through the door, she was pulled over by the police who requested to search her bags and she agreed. After that search she was taken to a room where a more thorough search was conducted. She saw the police remove some parcels from the biscuits and told her it was ganja. She said, "I didn't put no ganja in my luggage. The bags that the police took the ganja from were all given to me by my baby father Courtney Dewar otherwise called Jack Palance."

[12] The appellant gave evidence on oath which, for the most part, was consistent with her statement to the police as to when she came to Jamaica, her association with Mr Dewar, the request that he made of her and how she came to be in possession of the items found in her luggage. The appellant said that she had just barely looked in the five bags she had collected from Jack Palance and found them to contain items that she had expected to see - cheese biscuits, banana chips, buns, dutch pot, fish, some bags of seasoning - and Mr Dewar gave her a phone number for his brother.

[13] She then recounted what transpired on 11 September 2009 when she got to the airport in terms consistent with the Crown's case. She said when the officer opened the packet of biscuits and showed her the

contents her response was, "Can I go so I can kill him. I can't believe he did this to me." (It is nothing short of ironic that by the time she was to give this evidence Mr Dewar was indeed no longer numbered among the living, having died, according to the appellant, one week prior to 12 January 2010.) She said, "When I got the bags from Mr Palance I did not know what was in those biscuits. I took the bags from him and he asked me to bring it, it is my baby father. I just didn't think."

[14] In cross-examination she said she travelled regularly and her aunt would say to her, "Don't take nothing from nobody cause people are not nice meaning they would give you drugs and stuff." When she was asked about her statement to the police and whether she had then said that Jack Palance was deported for drug-related offences, she said she had told the police that his deportation was for gun-related offences and even after being shown the statement she still maintained that she had told the police that the offences were gun-related. She denied having made any mention of drugs. She said Mr Dewar had been "pulled over and there was (gun) in the car". When asked by prosecuting attorney whether, knowing Mr Dewar's criminal background, she thought it was prudent to take the items from him to be conveyed overseas, she responded, "It is my children father. Now, no."

[15] Both in her statement (exhibit 1) and in her evidence in cross-examination she had said that she understood Mr Dewar to have been a member of the Shower Posse, so the learned magistrate asked her whether she understood the group to be involved in drugs and she said no but she had heard rumours that they hurt people. It was her understanding that members of the group would extort and rob people. That is why her mother had told her that she "ought to get away from around them" and they had not been together for five years.

[16] Her witness and friend Veronica Washington testified that she had witnessed the delivery of the items to the appellant – two black scandal bags and a dutch pot – by "her baby father Jack". She had seen the packets of biscuits and had begged for one but the appellant told her that she could not give it to her because her baby father had given it to her to take to his brother. She nevertheless took out a packet and then the appellant told her to take it. She took it home and later ate it with some tea. She noted nothing out of the ordinary with the biscuits.

[17] In cross-examination she said she has known the appellant for over 20 years and if she had the power to help her she would. They would speak about her baby father but not to the extent where they would talk about whether he was involved in criminal activities. She knew he was not an easy man. To the court, she said she did not know of him being a drug

dealer. He looked good (referring it would seem to his physical attributes) "but mi know sey him nuh nice".

[18] The appellant's second witness was Detective Sergeant Barbara Joseph from the Transnational Crime and Narcotics Division. There, on 11 September 2009, she spoke to the appellant having been introduced to her by Detective Corporal Crooks. She had interviewed the appellant and had conducted certain investigations pursuant to the information she had received from the appellant. In fact, Sergeant Joseph said her duties involved such investigations as it was common for persons apprehended in circumstances similar to those of the appellant to provide information upon which her division acts. The sergeant concluded her evidence by expressing her opinion on the appellant's state of mind in relation to the offences with which she was charged.

The Findings of the Learned Resident Magistrate

[19] The significant findings of the learned Resident Magistrate may be summarized thus:

> i. The central issue in the case was "whether or not the accused had knowledge that the biscuits admittedly found in her suitcase contained ganja." For this determination reliance is to be placed on the case of **Bernal and Moore v R** (1996) 50 WIR 296, where the two degrees of knowledge - actual and constructive - are discussed, with particular reference to the second

degree of knowledge which is the concern of the court in the instant case.

ii. There is evidence upon which the court can rely to establish that the accused (appellant) fell into the category of the second degree of knowledge. For instance, she was a person who travelled before who is aware of the drug trade and in the past had been warned by her aunt about taking things for people and by her own mother who had warned her to get away from around Mr Dewar.

iii. The evidence given in her statement to the police was of importance in that her denial that she had told the police that Mr Dewar was deported for drug related issues (even though the statement was read over to her and she had signed it) was an attempt by the appellant to distance herself from any mention of anything drug-related.

iv. It was thought incredible that the appellant would not have known that the Shower Posse gang was involved in drugs. "It is really no secret that Shower Posse is involved in drugs and guns and yet the accused who in her statement admits to having shared a thirteen year relationship with a member of the gang says she did not know this." She knew that he was a member of the Shower Posse gang and that the said gang was involved in illegal activities. Having shared a long relationship with him she knew that he was involved in illegal activities.

v. Her evidence and her demeanour and 'the way she came across' led to the conclusion that she was not speaking the truth when she said she did not tell the police that the deportation was drug-

related. She knew that he was deported from Canada for a drug-related issue.

vi. The defence witnesses did not assist the appellant. In particular, Miss Washington's evidence was to be viewed in light of her assertion that she would do anything in her power to assist the appellant. Both her witnesses are saying she did not know, but the Crown's case is based on the second degree of knowledge and to that extent, her witnesses really did not assist her.

vii. The appellant did not fail to make the enquiries that a reasonable and prudent person would make but rather she deliberately refrained from making enquiries, the result of which she may not have cared to have. She had ample opportunity to make checks if she wanted to, yet she did not do so but blinded her eye to an obvious means of knowledge. She made no due diligence checks in circumstances which warranted it.

viii. The prosecution's witness was a witness of truth and the Crown's case was satisfactorily proved. The appellant in all the circumstances had the second degree of knowledge and therefore had the requisite knowledge, custody and control of the ganja found in her luggage. She was therefore guilty of possession. The evidence also supported findings of guilt on the other charges (the quantum in relation to dealing and the fact that she was preparing to board a flight destined for England in relation to taking steps preparatory to exporting ganja).

The Grounds of Appeal

[20] Before commencing his submissions, Mr Codner sought and was granted leave to argue the grounds of appeal which are set out below:

> "a) As to "possession" and "the second degree of knowledge" the Learned Magistrate wrongly applied the Principles of the **Bernal & Moore** case to the facts of the instant case.
>
> b) The Learned Magistrate in applying **Bernal v Moore** as a foundation for her verdict of guilty failed to consider the distinguishing circumstances between the facts of the Bernal & Moore case and that of the Appellant's case as it relates to warnings.
>
> c) The Learned Magistrate wrongly found facts and drew inferences from such facts that were unreasonable given the totality of the evidence.
>
> d) The Learned Magistrate's findings of fact are inconsistent with a verdict of guilty.
>
> e) The sentence of the Court was manifestly excessive in all the circumstances."

What are the principles to be distilled from Bernal and Moore as they relate to "possession" and "the second degree of knowledge" and did the learned Resident Magistrate fail to properly apply them to the facts of the instant case? (Ground (a))

[21] The principles in **Bernal and Moore** are the very principles which were established in our courts since **R v Livingston** (1952) 6 JLR 95 and which were approved and applied in **DPP v Wishart Brooks** (1974) 21 WIR 411 where, Lord Diplock who delivered the opinion of the Board had this to say of the stance taken by the Jamaican Court of Appeal:

> "...that court accepted its own previous decision in **Reg. v Livingston** (1952) 6 JLR 95 as correctly

> laying down the law in Jamaica as to what knowledge the accused must have of the identity of the substance as ganja, in order to amount to "possession" of it for the purposes of an offence under section 7(c) of the Dangerous Drugs Law."

[22] Lord Diplock said that the question of what are the mental elements required to constitute a criminal offence of having in one's possession a prohibited substance is a finely balanced one as the case of **Warner v Metropolitan Commissioner** [1969] 2 AC 256 showed. "It turns", he said:

> "on a consideration not only of the particular provision creating the offence but also of the policy of the Act disclosed by its provision taken as a whole."

[23] Then his Lordship continued:

> "Since **Reg. v Livingston** was decided more than 20 years ago, it has been treated as authoritative on the extent of the knowledge of the accused needed to constitute the offence under the Jamaican legislation, and has been frequently followed in Jamaican courts."

Their Lordships did not think it right to disturb **Livingston** as authority for what it did decide as to the mental element required to constitute the offence of having a dangerous drug in one's possession.

[24] Forte, JA in his judgment in the **Bernal** case examined the authorities in so far as the offence of possession was concerned and referred to the case of **R v Nicholson** (1971) 18 WIR 61, where the court once again

approved the **Livingston** case per Luckhoo JA and laid down what Forte JA said was, in his view, the proper formula for adjudicating on these matters.

Luckhoo JA said at page 64:

> " We are in agreement with the view taken by the Court of Appeal in **R. v. Livingston** (1952) 6 Jamaica LR 95 that mens rea is a necessary ingredient in proof of a charge of possession of ganja. Once the prosecution adduces evidence in proof (i) of the 'fact of possession', that is that the accused person had the thing in question in his charge and control and knew that he had it and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by reason of any fact or circumstance inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima face case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution."

[25] The judgment of Downer, JA in **Bernal** is also instructive. At page 340 his Lordship had this to say:

> "As regards possession, as exemplified by the cases, the starting point must be **Director of Public Prosecutions v Brooks** (1974) 21 WIR 411.

> Lord Diplock in the course of his opinion raised the issues posed in **R v Livingston**.... Those questions deal with the principles of law of general application as to the extent of the two different degrees of knowledge on the part of the defendant needed to constitute the mental element in the criminal offence of having in one's possession a dangerous drug."

[26] The learned judge of appeal (as he then was) added that the principles expounded in **Warner v Metropolitan Police Commissioner** in relation to possession in the criminal law and how knowledge was to be inferred were similar to those explained in **Brooks** and he referred to **R v Nicholson** where Luckhoo, JA cited the following passage from **Livingston**:

> "Merely to say "we did not know that we had ganja" is not however, so easy a way out for persons found in possession of ganja as might at first sight appear. As was pointed out by Devlin J, in **Roper v Taylor's Central Garages (Exeter) Ltd** (1951) 2 TLR 284 at page 288, there are two degrees of knowledge which are sufficient to establish mens rea in cases of this kind. The first is actual knowledge, which the magistrate may find because he infers it from the fact of possession, or from the nature of the acts done, or from both. The magistrate may find this even if the defendant gives evidence to the contrary. The magistrate may say "I do not believe him: I think that that was his state of mind". Or 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. **(Roper v Taylor's Central Garages (Exeter) Ltd.** (supra)."

[27] Luckhoo JA then continued:

> "... Once the prosecution adduces evidence in proof (i) of the 'fact of possession,' that is that the accused person had the thing in question in his charge and control and knew that he had it, and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by any fact or circumstances inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima facie case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution." (Emphasis added)

[28] Bearing in mind the principle from the authorities as reviewed in **Bernal,** which, shortly stated is that knowledge, sufficient to establish mens rea, may be (i) actual knowledge, which may be inferred from the act of possession, or from the nature of the acts done, or from both, or, (ii) if it falls short of actual knowledge, it may be inferred if the defendant

deliberately shut his eyes to an obvious means of knowledge by refraining from making enquiries, the result of which he may not care to have, the learned Resident Magistrate concluded that this case fell to be determined on the knowledge described in the second category.

[29] Did the learned magistrate misapply the principle? It was Mr Codner's contention that the magistrate fell into error in concluding that in the circumstances of this case (that is, the appellant's knowledge that "Jack Palance" was deported from Canada for a drug-related issue some eight years before; that she was warned in the past by an aunt about taking things from people and that her mother had warned her to get away from around Jack Palance), the appellant ought to have been alerted to make inquiries, yet made no due diligence checks in circumstances that clearly warranted such checks.

[30] Counsel argued that there was nothing suspicious about the items that the appellant had been asked to carry that would have alerted her to the possibility that they contained ganja or other prohibited substances and the evidence of the prosecution witness Corporal Crooks attested to that. She was able to make the discovery because of her training particularly in relation to the biscuits which seemed to have been a popular means of conveyance of the drug. It was her evidence that an ordinary person would not have been able to detect that there was

something there just by looking at the packets which were still sealed as they would appear on the supermarket shelves. The learned magistrate ought to have addressed her mind to the packaging and counsel also considered that the magistrate failed to appreciate the significance of the evidence of the appellant's witness, Veronica Washington, which inferentially she accepted as true.

[31] Furthermore, there were other factors which would militate against the appellant being put on notice such as the relationship between her and Jack Palance which inspired a level of trust that he would not put her in jeopardy and these were ignored by the magistrate. Mr Codner argued that she therefore erred in finding constructive knowledge in the appellant.

[32] Counsel for the Crown argued, however, that the statement of the appellant which was voluntarily given, contained an admission that she knew that the person who gave her the goods had been convicted for drug related offences and it was only during the course of her oral evidence when searching questions were asked of her to indicate what her state of mind should have been, that she sought to resile from her statement and to say that the conviction she knew of related to some gun-related activity. Counsel said that there were indeed circumstances

which should have put the appellant on notice and they were not inconsistent with the circumstances in **Bernal and Moore.**

[33] At this point I think it useful to provide a summary of the facts in the **Bernal** case, as they related to Bernal himself. He and his brother were departing from the island bound for Washington DC, USA. They had with them four boxes with tins labeled "Grace Pineapple Juice" which caught the attention of the security personnel who alerted the police. The tins were then examined and found to contain ganja. Bernal had cooperated with the police throughout the process, opening tins with his Swiss army knife, for inspection and when the substance was found told the police that Moore had asked him to take the tins of what he thought contained pineapple juice to his sister in Washington. Moore subsequently confirmed this.

[34] They (Bernal and Moore) had picked up boxes labeled "Grace Pineapple Juice" from local wholesalers and had taken them to Bernal's grandfather's house where Bernal was staying while in Jamaica. Grandfather Bernal had seen the boxes, saw Moore taping them up, making two packages of two boxes each and had asked his grandson what was in the boxes. Bernal told him it was pineapple juice and on being asked to whom they were going, said they were going to Moore's sister who lived in Washington DC. Grandfather Bernal then remarked

that it was a lot of juice going to one person to which Bernal responded, "Maybe she likes pineapple juice or is in some business." Grandfather Bernal then said to his grandson, "Make sure it is pineapple juice"

[35] Interestingly, (as it relates to similarities with the instant case) the Bernal brothers were late for their flight and were not allowed to board even after expressing a willingness to leave their luggage behind to be shipped at a later date. So, they returned to their grandfather's house with their luggage, which included the four boxes, and next morning returned to the airport when the prohibited substance was discovered. There was also evidence that the appellant readily agreed to the opening of the tins. When he was shown the ganja, he was stunned and at first had said nothing. Then, after a few moments he told the police what his mission was and at whose instance. He gave evidence that he had no reason to believe that the tins contained anything other than pineapple juice because he had been present when Moore took delivery of the boxes from the wholesalers.

[36] In the instant case, the learned Resident Magistrate outlined in her findings the factors which informed her conclusion that the appellant had no actual knowledge that ganja was in the packages she received from Mr Dewar but had deliberately shut her eyes to obvious means of

knowledge by refraining from making enquiries, the result of which she may not have cared to have. The circumstances she relied on were that:

i. the appellant knew that Jack Palance was deported from Canada for a drug related issue and had lied to the court about it, (a factor which weighed heavily in her determination);

ii. the appellant knew that Jack Palance was a member of the Shower Posse gang;

iii the gang was involved in illegal activities. She thought it incredible that the appellant would not have known that the Shower Posse gang was involved in drugs. "It is really no secret that Shower posse is involved in drugs and guns";

iv. having shared a long standing relationship with him, she knew that he himself was involved in illegal activities;

v. her mother told her to get away from around him; and

vi. she travelled regularly and her aunt would say to her, "Don't take nothing from nobody cause people are not nice and they will give you drugs and stuff."

[37] In my view, these circumstances were not sufficient to lead the learned Resident Magistrate to the conclusion that the appellant deliberately shut her eyes, failing to make enquiries which the circumstances warranted and therefore had the second degree of knowledge. The magistrate did not seem to have assessed the appellant as an untruthful witness generally but found that she could not be

believed in relation to her denial that she had told the police that Mr Dewar's deportation was drug-related. It therefore means that the evidence contained in her statement that she had taken packages from Mr Dewar for his brother on several occasions without incident was also to be considered and may well have been found to be a factor capable of displacing the inference of guilty knowledge - (see **R v Nicholson** – Luckhoo JA following **Livingston**). So, when the magistrate posed the question to herself as to why the appellant was so trusting in the face of the circumstances she outlined, she ought to have considered whether that evidence was capable of providing an answer to her question. There was a special relationship between them, being the parents of at least one child, and she had been the bearer of like items on several occasions in the past. There was nothing overtly suspicious about the kind of items she was being asked to take and I believe that the court could have taken judicial notice of the increased and sometimes intensified security checks at our local airports as well as internationally, over the past several years, with improved equipment and manpower (hence the detection on September 11) and consider whether it may have been reasonable for her to have adopted the attitude she did notwithstanding her aunt's warning about "people". Clearly, in her view she was not dealing with "people" here but the father of her child/children and to her it may not

have warranted more than the look she gave to the items as she had taken similar items before.

[38] The prosecution's own witness would tend to support her on that as Corporal Crooks said the packages had a normal appearance. That ought to have been weighed against the factors considered by the learned magistrate which really amounted to past known behaviour of Mr Dewar and her comment that the activities of the Shower Posse gang were "really no secret", which was without any evidentiary foundation, was clearly brought to bear on her reasoning and findings leading up to her conclusion on the appellant's state of mind. The appellant had said that Mr Dewar had been a member of the gang in Canada and there was no evidence that in the eight years since he was returned to Jamaica, those activities had continued.

[39] It seems to me that the conclusions drawn by the learned Resident Magistrate from the circumstances in this case were flawed and that ground (a) must succeed.

Were there distinguishing circumstances between the facts of Bernal and Moore and that of the appellant as it relates to warnings? (Ground (b))

[40] Mr Codner argued that there was no evidence that the warnings of the appellant's aunt and mother were contemporaneous with the receipt

of the offending items. In the face of those warnings, the magistrate had asked herself why the appellant would be so trusting of Jack Palance. He sought to distinguish the warnings in the **Bernal** case from the warnings in the instant case on the basis that in **Bernal** the warnings were contemporaneous with the receipt of the goods coupled with suspicion about the actual package in which the drugs were found. These features were missing from the instant case. There was no evidence that a warning from the appellant's aunt to be cautious about the items given to her by Jack Palance was ignored and that she failed to examine the items despite the warnings. The learned Resident Magistrate had erred in finding that the warnings of the appellant's aunt were sufficient to establish guilt on the second limb of knowledge and certainly none that could establish this guilt beyond a reasonable doubt.

[41] On the other hand, Mrs Feurtado-Richards argued that there was no requirement that the warnings had to be contemporaneous and that there was no distinction to be made between the instant case and **Bernal** as the warnings related to the imprudence of the course of conduct undertaken - in each case there was a failure to heed the warnings.

[42] There seems to me to be no doubt that the **Bernal** warning differed significantly from the warnings in the instant case. The former was very direct and related to the specific matter at hand. Furthermore, it was

accompanied by suspicious circumstances. Bernal had himself expressed reservations when he saw the quantity of pineapple juice he was being asked to take, according to his own evidence, and had asked questions relating thereto (how was overweight to be addressed and transportation to the airport) and the court held that his grandfather's questions about so much juice going to one person and his warning to make sure that it was what he was told it was, ought to have alerted him to the need to be cautious.

[43] In the instant case, I cannot see that a mother's concern about her daughter's association with persons she clearly did not approve of can be brought to bear on this matter, but her aunt's warning is more to the point although there was no evidence as to when that warning was given, whether it was known that the appellant carried items for Mr Dewar and if her aunt was warning her about taking items from him. Bearing in mind their special relationship, it seems to me that her aunt's warning would not carry the same weight as a **Bernal** warning. The particular circumstances in the **Bernal** case no doubt formed the basis of the view expressed by Downer JA at page 339- 340 when he said:

> "To have persisted with his intention to take those cartons to the USA in the face of those warnings raised the inference that his conduct was reckless as adumbrated by Lord Diplock in **Sweet v Parsley** [1969] 1 All ER 347 at page 360."

[44] In reviewing the learned Resident Magistrate's finding on the point Downer JA concluded that in the circumstances of the **Bernal** case *"uppermost in the Resident Magistrate's mind at this stage of the case was the warning given to the appellant Bernal by his grandfather and his refusal to heed that warning. Because of the warning he had a reason to suspect"*. The warning in the instant case lacked the significance of the **Bernal** warning and while I do not disagree with the Crown's position that there is no requirement for contemporaneity, it seems to me that the warning should at least be specific to the matter at hand, sufficient to say that ignoring such a pointed warning was reckless – that ignoring that warning would amount to shutting one's eyes.

[45] For my part, the warning in the instant case offered no support to the learned magistrate for her finding that it was a circumstance warranting the making of enquiries. Ground (b) also succeeds.

Did the learned Resident Magistrate find facts and draw Inferences which were unreasonable and against the weight of the evidence? (Ground (c))

[46] It was Mr Codner's contention that the learned magistrate erred in finding and adopting the unassailable position that her knowledge of the antecedents of Jack Palance and the Shower Posse gang was sufficient to draw the inference that the appellant refrained from making enquiries, the result of which she may not have cared to have. In so doing, the

learned magistrate fell into error by not considering other co-existing circumstances which would weaken or destroy the inference.

[47] Further, he argued, there was no evidence that the appellant knew anything about the activities of Jack Palance in the eight years since his deportation. They no longer shared a romantic relationship. Ultimately, Mr Codner argued, the knowledge of the prior activities of Jack Palance was insufficient to constitute suspicious circumstances which would have been willfully ignored by the appellant.

[48] Essentially, these arguments have been addressed above but I would wish to add the following:

I. A part of the evidence before the learned Resident Magistrate was contained in the statement admitted into evidence as exhibit 1 but she gave no indications in her findings that she considered aspects of it that were favourable to the appellant particularly as it related to her previous course of conduct.

II. In like manner, she gave no indication that she considered the evidence of Veronica Washington but held instead that in light of the degree of knowledge that was relevant to her determination, Miss Washington's evidence did not assist. She seemed to have dismissed Miss Washington's evidence in its entirety on the basis that she said she would do anything in her

power to help her friend (although what she was actually recorded as saying is that if she had the power, she would help her). This evidence related to circumstances affecting the appellant's state of mind as, having permitted Miss Washington to acquire one of the packets of biscuits, it could be inferred that she did not believe that there was any reason to suspect that anything was amiss and certainly Miss Washington said she consumed the biscuits, clearly, with no adverse effect. It seems to me that in the circumstances of this case, the learned Resident Magistrate was obliged to make express findings relating to Miss Washington's evidence. She failed to consider the impact of Miss Washington's evidence on the appellant's defence as part of the circumstances which could tend to show the absence of suspicious circumstances and the need for making enquiries. Instead, she found that her evidence did not assist the appellant's case.

III. The learned Resident Magistrate also gave no indication that she had considered the evidence of the conduct of the appellant when the prohibited substance was discovered, inclusive of her cooperation with the police. The court in **Bernal** had approved the finding of the learned Resident Magistrate that "admittedly one's conduct when confronted

with an illegal substance can assist a court in determining whether or not that person had knowledge of the substance", but that magistrate found that that evidence paled into insignificance when weighed up against the surrounding suspicious circumstances and, in the end, availed Bernal nothing. In the instant case, there were no suspicious circumstances – even to the point that when the appellant could not travel on the expected date she got no reaction from Mr Dewar which, according to her evidence, could have put her on notice that something was wrong. Therefore, it seems to me that the learned Resident Magistrate ought to have made an express finding as to how she treated with that evidence (see Forte JA in **Bernal and Moore** – supra - (pages 315; 316) quoting from the judgment of Carey, JA in **R v Lloyd Chuck** (1991) 28 JLR 422 where he explained a Resident Magistrate's duty under section 291 of the Judicature (Resident Magistrates) Act as it relates to recording findings of fact).

[49] Having not given due consideration to all the evidence the complaint that the findings of the learned Resident Magistrate were unreasonable and against the weight of the evidence has merit and ground (c) must succeed.

Were the findings of the learned Resident Magistrate inconsistent with the verdicts she returned? (Ground (d))

[50] Mr Codner argued that having found that the evidence fell short of actual possession, the magistrate's verdict was inconsistent with her findings of fact (that Jack Palance gave her the biscuits containing ganja; that she did not know that what she had was ganja; that she knew that Palance was involved in illegal activities and that she had not conspired with him to possess the substance) as there was no basis on which to conclude that the appellant willfully blinded her eyes to an obvious means of knowledge on those findings. He placed some reliance on the judgments of Lords Reid and Wilberforce in **Warner v Metropolitan Police Commissioner** relating to the requirements for a finding of circumstances from which guilty knowledge may be inferred. However Mrs Feurtado-Richards cautioned that there was a need for care in placing reliance on the principles to be distilled from **Warner** as that case was based on legislation which was different from the Jamaican legislation and indeed Lord Diplock did make the point in **Wishart Brooks** (at page 413) that "The Jamaican legislation is not the same as that which was under consideration by the House of Lords in **Warner's** case".

[51] It was her submission that the learned magistrate addressed her mind to the main issues and having heard from the appellant and examined her statement, she properly concluded that the appellant

availed herself to constructive knowledge and there was ample support for her verdict.

[52] The magistrate did say in her findings that she was "not impressed with the defence" and that having assessed the appellant's evidence and her demeanour and the way she "came across" she must say that she was "not impressed with her evidence," but at the same time she accepted that the appellant received the biscuits from Jack Palance and did not conspire with him to possess the drug. That surely was a significant part of the defence. However, I found no indication in the record that the learned magistrate accepted the evidence for the defence that the appellant did not know that what she had was ganja. The witnesses were in no position to testify to that. It was for the magistrate at the end of the day to make that determination and she found circumstances which in her view amounted to constructive knowledge on the part of the appellant. It is because she found that Jack Palance gave her the biscuits with the offending substance and that there was no conspiracy between them to possess it that she ruled out actual knowledge. Therefore, to that extent, her verdict cannot be said to be inconsistent with her findings. The real issue is whether those findings could be supported by the evidence. This ground is therefore without merit and must fail.

[53] The only ground remaining is ground (e) which requires no consideration in light of the success of grounds (a) (b) and (c).

[54] In the final analysis, I do not find that the learned Resident Magistrate demonstrated in her findings and reasoning a proper appreciation of the issues and principles of law applicable to this case and I would allow the appeal, set aside the convictions and sentences recorded on 21 January 2010 and enter in their stead judgment and verdicts of acquittal.

HARRISON, JA

ORDER

Appeal allowed. Convictions quashed and sentences recorded on 21 January 2010 set aside judgment and verdicts of acquittal entered.