NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Bremner*, 2007 NSCA 114

Date: 20071206
Docket: CAC 273558
Registry: Halifax

Between:

Brian James Bremner

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.
Appeal Heard:	September 20, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Warren K. Zimmer, for the appellant Susan Y. Bour, for the respondent

Reasons for judgment:

OVERVIEW

[1] Nova Scotia Supreme Court Justice Walter R.E. Goodfellow convicted the appellant, Brian James Bremner, of possessing crack cocaine for the purposes of trafficking. The offence occurred while Mr. Bremner was in prison. In making its case, the Crown established that the cocaine was part of a package that Mr. Bremner had ordered to be smuggled into the institution. The Crown did not suggest that Mr. Bremner ever had the cocaine in his personal possession. Instead, it alleged, and the judge agreed, that Mr. Bremner wielded sufficient authority over his drug dealing subordinate to establish a case of constructive possession. On appeal before us, Mr. Bremner asserts that this conclusion either reflects errors of law or otherwise cannot be supported by the evidence. For the reasons that follow, I would dismiss the appeal.

BACKGROUND

Operation Midway

[2] In the Spring of 2002, Mr. Bruce Alan Jackson, long-time drug user and dealer, was managing a retail cocaine shop in Halifax's Spryfield district. He did so on behalf of several higher level drug dealers, including Mr. Bremner. It was a 24 hour operation that continued to thrive despite Mr. Bremner and other superior associates being in jail.

[3] Unbeknownst to Mr. Bremner, back in 1999, Mr. Jackson became a police source and then, in 2002, he became a police agent. This set the stage for a major undercover operation known as "Operation Midway". It ran from May 9 to July 25, 2002. During this period, Mr. Jackson appeared to carry on his drug business as usual. However, clandestinely and in conjunction with the police, he electronically recorded his dealings with various targeted associates, including the appellant. The subject charge is one of the fruits of this investigation. The facts supporting this charge involve several phone calls Mr. Jackson had with the appellant and others in late May 2002, where, according to the Crown, the appellant directed the delivery of the “prison package”; a direction that Mr. Jackson followed.

The Evidence at Trial

[4] Not surprisingly, Mr. Jackson was the Crown's main witness. He testified to managing the shop throughout May of 2002 where it was essentially business as usual. He confirmed that, during this time, several of his superiors including the appellant were incarcerated. Nonetheless, it would have been common for them to demand the delivery of prison packages which would often include illicit drugs. Typically the prisoner would dispatch orders by way of three-way telephone calls to the prison. For example, because a prisoner could receive calls only from certain listed people such as family members, arrangements would be made to have a drug associate joined as a third party to the call. In coded language, the orders would then be given. Once ordered, messengers would be recruited. They, in turn, would hide the drugs in their body cavities and enter the prison either as visitors or as fellow inmates (having conveniently turned themselves in on outstanding warrants). Once smuggled into the institution, the drugs could be sold at premium prices.

[5] Mr. Jackson testified that Mr. Bremner first ordered the subject package sometime before May 30, 2002. Through several recorded phone calls, the appellant subsequently confirmed the order. Productions of these recorded phone calls were tendered into evidence with the coded street language deciphered by Mr. Jackson during his direct examination. The order in question included the one-half ounce of cocaine for which the appellant was charged, as well as 50 grams of hashish. All this was to be delivered before a prison “social” scheduled for June 1, 2002. Mr. Jackson also testified about his arrangements to secure the drugs from fellow associates and for his messenger, Ms. Mary Sampson, to transport them to the institution. Specifically, Ms. Sampson would enter the prison ostensibly to visit her boyfriend - fellow inmate, Mr. Wayne James. Mr. Jackson's evidence surrounding these arrangements was again corroborated by the various recorded conversations Mr. Jackson had with his suppliers and with his messenger, Ms. Sampson.

[6] The defence called no evidence.

The Judge's Decision

[7] In his oral decision convicting Mr. Bremner, the judge was keenly aware of the Crown's key witness' unsavory character and the risks of accepting Mr. Jackson's evidence even if uncontradicted:

> There are a number of aspects of this trial that I want to address at the outset, and two very important ones, are (1) Bruce Jackson's criminal record. It is lengthy, it is varied, it includes drug crime, fraud, and some degree of violence. Mr. Zimmer quite properly brought out many specifics of Bruce Jackson's life of crime in his cross-examination, and his criminal record must be considered in assessing credibility.
>
> Secondly, Bruce Jackson was, throughout, a major player in the drug acquisition and distribution of drugs, prior to, and during the Operation Midway. He cannot be described as a witness without self-interest. He has gained much by his career, first as the source, and then as an Agent for the police. Financially, and security-wise, he has been rewarded for his services. His evidence must be, and I do approach it with great caution. In **Vetrovec versus The Queen**, 1982, 67 CCC, 2nd, Dickson, J., as he then was, speaking for the Court said, at page 17:
>
> > Because of the infinite range of circumstances which will arise in the criminal trial process, it is not sensible to attempt to compress into a rule, or formula, or direction, the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risk of adopting, without more, the evidence of a witness.
>
> This case, because of the criminal background, and high degree of self-interest, including financial, of Bruce Jackson, I have, and as I've said, weighed his evidence with great caution.

[8] In the end, however, the judge, buoyed by the corroborating recordings, accepted Mr. Jackson's evidence on the essential elements of the offence:

> Now, the - there is a, the question of credibility of Mr. Jackson. After very careful, careful consideration, and assessment, and reflection of his demeanor and evidence, and his lack of truthfulness in areas, and areas, I still conclude that he was a very credible witness on the participation and direction of his boss, the Accused, in the preparation and delivery of a prison package.

ISSUES

[9] Mr. Bremner initially appealed his four year sentence but has since abandoned that request. His notice of appeal lists four grounds relating to his conviction:

> (1) That the verdict is unreasonable and not supported by the evidence.
>
> (2) That the Learned Trial Judge failed to instruct himself or inadequately instructed himself on the law of possession.
>
> (3) That the Learned Trial Judge erred in finding that the Prosecution had proved beyond a reasonable doubt that Brian James Bremner was in possession of cocaine for the purpose of trafficking.
>
> (4) That the Learned Trial Judge erred in law in ruling that hearsay evidence of Mary Sampson was admissible to prove the truth of the contents.

[10] The first and third grounds challenge the judge's conclusion that Mr. Bremner had the requisite knowledge to establish constructive possession. The issue as distilled on appeal is whether this finding could be supported by the evidence.

[11] The second ground of appeal also deals with the judge's finding that Mr. Bremner had the requisite knowledge to establish constructive possession but suggests that the judge erred when applying the law on constructive possession.

[12] The fourth ground of appeal involves the judge's decision to admit, for the truth of its contents, the messenger’s, Mary Sampson, hearsay statement to Mr. Jackson that she had delivered the package as directed. This, Mr. Bremner asserts, represents a reversible error in law.

[13] Therefore in summary, this appeal involves three issues:

(a) the reasonableness of the verdict;

(b) whether the judge committed reversible error when applying the law of constructive possession, and

(c) whether the judge committed reversible error by admitting Ms. Sampson's out of court utterance for the truth of its contents.

ANALYSIS

Unreasonable Verdict

[14] This court's authority to set aside an unreasonable verdict is set out in s. 686(1)(a)(i) of the *Criminal Code*:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

[15] Our limited role in assessing the reasonableness of a verdict was recently discussed by the Supreme Court of Canada in **R. v. Beaudry**, [2007] 1 S.C.R. 190, 2007 S.C.C. 5. Charron, J. sets out the basic test - whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered:

> ¶55 I agree with the majority of the Court of Appeal that it was reasonable for the trial judge to find that the accused had breached his duty by giving preferential treatment to Mr. Plourde because he was a peace officer. The standard to be applied in reviewing a verdict was established in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, and it is not in issue in this appeal. In *Biniaris*, Arbour J. summarized it as follows:
>
> > The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
> >
> > > [C]urial review is invited whenever a jury goes beyond a reasonable standard... . [T]he test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered".

> (*Yebes, supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)

[16] However, in the context of judge-alone trials where reasons become important, Fish, J. for the majority on this issue added this caveat:

> ¶98 I hasten to add that appellate courts, in determining whether a trial judge's verdict is unreasonable, cannot substitute their own view of the facts for that of the judge or intervene on the ground that the judge's reasons ought to have been more fully or more clearly expressed. That is beyond the purview of an appellate court: *R. v. W. R.)*, 1. [1992] 2 S.C.R. 122; *Burke; Biniaris; H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Kerr* (2004), 48 M.V.R. (4th) 201, 2004 MBCA 30. *But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(a)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.*
>
> [Emphasis added.]

[17] In his factum, the appellant summarizes his position on this issue this way:

> ¶60 It is respectfully submitted that the conclusions that Justice Goodfellow came to in relation to Mr. Bremner's knowledge were not supported by the evidence and were unreasonable. Although Mr. Bremner knew of the existence of the crack house and the existence of suppliers and the availability of drugs, this is all general knowledge relating to past history. It is true that he asked for the drugs in question, but, with all due respect, he did not direct the timing of its delivery, nor have any effective control over the actual delivery as that was totally in the hands of both Mr. Jackson and his Halifax Regional Police handlers. He had no control over the purchase by Mr. Jackson nor any other information relating to its acquisition, which Mr. Jackson said would be from "downtown".
>
> ¶61 The only evidence that suggests delivery was made was the evidence of the recorded conversation between Bruce Jackson and Mary Sampson on June 1, 2002. It will be argued that this is hearsay evidence which cannot be used to prove the fact of the delivery. Justice Goodfellow concluded that it would be naive to think that Mr. Bremner did not know his instructions were carried out. However, this conclusion ignores the evidence found in the phone calls which would indicate that Mr. Jackson had not been reliable with respect to other requests that had been made and that other people had been equally disappointing. Take for example, Mr. Jackson's simple failure to obtain a pair of sneakers and deliver them to Mr. Bremner as had been requested on numerous occasions.

. . .

> ¶70 On the Crown's theory, possession by Mr. Bremner occurred at the moment that Mr. Jackson received the cocaine from Gary Boudreau on the afternoon of May 31, 2002 at his apartment. If one were to ask the question, "How would Mr. Bremner know that", the reply by the Crown would be because he placed the order. The answer to that question by Justice Goodfellow would be because of the "high level of direction and control" by Mr. Bremner over Mr. Jackson. "It would be naive to think that Mr. Bremner didn't know his instructions were being carried out."
>
> ¶71 With all due respect to the judgment of Justice Goodfellow, there was no high level of direction exercised in the circumstances before the Court. After the request was made, it was Mr. Jackson who took over and utilized his own existing network to smuggle the drugs to Springhill. In fact, he was using Mary Sampson as he had in the past to smuggle to the same persons that he had in the past, without Mary Sampson and Brian Bremner even being acquainted. With all due respect, this is the antithesis of a "high level of control or direction"

[18] Section 4(3)(a)(i) sets out the definition of possession and establishes the case for constructive possession:

> (3) For the purposes of this Act,
>
> > (a) *a person has anything in possession when he* has it in his personal possession or *knowingly*
> >
> > > (i) *has it in the actual possession or custody of another person, or*
> >
> > > (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
> >
> > (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the possession of each and all of them.
>
> [Emphasis added.]

[19] The judge relied specifically on s. 4(3)(a)(i) of the *Criminal Code* to find Mr Bremner in constructive possession of the cocaine; i.e., Mr. Bremner *knowingly [had] it in the actual possession or custody of another person* [Mr. Jackson]. In

doing so, the judge **inferred** that Mr. Bremner had the requisite knowledge in light of the control he exercised over Mr. Jackson:

> The first thing I want to mention is that, is that there is a difference in terminology between possession and custody. Section 3(a)(i) says:
>
> > Has in the actual possession or custody.
>
> So you're not dealing with actual custody, and so it's a much broader term, and what we do have in the way of evidence is that very clearly there's a pre-existing relationship between the Accused, people such as Jackson, Boudreau, and Teddy. The Accused knows of the existence of the crack house, knows the existence of suppliers, knows of the availability of drugs. He directs the package be prepared. He directs the timing for its delivery, and there's the actual delivery made at the institute which he directed, at the event which he directed, and on the date he directed. *As I say, the, the term "custody" is a much broader term. It means in someone's keeping, in someone's care, charge in someone's care. It seems to me it would be naive to think that the Accused did not know his instructions were carried out, which concludes, which I conclude because of the relationship. Jackson was the Agent, employee, and the Accused was the boss. There was such a high level of direction and control, that I have no difficulty concluding that he had knowledge.*
>
> [Emphasis added.]

Conclusion on this Issue

[20] Mr. Bremner is correct to assert that in order to sustain a conviction, he would have to have known that the cocaine was in Mr. Jackson's custody. I further agree that there is no direct evidence confirming such knowledge.

[21] However this is not necessarily fatal to the Crown's case. The judge was at liberty to infer, as he did, that Mr. Bremner had this requisite knowledge, provided his inference is reasonable and supported by the evidence. See **R. v. Torrie**, [1967] 3 C.C.C. 303 (Ont. C.A.); **R. v. Wild**, [1970] 4 C.C.C. 40 (S.C.C.); **R. v. Bagshaw** (1971), 4 C.C.C. (2d) 303 (S.C.C.); **R. v. Johnson**, [1995] N.S.J. No. 193 (C.A.); and **R. v. Barrow**, [1991] B.C.J. No. 3878 (BCCA).

[22] In this case, to support this inference the judge relied primarily on three factors: firstly, the control Mr. Bremner wielded over Mr. Jackson; secondly, the

fact that the order was given; and, thirdly, the fact that Mr. Jackson acted on this order. As the following review suggests, there was a sound evidentiary basis to support all three premises.

Bremner's Control Over Jackson

[23] The evidence presented at trial suggests that Mr. Bremner had control over Mr. Jackson, both prior to and during his incarceration. Mr. Jackson testified that he was the middleman in the shop for four years leading up to Operation Midway. His managers were Gary “Boo” Boudreau, Jimmy Melvin and the appellant, B.J. Bremner. Mr. Jackson stated that they all had authority over him and they exercised their authority through intimidation, which included beatings and death threats, such as: “Well Brucie, we'll kill you.”

[24] Recorded telephone conversations entered into evidence have further demonstrated Mr. Bremner's ability to intimidate Mr. Jackson. In a May 27th conversation, Mr. Bremner stated to Mr. Jackson that even though he is currently in jail, he can still “do anything”, just as he would if he were not incarcerated. When asked at trial what Mr. Jackson understood the appellant to mean by that statement, Mr. Jackson confirmed that Mr. Bremner could “make things happen” as easily in jail as he could if he were out of jail. In a subsequent telephone conversation recorded on May 30th, Mr. Bremner reiterated that when he is “out on the street” people do whatever he asks and reminded Mr. Jackson that he has the same authority from inside the prison.

[25] Upon review of this May 30th conversation, it appears that Mr. Jackson attempted to appease Mr. Bremner when he became irate because his prison package had not yet been prepared. Mr. Jackson pleaded with Mr. Bremner not to be angry at him; assured him that he will have the order ready the next day; and stated: “I always do what I'm supposed to do.” When this evidence was read into the record and counsel asked Mr. Jackson why he would prepare a package for Mr. Bremner, Mr. Jackson replied, “Cause he asked me to. He's still in charge.”

[26] Again, in this May 30th conversation, Mr. Jackson can be heard expressing his fear of what could happen when “people” got mad: “Don't be fucken' him around. You fuck people around, man I'm tellin' ya they get pissed... things happen.” In a separate conversation, on May 31st, Mr. Jackson expressed to Mr.

Boudreau his anxiety over successfully preparing the package for Mr. Bremner. In this same intercepted conversation, Mr. Jackson can be heard saying: “Okay wait. ‘Cause man... ‘cause B's gonna be pissed at me if I don't get this parcel to where it's supposed to be.” Mr. Jackson confirmed at trial that “B” was in fact a reference to the appellant and that he was unable to “think” until he got the order prepared.

Bremner’s Order to have the Package Delivered

[27] Mr. Jackson's evidence was that the initial order for the prison package had been made by Mr. Bremner by telephone prior to May 27, however, no intercept of that conversation existed because Mr. Jackson's telephone was yet to be set up for recording. Mr. Jackson testified that the order destined for the prison consisted of 50 grams of hashish and the subject one-half ounce of crack cocaine. Mr. Bremner instructed him at the time to prepare the drugs, give them to the chosen messenger, Ms. Mary Sampson, who, as noted, would deliver the package to her boyfriend in prison, who would then ultimately deliver them to Mr. Bremner at the upcoming prison social.

[28] The order and its contents were confirmed through subsequent recorded conversations between Mr. Jackson, Mr. Bremner, the suppliers and the messenger. Specifically, in a May 30th conversation, Mr. Bremner discussed the arrangement with Mr. Jackson and asked him in guarded language: “Did ya ... do that yet for me?”, which Mr. Jackson explained at trial was a reference to getting sneakers from Mr. Bremner's mother and a drug prison package for him. In the same conversation, Mr. Jackson referred to the order for drugs when he asked Mr. Bremner: "You know what you want me to do, right?", which Mr. Jackson confirmed during his testimony was another reference to the prison package. Mr. Bremner expressed the urgency of preparing the package, given that it needed to be ready for the upcoming social: “Yeah, but I need that done... like right away... today.” Another reference to the order was made later that day in a subsequent recorded telephone conversation, when Mr. Jackson explained to Mr. Bremner that he couldn't get a hold of Mr. Boudreau to purchase the crack cocaine.

[29] Under Mr. Bremner's instruction, the drugs were to be purchased with the money from the shop. Mr. Jackson's evidence was that when he indicated to Mr. Bremner that the money was not currently at the shop to pay for the drugs, he was directed by Mr. Bremner to get the money from Mr. Boudreau.

[30] The evidence also included details as to how Mr. Jackson was directed to comply with the order: Mr. Jackson was instructed to go see Mr. Bremner's mother for the hashish and to go "downtown" to the shop to get the crack cocaine and, above all, to get it done that day.

Jackson Complied With the Order

[31] Leading up to the actual physical compliance with the order, Mr. Jackson repeatedly gave his assurances to Mr. Bremner that he would fulfill the order as directed.

[32] At approximately noon on May 31st, Mr. Jackson spoke to Ms. Sampson to inform her that he needed to see her that day, so that he could give her the drugs in time for the prison social on the following day.

[33] At approximately 14:00 that day, Mr. Jackson called for Dawn Bremner, the appellant's mother, but spoke with Teddy Bremner instead. Mr. Jackson told Teddy Bremner that he had to see him immediately, which Mr. Jackson explained at trial was because he needed to buy the hashish for the prison package.

[34] The evidence shows that approximately 30 minutes later, Mr. Jackson met with Teddy Bremner with the intent to pick up the 50 grams of hashish. However, Teddy Bremner stated that he did not have the drugs at that time, but instructed Mr. Jackson to come back at 17:00 when the drugs would be ready. They agreed on a price: $11.00 a gram, multiplied by 50 grams, for a total price of $550.00. Shortly thereafter, Mr. Jackson spoke to Mr. Boudreau to discuss purchasing the one-half ounce of crack for Mr. Bremner's prison package. Mr. Jackson also spoke with Ms. Sampson a second time and reminded her that he needed to see her “today” to give her the one-half ounce of crack and 50 grams of hashish for Mr. Bremner and that it was “very important”.

[35] Mr. Boudreau arrived at Mr. Jackson's residence at 16:40 to deliver a bulk amount of crack cocaine, which was captured by an “eagle” intercept, a room probe camera and on videotape. The evidence shows that Mr. Jackson purchased the one-half ounce of crack cocaine for the prison package at cost from Mr. Boudreau, which totalled $700.00. Although Mr. Boudreau attempted to convince

Mr. Jackson to also purchase the hashish from him for the prison package, Mr. Jackson is heard explaining to Mr. Boudreau that he has already purchased it from Teddy Bremner. Mr. Jackson later met with Teddy Bremner to purchase the 50 grams of hashish for the package.

[36] After purchasing both the hashish and the crack cocaine, Mr. Jackson was involved in preparing the package for delivery. He first took the drugs to the “safe house” where the drugs were photographed by police and samples were taken. The drugs were subsequently given back to Mr. Jackson so that he could bring them to Ms. Sampson for delivery.

[37] On the evening of May 31st, at approximately 20:30, Mr. Jackson met with Ms. Sampson, which was recorded by a room probe and videotape. Mr. Jackson is seen giving the hashish and the crack cocaine to Ms. Sampson and he asked her to confirm that she will be taking the drugs into the prison personally, to which she replied in the affirmative. He advised her that she may have to “heat up” the hashish to mold it before inserting it into her cavity for the concealed delivery into the prison. Mr. Jackson testified that this was not the first time Ms. Sampson took drugs into the prison.

[38] In light of this detailed evidence, it was reasonable for the judge to infer that Mr. Bremner had the requisite knowledge to sustain a finding of constructive possession. The Crown evidence made it clear that Mr. Jackson took custody of the cocaine at the appellant's behest. There was ample evidence of the control that the appellant wielded over Mr. Jackson. Mr Jackson secured the cocaine in response to the order.

[39] Furthermore, it must be remembered that this Crown evidence was uncontradicted. The judge properly inferred that given the appellant's control over the situation, he would have known that the order would be complied with and that Mr. Jackson would have taken custody of the cocaine on his behalf.

[40] In reaching this conclusion, I acknowledge that, at trial, the judge was asked to speculate that the cocaine may have been ultimately destined for a fellow inmate, Mr. Shawn Shay. The appellant presents this submission in his factum:

> ¶63 It is respectfully submitted that Justice Goodfellow failed to consider all of the evidence and, in particular, the evidence relating to Shawn Shay and the

> fact that Mr. Bremner may have been doing no more than passing along a request from Shawn Shay. During the course of Defence submissions reference was made to that evidence, beginning at p. 530 through to p. 546, Transcript. The first intercepted call that took place on May 27, 2002 would seem to suggest, at that point, that Mr. Bremner was not aware of there being a social at Springhill that coming Saturday (Tab 2, p. 11). There were no further conversations introduced until the call that took place on May 30, 2002 at 14:41 hours found at Tab 6. That call, together with the Eagle intercept involving Mr. Boudreau and the subsequent discussions with Mary Sampson all refer to Shawn Shay as the recipient of at least the hash.
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> ¶64 The evidence indicated that Mr. Shay had been transferred from Springhill to the Correctional Facility where Mr. Bremner was on the 28th of May, 2002. He went to Court on May 29, 2002 and then was returned to Springhill on May 31, 2002. The social was the following day.
>
> ¶65 The evidence of Mr. Jackson also confirmed that Mr. Shay had worked for him in the crack shop and that he prepared prison packages for a number of the workers, including Mr. Shay. It would appear that Mr. Jackson had an on-going relationship with Mary Sampson who regularly delivered packages to Springhill at the request of both Wayne James and Shawn Shay.
>
> ¶66 It is respectfully submitted that there was reasonably strong evidence that the package was intended for Mr. Shay and that Mr. Bremner did no more than pass along a request to Mr. Jackson while Mr. Shay was in the Correctional Facility with him.

[41] This speculation, respectfully, has no impact on the outcome of this appeal. Even had the cocaine been ultimately destined for Mr. Shay, it is clear that when Mr. Jackson took custody of it, he was acting exclusively for the appellant.

[42] With no other evidence as to what the appellant may have known or may not have known, it was not up to the judge to conjecture about every possible "what if". For example, **R. v. Jenner,** [2005] M.J. No. 95 (MBCA), the Manitoba Court of Appeal in considering another case involving constructive possession aptly observed:

> ¶16 The accused's argument is based not on attempting to rebut the evidence tendered by the Crown, but on raising questions and issues that, although valid in a rhetorical sort of way, add nothing to the issues that the trial judge had to address, and the manner in which he did so. Such a manner of attack was dealt

with by this court in **R. v. Drury (L.W.) et al.** (2000), 150 Man.R. (2d) 64, 2000 MBCA 100. Huband J.A. addressed the issue as follows (at para. 92):

> This is a question that only the accused Drury could answer, but he elected not to testify. Raising the question and inviting the court to speculate as to the answer does nothing to overcome the body of evidence which overwhelmingly points to guilt. ....

. . .

¶20 In **Larier**, Culliton J.A. wrote (at p. 312):

> It was contended that proof of knowledge as to the character of the substance would place upon the Crown a difficult, if not impossible, burden. I cannot agree with the contention. Proof of knowledge is no more difficult than the proof of intent in any criminal prosecution. Knowledge, like intent, is a state of mind. It cannot, generally speaking, be proved as a fact but can only be inferred from facts which are proved. A jury, on properly established facts, should experience no more difficulty in finding knowledge than it does in finding intent.

¶21 There was ample evidence on which the trial judge could find that, a) the accused had control and therefore possession of the cocaine, and b) had knowledge of the content of his locker. *Raising a series of "what-if" questions without providing any foundation in evidence for those questions does nothing to diminish the control or the knowledge that the accused possessed. His conviction appeal is accordingly dismissed.*

[Emphasis added.]

[43] In conclusion, this is a verdict "that a properly instructed jury, acting judicially, could reasonably have rendered". Furthermore, in addressing Fish, J.'s caveat in **Beaudry**, *supra*, the judge's findings were compatible with the evidence.

[44] However, before leaving this ground of appeal, let me address an issue that was only briefly referred to in the appellant's factum but, at the request of the court, fully developed in oral argument. It involves the fact that while it appeared to be "business as usual" at the shop, Mr. Jackson was at all material times acting as a police agent. Furthermore, control of the cocaine was based on control over Mr. Jackson. Perhaps Mr. Bremner only thought he had control over Mr. Jackson when

in reality, the police were in control. In other words, does the police control supersede the control Mr. Bremner otherwise had over Mr. Jackson?

[45] The appellant touched on this issue in his factum:

> It is clear that Mr. Jackson was the person who was in absolute control of virtually every movement that occurred after the initial request. The moves that he made were approved in advance by his police handlers. Although Mr. Bremner may have thought otherwise, he had absolutely no ability to control anything that Bruce Jackson did at the time Operation Midway was underway.

[46] For the reasons that follow, I conclude the police involvement in this case did not diminish or vitiate the control the appellant exercised over Mr. Jackson.

[47] Let me begin by considering the authority the police had over Mr. Bremner. Detective Blair Hussey oversaw the operation. In regards to Mr. Bremner's demand for a prison package, Detective Hussey confirmed:

> ... In relation to that call, based on the information that was provided to me by Mr. Jackson, I had directed him to proceed in putting together what I referred to earlier as getting product for a prison package that was destined for another individual to be taken into an institution and - with the intentions on it going to Mr. Bremner. That package was to include crack cocaine and cannabis resin.
>
> As part of that direction, Mr. Jackson had to - he was directed by me to get the cannabis resin from one individual who was, at the time was Teddy Bremner, and then the crack cocaine was supposed to come from a supply of crack cocaine that came to the agent from Gary Boudreau, who was one of the people that was supplying him the bulk amounts.
>
> . . .
>
> A. I gave direction based on the information that I had, what was required for the packages. Half an ounce of crack cocaine and 50 pieces of - or 50 grams of cannabis resin was to be included in the package. Based on the information that I had, I directed the agent to get those amounts.

[48] This is significant police control by any standard. Yet it must be noted that the police were exercising control solely to enforce the law. Thus, the question becomes: When police manipulate contraband solely to advance a criminal investigation, is a suspect's control over it consequently diminished?

[49] The weight of authority suggests that control in this context is not a mutually exclusive concept and that police manipulation should not be seen to excuse what would otherwise be an illegal act.

[50] In *Drug Offences in Canada,* MacFarlane, (3d), Canada Law Book, p. 6-24.3, the authors dedicate a section to *Drug Deliveries Controlled by the Police*. They pose the question this way:

> What impact does state control over the drugs have on the Crown's ability to prove that an offence occurred - especially where a measure of control over the drugs *by the accused* forms an essential ingredient of the offence?

[51] Their response suggests that although not necessarily based on established principles, courts will not see police control vitiate acts of possession that would otherwise be illegal. At p. 6-28:

> In summary, it is apparent that the reasoning process used in these controlled delivery cases does not yield any common, underlying principles or themes. It is equally apparent, however, that appellate courts in Canada, Australia and the United States have not been impressed with attempts by accused individuals to avoid criminal liability simply on the basis of police intervention and control where the evidence otherwise demonstrates significant criminality on the part of the accused.

[52] One case referred to by the authors is **R. v. Harrison** (1982), 67 C.C.C. (2d) 401 (Alta C.A.). There, customs agents discovered a large quantity of hashish hidden inside footballs that were being imported from Pakistan to Edmonton. The R.C.M.P. were called in and they took control of the shipment. One R.C.M.P. officer posed as a customs agent when the appellant importer provided the necessary paperwork and took possession of the contraband. Upon being convicted of possession for the purposes of trafficking, the appellant claimed that he could not be in possession because of the police control. The Alberta Court of Appeal rejected this submission concluding that the appellant possessed the contraband jointly with the police:

> ¶49 Another ground of appeal of Alonso is that the narcotics in question were under "the control of officers of the Crown acting pursuant to the Narcotics Control Act" and that, therefore, it was legally impossible for the appellant (Alonso) to "possess" the said narcotic. On this ground the cases cited by the

> appellant's counsel are cases dealing with possession of stolen goods when they have ceased to be stolen. They have no application. *Here, the best that could be said for the appellant was that there was joint possession with the police (s. 3(4) of the Criminal Code).* The police had a legal excuse for their possession which the appellant did not have.
>
> ¶50 During oral argument counsel put a similar proposition about the charge of importation: because the police had removed the drugs from the customs warehouse for safe keeping until Alonso came for them, the goods were already imported when Alonso got them, and so the offence of importation was legally impossible. This argument assumes that Alonso was guilty only because he took delivery. Certainly that act alone is enough for guilt. See: *R. v. Hijazi* (1974), 20 C.C.C.(2d) 183. *And, putting aside the question of whether Alonso was already guilty before he arrived to pick up the goods, the simple answer is that the goods never left the legal control of the customs officer while the police stored them; the best that could be said was that the police and customs had them in joint control.* This ground must fail.
>
> [Emphasis added.]

[53] This principle of joint possession referred to by the court in **Harrison** is now set out in s. 4(3)(b) of the *Criminal Code*:

> 4(3) For the purposes of this Act, ...
>
> > (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[54] The concept of joint police-offender control was also discussed in the drug importation case of **R. v. Miller et al** (1984), 12 C.C.C. (3d) 54. There the British Columbia Court of Appeal observed at page 90: “And, on the law, a measure of control by one person does not exclude the control required to establish possession on the part of another person.”

[55] In **United States of America v. Graziani**, [2007] B.C.J. No. 232, Silverman, J. of the British Columbia Supreme Court, succinctly summarized the following principles of law flowing from **Harrison** and **Miller**:

> ¶44 On the question of the police already having seized the narcotics, that argument was dealt with again in favour of the arguments made by the United

> States by the Alberta Court of Appeal in the case of *R. v. Harrison and Alonso* (1982), 38 A.R. 304 in 1982, and *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.). These cases indicate that *police intervention and control does not necessarily negative a continuing control by an accused person and that while the police may exercise a measure of control in intercepting a drug shipment, a measure of control by one person does not exclude the control required to establish possession on the part of another person*.
>
> [Emphasis added.]

[56] See also **R. v. Chan** (2003), 178 C.C.C. (3d) 269 (Ont. C.A.), leave to appeal to S.C.C. refused 180 C.C.C. (3d) vi.

[57] In light of the above, I conclude that in the circumstances of this case, the control exercised by the police did not supplant the appellant's control over the illicit drug. In short, Mr. Jackson was doing what Mr. Bremner told him to; albeit with the approval of the police. Our concern in this regard has therefore been addressed.

[58] For all these reasons, I would dismiss this ground of appeal.

Constructive Possession

[59] In advancing this ground of appeal, the appellant suggests that the judge ignored the fact that his last contact with Mr. Jackson was before Mr. Jackson secured the drugs for the package. In other words, because there was no contact with Mr. Jackson after Mr. Jackson took custody of the cocaine, there could be no control by the appellant. In his factum, the appellant explains it this way:

> ¶77 Justice Goodfellow spoke of a high level of direction and control and from that he had no difficulty inferring knowledge. This "high level of direction and control" was with respect to Mr. Jackson and his activities. Justice Goodfellow did not turn his attention to whether or not Mr. Bremner either did or could have exercised any control over the cocaine once it had been acquired by Mr. Jackson. The evidence is clear that there was no contact or discussions between Mr. Jackson and Mr. Bremner following the acquisition of the cocaine by Bruce Jackson and therefore Mr. Bremner did not exercise any control over the cocaine after it was acquired, nor could he have been told of its purchase through Gary Boudreau instead of "downtown".

> ¶78 It is respectfully submitted that Justice Goodfellow erred in not properly instructing himself with respect to this constituent element of possession and further erred in inferring knowledge in these circumstances. Given the history of deteriorating control by Mr. Bremner over the individuals referenced in his conversation with Mr. Jackson and the growing uncertainty of Mr. Jackson's ability to keep his word to Mr. Bremner, there is another reasonable inference that could be drawn and that is that Mr. Bremner would not know that his instructions were carried out until such time as they had been confirmed by Mr. Jackson or some other individual. The Crown failed to present any evidence on this point. To have an expectation is one thing. To have actual knowledge is another. Proof beyond a reasonable doubt is not satisfied by anything less than actual knowledge on these facts.

[60] In many ways, by this ground of appeal, Mr. Bremner is relying on the same submission he used to attack the reasonableness of the verdict. However, let me briefly address the law surrounding constructive possession.

[61] As noted, to establish constructive possession the Crown must prove that Mr. Bremner *knew* that the cocaine was in Mr. Jackson's custody and while in his custody, the appellant had some measure of control over it. The British Columbia Court of appeal in **R. v. Smith** (1973), 10 C.C.C. (2d) 384 (B.C.C.A.), pp. 390-391, explains:

> … the question becomes, "What constitutes ‘possession’ within the definition of that term in s 3(4)(a)(ii) [now s. 4(3)(a)(ii)] of the *Criminal Code*?" In *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285, 19 C.R.N.S. 293, [1972] 5 W.W.R. 150, Allen, J.A., considered the authorities relating to the definition of "possession". In that case the Crown alleged possession jointly by several accused and consequently s. 3(4)(a)(ii) was not applicable. However, in my view, the following language taken from the judgment of Allen, J.A., at pp. 290-1, does apply to the present case.
>
> > Without discussing in detail those authorities I think their effect can be summed up by saying that while possession under the definition prescribed by the *Criminal Code* is a matter to be determined on the facts of each case, *when the goods in question are not in the physical possession of an accused, in order to constitute constructive possession it must extend beyond quiescent knowledge and disclose some measure of control or right of control over the goods.*
>
> [Emphasis added.]

See also **R. v. Fisher**, [2005] B.C.J. No. 1955 (B.C.CA.).

[62] As earlier noted, the judge inferred that Mr. Bremner knew the cocaine would be in Mr. Jackson's possession and that this inference was based on the significant measure of control the appellant exercised over Mr. Jackson. As I have already concluded, this was a reasonable inference for the judge to draw. Furthermore, control over Mr. Jackson obviously meant control over the cocaine. I see no legal error in the judge's analysis. There is no merit to this ground of appeal.

The Hearsay Issue

[63] Ms. Sampson telephoned Mr. Jackson on June 1, 2002 to confirm that the package containing the cocaine had been delivered to the prison. Mr. Bremner considers this to be inadmissible hearsay. This is set out in his factum:

> ¶79 Tab 43 contained a telephone conversation recorded between Bruce Jackson and Mary Sampson on June 1, 2002 at 19:25 hours. In that call Mary Sampson indicates that "Hi, listen Honey, that's done, okay", and further, "just wanted to let you know". Mr. Jackson replies in the form of a question "It's all there" and Ms. Sampson replies "yup".
>
> ¶80 Objection was taken to this call if it's purpose was to prove that the drugs had been delivered to Springhill Penitentiary by Ms. Sampson. Justice Goodfellow ruled that the statement was admissible as part of the agreement and used this evidence of delivery at the institution, for the social, on that date as proof of the statement (p. 588, Transcript).
>
> ¶81 It is respectfully submitted that Justice Goodfellow erred in admitting the statement for that purpose.

[64] I agree with the appellant that this evidence represents an out of court utterance which the judge accepted for the truth of its contents. Furthermore, as the following passage confirms, the judge relied on this fact in his analysis:

> So you're not dealing with actual custody, and so it's a much broader term, and what we do have in the way of evidence is that very clearly there's a pre-existing relationship between the Accused, people such as Jackson, Boudreau, and Teddy. The Accused knows of the existence of the crack house, knows the existence of suppliers, knows of the availability of drugs. He directs the package be prepared.

> He directs the timing for its delivery, *and there's the actual delivery made at the institute which he directed, at the event which he directed, and on the date he directed.* As I say, the, the term "custody" is a much broader term.
>
> [Emphasis added.]

[65] The Crown, however, submits that this fact is nonetheless admissible on the basis that Ms. Sampson is a co-conspirator and the evidence depicts part of their common design. As such, it represents an exception to the hearsay rule - the so-called *co-conspirator rule*. The Crown explains it this way in its factum:

> ¶57 In the Respondent's submission, the statements by Mary Sampson on June 1, 2002 were admissible on the basis of the co-conspirator's exception to the hearsay rule and thus the Learned Trial Judge did not err in law.
>
> ¶58 Statements made by a person engaged in an unlawful common design are admissible as admissions as against all parties who are acting in concert, provided that the declarations were made while the common unlawful design was ongoing and in furtherance of the common unlawful design.
>
> **R. v. Mapara** (2005), 195 C.C.C. (3d) 225 (S.C.C.) at para 8. See also: **R. v. Smith and James**, 2007 NSCA 19.

[66] Alternatively, the Crown submits that even had this evidence been tendered in error, the remaining evidence was more than sufficient to sustain a conviction. In other words even had the trial judge erred in this regard the result would not represent a substantial wrong or miscarriage of justice. Again, here is the Crown's written submission:

> ¶ 67 In any event, if this Honourable Court determines that the statements of Mary Sampson were not properly admissible, and the statements are excluded, the Respondent submits that there was more than sufficient evidence at trial to justify a conviction pursuant to section 686(1)(b)(iii) of the *Criminal Code.* No substantial wrong or miscarriage of justice occurred.

[67] The Crown is correct in that not every error represents reversible error. Specifically, s. 686(1)(b)(iii) provides:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, *the court of appeal* ...

> (b) *may dismiss the appeal where ...*
>
> > (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, *it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or*
>
> [Emphasis added.]

[68] I accept the respondent's alternative submission. The Crown did not have to prove that the package was delivered in order to secure a conviction. The case was made out when Mr. Jackson arranged for and then took custody of the drugs on the appellant's behalf. As noted above, the judge made this finding and it is properly supported by the evidence. Furthermore, none of this was contingent on Ms. Sampson's evidence that the package was delivered. Thus even had the judge erred in admitting this evidence, there would still be no substantial wrong or miscarriage of justice.

[69] It is therefore unnecessary for me to consider the respondent's *co-conspirator rule* submission.

[70] I would therefore dismiss this ground of appeal.

DISPOSITION

[71] I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Bateman, J.A.

Saunders, J.A.