

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Francis, 2010 NSPC 102

**Date:** March 5, 2010  
**Docket:** 1942357 and 59  
**Registry:** Dartmouth

**Between:**

**Her Majesty the Queen**

v.

**Doreen Monica Francis**

**Judge:** The Honourable Judge Frank P. Hoskins, J.P.C.

**Heard:** September 18, 2009; January 12, 2010; January 28, 2010;  
February 1, 2010; in Dartmouth, Nova Scotia

**Oral decision:** March 5, 2010

**Charges:** On or about the 26<sup>th</sup> day of August, 2008, at or near Dartmouth, Nova Scotia, did unlawfully have in her possession, for the purpose of trafficking, not in excess of three kilograms, Cannabis (Marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(2) of the said Act.

And further that at the same time and place aforesaid did unlawfully have in her possession, for the purpose of trafficking, Cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to section 5(2) of the said Act.

**Counsel:** Jeffrey Moors for the Crown  
Jill Lacey for the Defence

## **Introduction**

[1] This is the decision in the matter of *The Queen & Ms. Doreen Francis*, who is charged with two offences under the *Controlled Drugs and Substances Act (CDSA)*.

[2] On August 26, 2008, the police conducted a warrantless search of a 2008 Ford Escape SUV. There were two adults and a small child in the vehicle. The driver, Ms. Nicola Holness, was positioned in the driver's seat and Ms. Doreen Francis, the accused, was positioned in the back seat behind the driver's seat. The small child was in a car seat fashioned in the back seat beside Ms. Francis.

[3] The police seized from the vehicle a large quantity of illicit substances, including a number of bags of crack cocaine, marihuana, and powdered cocaine. As a result both Ms. Holness and Ms. Francis were charged with two offences under the *CDSA*; namely:

- (a) did unlawfully have in their possession, for the purpose of trafficking, not in excess of three kilograms, Cannabis (Marihuana), a substance included in schedule II of the *CDSA*, and did thereby commit an offence contrary to s. 5(2) of the *CDSA*; and,

(b) did unlawfully have in their possession, for the purpose of trafficking, cocaine, a substance included in schedule I of the *CDSA*, and did thereby commit an offence contrary to s. 5(2) of the *CDSA*.

[4] Accordingly, I have had the opportunity to listen intently to the submissions that have been made by counsel and have carefully considered all of the evidence that was proffered in the case.

**Review of the Evidence:**

[5] I will briefly review the evidence, and then touch upon the law before I provide my analysis which has led me to the conclusion that I have reached with respect to both offences.

[6] The Crown called three witnesses: Cst. Peter Hurley and Cst. Mike MacAlpine, members of the Halifax Regional Police Street Crime Enforcement Unit, and an expert, Cst. David Lane of the RCMP.

[7] Cst. Hurley testified that he received information from a confidential source on two separate occasions regarding the trafficking of illicit substances from a SUV vehicle. On the first occasion, the informant told him that an unknown black female was operating a newer model Ford SUV, silver in colour, with Ontario license plates, and the individual was selling crack cocaine from her SUV.

[8] On August 26, 2008, within seven days of receiving the confidential information from the informant, the informant again telephoned Cst. Hurley and told him that the same female would be driving the SUV in the north end of Dartmouth. The source described the driver as a black female of Jamaican descent, and said that there would be a small child in the back seat. The informant also stated that there would be a large quantity of crack cocaine in the SUV.

[9] Cst. Hurley observed a silver, 2008 Ford Escape SUV with Ontario license plates on August 26, after he spoke to the informant. The vehicle was observed on Victoria Road in the north end of Dartmouth. The vehicle turned off Victoria Road onto Highfield Park Drive. Cst Hurley requested that the vehicle be pulled over by a marked police vehicle. Cst. Phil MacKenzie activated his marked police vehicle emergency equipment and stopped the vehicle on Highfield Park Drive. Cst. Hurley then immediately parked his unmarked police vehicle directly behind Cst. MacKenzie's vehicle.

[10] Cst. Hurley approached the SUV, and observed two African Canadian females and an African Canadian child in the SUV.

[11] Cst. Hurley approached the driver of the SUV, Ms. Holness. He advised her that she was under arrest for possession of crack cocaine and asked her to step out

of the vehicle. Cst. Hurley then advised Ms. Francis, who was positioned in the rear passenger seat, directly behind the driver's seat, that she was under arrest for possession of crack cocaine. After placing Ms. Holness and Ms. Francis under arrest, Cst. MacAlpine noticed a bag of crack cocaine, Exhibit 1, on the floor of vehicle, the rear passenger's side, backseat. Exhibit 1 contained 34.6 grams of crack cocaine. Cst. MacAlpine viewed Exhibit 1, from his vantage point, which was from the rear side of the passenger's side of the vehicle. Cst. Hurley also observed Exhibit 1 on the rear passenger's side floor. Cst. Hurley observed Exhibit 3, a bag containing three individually packaged stones of crack cocaine in the driver's door handle on the inside of the vehicle.

[12] After Ms. Francis exited the vehicle, Cst. Hurley noticed Exhibit 21, a small bag of powdered cocaine. Exhibit 21 was located on the rear passenger seat, between the seat occupied by Ms. Francis and the child-booster seat fashioned in the middle of the rear seat, near where Ms. Francis' purse was located. Exhibit 21 contained 3.7 grams of cocaine. Cst. Hurley described the powdered cocaine as "a little bigger than the top of an adult male's thumb, or about the size of a loonie and similar to a size of a quarter and probably four loonies thick".

[13] Having made these observations, Cst. Hurley searched the vehicle. He seized a cardboard box, similar to a tissue box, from underneath the driver's seat, which

contained cocaine. Exhibit 5, a bag, which contained 29.8 grams of cocaine, was seized from the cardboard box. Exhibit 7 was also taken from the cardboard box, which contained 17.4 grams of cocaine. Exhibit 11, a clear sandwich bag, which contained 27 grams of crack cocaine, was discovered in the cardboard box. Exhibit 13, a bag of marihuana which weighed 25.2 grams was also located inside the cardboard box. Exhibit 17, a clear plastic bag of cocaine was also located in the cardboard box underneath the driver's seat.

[14] Cst. Hurley seized Exhibit 26, which contained numerous receipts, including a Western Union receipt with Ms. Francis' name on it. This receipt was discovered on the center console between the driver's and front passenger's seat, where the cup holders and emergency brake handle are located. This receipt was dated on Aug. 25, 2008, from the Money Mart in Lower Sackville. There were other receipts, including: a gas receipt from Kirland, Quebec, dated August 19, 2008; a gas receipt from Oromocto, New Brunswick dated August 20, 2008; a receipt from Dartmouth, N.S. dated August 21, 2008; a gas receipt from Mt. Uniacke, N.S., dated August 22, 2008, and a gas receipt from Lower Sackville, dated August 24, 2008.

[15] Cst. Hurley seized Exhibit 15 from Ms. Francis' purse, which included a number of identification cards of Ms. Francis'; including an Ontario health card, an

Ontario driver's license, and a Bank of America cheque book. The address on the cheque book was a location in the United States, and the address on Ms. Francis' driver's license was in North York, Ontario. It also contained what Cst. Hurley believed to be a digital scale. However, after careful examination in court he changed his testimony and concluded that it was a calculator.

[16] The police seized \$130.00 from Ms. Holness' purse: four \$20.00 bills, and one \$50.00 bill. The purse was located on the driver's seat. A \$10.00 bill in American currency was seized from Ms. Francis' purse, Exhibit 23.

[17] The police also seized Ms. Holness' driver's license which contained an Ontario address, which was located in East Toronto, Ontario.

[18] Cst. Hurley testified that the SUV was a rental vehicle, but did not recall who the registered owner of the vehicle was. In fact, there was no evidence of any rental agreement proffered in evidence.

[19] Cst. MacAlpine initially testified that he thought that the child might have been taken out of the vehicle by Ms. Francis, but later in his testimony testified that he thought the child was next to Ms. Francis while she was standing on the side walk, but qualified that by saying that it could have been Ms. Holness with the child. Later in his testimony, Cst. MacAlpine testified that Ms. Holness attempted

to keep the passenger door closed, tight to her body, as she was removing the child from the seat. He stated that she attempted to keep him from accessing the passenger's door. After he accessed the door, he observed the crack cocaine on the rear passenger's floor. The child was approximately three to four years of age. It was after Ms. Holness removed the child from the car that Cst. MacAlpine observed the crack cocaine. However, Cst. MacAlpine testified that he does not recall when the child was taken out of the car-seat or who removed the seat itself.

[20] Cst. MacAlpine also stated that the care of the child was in the hands of Ms. Holness. He also recalled that a gentleman arrived at the scene and had taken the child to his place.

[21] Cst. Hurley testified that he did not identify the child. He did not remember who was responsible for the child.

[22] Cst. Lane was qualified as an expert and provided opinion evidence in respect to cocaine usage, the unlawful possession of cocaine, the unlawful possession of cocaine for the purpose of trafficking, the unlawful possession of cannabis marihuana, the unlawful possession of cannabis marihuana for the purpose of trafficking, methods used to avoid police detection, drug distribution chains, drug hierarchy, drug runners, pricing, packaging, jargon, stash houses, dial-



a-doping and packing methods. After Cst. Lane described the nature of the illicit drugs and the approximate street value, he expressed an opinion that, on the whole of the evidence, including the nature, quantity, packaging and location of the illicit substances in the vehicle, it was consistent with being in possession for the purpose of trafficking, and that the illicit substances in the vehicle was consistent with being transported or couriered to other drug traffickers. He also provided the opinion that it was not unusual for drug couriers to have children present in a vehicle to avoid suspicion.

[23] The accused, Ms. Francis, elected not to call evidence.

### **Issue**

[24] The central issue in this case is whether the Crown proved beyond a reasonable doubt that the accused, Ms. Francis, was in *possession* of the illicit drugs seized from the vehicle.

### **Burden of Proof:**

[25] It is trite to say, that the burden is upon the Crown to prove these allegations beyond a reasonable doubt.

[26] This legal or persuasive burden never shifts to the accused, it remains with the Crown throughout the trial.

[27] As stated, the issue in the present case is whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt that Ms. Francis committed the offences of possession for the purpose of trafficking in cocaine and in cannabis (marihuana).

[28] In *Starr* 2000 SCC 40, at paras. 87-88, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[29] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, para. 32, the Supreme Court of Canada held that it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

### **Relevant Statutory Provisions & the Common Law**

[30] The *Criminal Code* defines what constitutes “possession”. Section 4(3) provides:

4(3) Possession -- 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 custody and possession of each and all of them.

[31] In essence, s. 4(3) of the *Criminal Code*, defines three forms of possession: personal, constructive or joint.

[32] To prove possession, the Crown must prove beyond a reasonable doubt both knowledge of and control by the accused, Ms. Francis, of the illicit substance allegedly possessed.

### **Personal Possession**

[33] Personal possession or actual possession requires the Crown to prove that the accused manually or physically handled the illicit substance as well as had the requisite knowledge and control. Thus, evidence that the accused at some point in time came into contact with the illicit substance is required; although the period of contact may be brief, the contact must have been willing and deliberate.

[34] The most common means of establishing knowledge are through circumstantial evidence or by the admission of an inculpatory statement. Knowledge of the nature of the illicit substance can be inferred from the accused person's control over the substance. Attempts to disguise or conceal the substance or the presence of other indicia are also indicators that the accused had knowledge of what he or she possessed. The requirement to establish control is often tied to

the accused's manual or physical contact with the substance. Thus, consideration must be given to whether the accused exercised some degree of power or control over the substance.

[35] In *R. v. LeBlanc* 2009 NSSC 221, Justice Beveridge, in delivering the judgment of the Nova Scotia Court of Appeal, touched upon the essential elements of possession at paras. 24 and 25:

In any event, to establish personal, constructive or joint possession the Crown must establish knowledge, consent and control. As noted by Freeman J.A. in *R. v. Cameron* 2002 NSCA 123, (2002) 208 N.S.R. (2d) 349, control is not mentioned in the statutory definition, but case law has interpreted the *Code* section to require the Crown to establish control. There appears to be an obvious overlap between consent and control, since the requirement of consent means some measure of control. (see *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (S.C.C.))

Absent an explicit admission by an accused about the nature and existence of the contraband alleged to be in his or her possession, knowledge must be inferred. If contraband is in the personal possession of an accused and in plain view, knowledge of its presence is an easy inference to draw. Where the contraband is not in plain view, inferences about knowledge, consent and control may pose a more difficult task.

[36] As Justice Beveridge observed, if the illicit substance is in the personal possession of an accused and is in plain view, an inference about knowledge, consent and control is easier to draw than when the substance is not in plain view.

### **Constructive Possession**

[37] Constructive possession arises when an accused person knowingly has the illicit substance in a place for the use or benefit of the accused person or of another

person. The accused person must know that he or she has control over the illicit substance. Often the court is required to examine the relationship between the accused person and the location in which the illicit substances were discovered. In addition to having knowledge, the Crown must also establish that the accused person had some measure of influence or authority over the illicit substance.

[38] In *R. v. Savory*, [1996] O.J.No. 3811, at para. 7, the Ontario Court of Appeal summarized the essential element of control, as follows:

Control for the purposes of constructive possession does not require that the accused did in fact exercise control over the object in question. In *R. v. Terrence* (citation omitted), the Supreme Court accepted that control means power or authority over the object in question. Similarly, in *R. v. Chambers*, (citation omitted), a decision of the Ont. C.A., the court held that the right to grant or withhold consent to drugs being stored in a bedroom was sufficient to constitute control. Again, control is established if there is the right to grant or withhold consent. It is not necessary that the consent in fact be granted or withheld.

### **Joint Possession**

[39] Joint possession occurs when one or more accused persons has possession of the illicit substance with the knowledge and control of the others then all of the people are deemed to be in possession of it. The elements of this offence are knowledge of the substance by the accused person and his or her consent to the other person possessing it. Further to this, in order for the accused to be in a position to consent, he or she must also have some measure of control over the substance.

[40] It should also be noted that one must be careful not to draw from the circumstances a conclusion of joint venture, and from there infer joint or constructive possession by all. As was explained in *R. v Chualna*, (2003), 181 C.C.C (3d) 192, wherein the British Columbia Court of Appeal, at p. 200, stated:

In my respectful opinion, the learned trial judge's analysis at [paragraphs] 39-40 of his reasons is an impermissible approach to the issue of possession. The learned judge inferred that the two men were "partners in crime", or engaged in a joint venture, and reasoned from that inference that they had joint possession of the stolen van and prohibited weapons. But to conclude that there was a joint venture between the two is to assume the very facts the Crown was obliged to prove - namely, the appellant's knowledge and consent. The trial judge's reasoning by-passed an analysis of the evidence to see whether the appellant's knowledge and consent was the only reasonable inference that could be drawn.

### **The Position of the Parties**

[41] The Crown contends that Ms. Francis was in possession of the illicit substances seized from the SUV vehicle on the date and time in question as either a principle or as a party to the offence.

[42] The Crown argues that there are reasonable inferences to draw from the totality of the circumstances to support the proposition that Ms. Francis was in possession of the illicit substances.

[43] The Crown asks the Court to consider the location of Ms. Francis' in the vehicle, the nature of the illicit substances, and the location of the illicit substances

within the vehicle, particularly the illicit substances which were in plain view when seized by the police.

[44] The Crown submits that Ms. Francis location within the vehicle is of significance because it suggests that she was sitting in the rear passenger seat next to the child, and not in the front passenger seat, because she was likely attending or caring for the child, which suggest that she had a relationship of trust, with the driver and the child, and it is reasonable to infer her connection to the vehicle was more than transitory or fleeting in nature. Furthermore, the location of the Western Union receipt, discovered on the center console also supports the inference that Ms. Francis' presence in the vehicle was more than transient or momentarily.

[45] The Crown also argues that the evidence that both occupants of the vehicle, Ms. Francis and Ms. Holness, have a connection to Ontario, as evidenced by their identification cards, coupled with the Ontario license plate on the vehicle, suggest that both women have a connection to the vehicle and thus a reasonable inference should be drawn that both women have knowledge and control of the illicit substances in the vehicle. Moreover, the location of the illicit substances in the vehicle supports the inference of knowledge and control, particularly the illicit drugs in plain view and the illicit drugs underneath the driver's seat, which were accessible to both Ms. Holness and Ms. Francis. The powdered cocaine which was

seized from the rear seat where Ms. Francis was seating is further evidence of knowledge and control.

[46] Lastly, the Crown submits that Cst. Lane's opinion evidence clearly establishes that the nature and quantity of the substances discovered in the vehicle was in their possession for the purpose of trafficking and they were likely drug couriers.

[47] The defence contends that on the totality of the evidence, the Crown failed to prove beyond a reasonable doubt that Ms. Francis was in possession of the illicit drugs seized from the vehicle. The position of the defence is that while the evidence clearly establishes that Ms. Holness was in possession of the illicit drugs, it does not establish that Ms. Francis was in possession, as there is no evidence which connects Ms. Francis to the vehicle, to Ms. Holness, to the child or to the illicit drugs. Other than her presence in the vehicle, there is insufficient evidence to establish that Ms. Francis had the requisite knowledge and control of the illicit drugs: her mere presence in the vehicle is not enough to establish beyond a reasonable doubt that Ms. Francis was in possession.



[48] The defence argues that there was no evidence of any illicit substances in Ms. Francis' actual possession, or on her person, nor was there any evidence of illicit substances in her purse.

[49] The defence submits that although the illicit drugs were in plain view for the officers, it cannot be said that the illicit drugs were seen by the accused, Ms. Francis, because it is possible that the illicit drugs were moved when the child and or child-seat was removed from the vehicle. The defence contends that the officers' evidence was too ambiguous as to when the illicit drugs, Exhibit 1, was first observed: was it observed after the child was removed or after the child-seat was removed, which could have caused the illicit substance to fall on the rear floor of the passenger side of the vehicle, and into plain view. With respect to the powdered cocaine discovered on the rear seat next to Ms. Francis' purse and the car seat, the Defence argues that it is possible that, given the quantity or size of the illicit substance, and its softness, Ms. Francis may have sat on the substance and not realize it. The defence also suggested that it was possible that the Western Union receipt was removed from Ms. Francis purse and inadvertently placed in the exhibits with the receipts.

[50] The defence also contends that the only evidence of suspicious behavior was that of Ms. Holness, who tried to keep the police from entering the rear seat of the

vehicle. There was no such evidence of suspicious behaviour in respect to Ms. Francis, which would suggest that she had the requisite knowledge and control of the illicit drugs in the vehicle.

### **Analysis**

[51] What we have here is a situation where there were two people in the SUV . The police stopped the vehicle, they found illicit substances in the form expected for being possessed for the purpose of trafficking. Thus, the nature of the relationship and mutual activities of the two occupants in relation to the vehicle and its contents are of significance in the determination of the central issue in this case.

[52] In my opinion, on the totality of the evidence, Ms. Holness was in possession of the illicit substances seized from the SUV, as she had care and control of the vehicle and its contents. The location, quantity and nature of the illicit substances in the vehicle forces one to the inescapable conclusion that she was in possession for the purpose of trafficking. Moreover, Ms. Holness' suspicious behaviour further establishes her knowledge and a measure of control over the illicit substances in the vehicle, including the illicit substances in the rear of the vehicle. Her behaviour in attempting to prevent the police from accessing the rear passenger door, where the Exhibit 21 was located, demonstrates

knowledge and control over the illicit substance. There is no evidence of any suspicious behaviour of Ms. Francis. In other words, there is no evidence adduced that suggested Ms. Francis was attempting to conceal, or remove the illicit substances, Exhibits 1 and 21. The only evidence of suspicious behaviour was the evidence relating to Ms. Holness.

[53] Having regard to all of the circumstances, the question that arises is what, if any, evidence connects Ms. Francis to the vehicle, Ms. Holness and/or the illicit substances, which considered in its entirety support the drawing of a reasonable inference that Ms. Francis was in possession of the illicit drugs.

[54] On the totality of the evidence, I find that Ms. Francis' connection to the SUV was extremely tenuous. Obviously, she is connected to the vehicle in the sense that she was in it, however, there is no evidence to suggest that she owned the vehicle, or that she had any control over the vehicle, nor that she had used it in the past or had any relationship with the driver, Ms. Holness, which would establish some special access to or privilege in regard to the vehicle. The evidence does not establish that Ms. Francis had any ability to regulate access to the vehicle. Indeed, there is no evidence that Ms. Francis was a passenger in the vehicle prior to the date and time when the police observed her in it. Whether Ms. Francis had been a passenger in the vehicle at some earlier time, and if so for how long, is a

matter of speculation. In my view, the presence of Exhibit 26 in the vehicle does not necessarily lead to a conclusion that the only reasonable inference is that Ms. Francis had been a passenger at some earlier time.

[55] While there was some evidence that the SUV was a rental vehicle, no evidence was adduced to establish that it was indeed a rental vehicle. Consequently, there is no evidence to connect Ms. Francis to the vehicle; such as a rental agreement with her name on it or, at least, as an additional driver for the vehicle. Further, other than Exhibit #26, the Western Union receipt, found in the center console, which is an open area, where she would have ready access; it was not located in a glove compartment, there is no other evidence of Ms. Francis' personal belongings connecting her to the vehicle. For instance, there is no evidence of luggage or clothing that would suggest that she was travelling in the vehicle for an appreciable an period of time; something to suggest that she was not merely transient on the date and time in question; such as motel or hotel receipts. The gas receipts, however, suggest that the vehicle moved from Quebec to New Brunswick and then to Nova Scotia. Thus, an inference could be drawn that Ms. Holness was traveling in the vehicle for several days.

[56] While the presence of the receipt in the center console raises suspicion, it does not in my opinion provide a sufficient basis to draw a reasonable inference of

some permanency of occupancy or measure of control over the vehicle by Ms. Francis. For instance, if any of the gas receipts, contained in Exhibit 26 were related or connected to Ms. Francis then one could infer some permanency of occupancy or measure of control over the vehicle, but that is not the case. Indeed, there are numerous inferences which could be drawn from the presence of Exhibit 26, including that she removed it from her purse and laid it there while she was in the vehicle on the date and time in question. In my view, on the totality of all the evidence, a reasonable inference cannot be drawn of or relating to time. In other words, there is insufficient evidence to establish how long the receipt was in the vehicle. In fact, the police only observed Ms. Francis in the vehicle for a relatively short period of time, as the vehicle turned off Victoria Road onto Highfield Park. Other than that evidence, there is insufficient evidence regarding surveillance of the vehicle and its occupants.

[57] Other than the addresses on the identification cards, including the driver's license, health card, credit card and cheques, there is no evidence called to confirm or establish Ms. Francis' current residency.

[58] Having regard to all of the evidence, I find that Ms. Francis' connection or relationship to the child is extremely tenuous, as it was too ambiguous to conclude that there was some relationship between she and the child. The most persuasive

evidence on this point is the evidence of Cst. MacAlpine who testified that the child was removed from the vehicle by Ms. Holness, the driver of the vehicle, and the child was in the care of Ms. Holness.

[59] While Ms. Holness and Ms. Francis' have identification cards connecting them to Ontario, and the SUV had Ontario license plates, there is no other evidence which establishes a relationship between the two women, which would suggest that they were travelling together in the vehicle for a period of time longer than was observed by the police. There are numerous inferences which could be drawn from Ms. Francis' presence in the vehicle on the date and time in question, including: getting a drive from an acquaintance or friend, entering the vehicle to make a purchase of illicit drugs, or selling drugs with Ms. Holness or acting as a courier with Ms. Holness.

[60] In other words, apart from the police observations on the date and time in question of the two women, there is insufficient evidence to connect them in some way to suggest something more; such as evidence that they had been travelling together in the SUV, from Quebec to Nova Scotia. Indeed, had any of the gas receipts been connected to Ms. Francis, then it may have change the circumstances as it could suggest something more than a fleeting presence with the vehicle. Also, their places of residence were not confirmed, nor was any evidence led to suggest

where Ms. Holness or Ms. Francis was staying, permanently or temporarily, on August 26, 2008; such as a motel or hotel.

[61] Moreover, there was no evidence of suspicious actions or behaviour of Ms. Francis, as there was with respect to Ms. Holness in relation to the illicit substances in the vehicle. There were no illicit substances found in the actual possession of Ms. Francis; either in her personal belongings or on her. Nor was there any drug paraphernalia in her possession; such as baggies or scales. There was no forensic evidence to connect Ms. Francis to any of the illicit substances seized from the vehicle; such as DNA or fingerprint identification.

[62] With respect to the location of the illicit substances, I am satisfied on the whole of the evidence that the location of the drugs leads one to the inescapable conclusion that Ms. Holness was in possession of them.

[63] It should be noted that the evidence that the officers relied upon in forming their grounds to arrest is not admissible for the truth of its contents. Thus, for example, the evidence that the officers were advised that a black female of Jamaican descent is driving a SUV in the northend of Dartmouth, with a small child in the back seat, has a large quantity of crack cocaine in the SUV, is admissible for a very limited purpose.

## **Evidence of Knowledge of the illicit substances in the Vehicle**

[64] With respect to knowledge, I am satisfied that on the totality of the evidence that a reasonable inference can be drawn from the circumstances that Ms. Francis knew that Ms. Holness was in possession of illicit substances. I am satisfied that the illicit substances in plain view on the rear passenger side floor, coupled with the circumstances surrounding Ms. Holness, leads me to infer that Ms. Francis knew that an illicit substance existed in the vehicle. However, I am not able to draw an inference that she was aware of the amount or specific nature of all of the illicit substances in the vehicle, particularly the concealed illicit substances in the vehicle, including the illicit substances in the cardboard box underneath the driver's seat, and the illicit substances in the driver's door. Given the small amount of the powder substance, with its soft texture, it is possible that Ms. Francis sat in the seat but did not see it. It is also possible that Ms. Francis knew that it was there because of its location which was close to her purse, as it was readily accessible. My point here is that I cannot conclude that the only reasonable inference to be drawn from the circumstances is that she knew the powder substance was on the seat. Unlike Ms. Holness, who acted suspicious when the officer was attempting to gain access into the rear of the vehicle, Ms. Francis simply exited the vehicle as requested without any evidence of suspicious behaviour or any effort to disguise,



conceal or hide the substance. Her behaviour could be consistent with a lack of knowledge.

[65] While I am satisfied that on the totality of the evidence, that Ms. Francis knew that there was an illicit substance in the vehicle, I am not satisfied that the only reasonable inference to be drawn from the all of the circumstances is that she knew the specific nature and quantity of illicit drugs in the vehicle. The evidence of the large amount of cocaine on the rear floor of the passenger seat, in plain view, supports the drawing of inference of knowledge. However, I am of the view that the Crown has not proven beyond a reasonable doubt that Ms. Francis had control over the drugs in the vehicle.

### **Evidence of Control of the illicit substances in the Vehicle**

[66] Control cannot be inferred from mere knowledge and opportunity.

[67] On the totality of the evidence, there is insufficient evidence to draw a reasonable inference that Ms. Francis exercised some measure of influence or authority over the illicit substances in the vehicle. In all of the circumstances, it is clear that Ms. Holness exercised complete control over the vehicle and the illicit drugs in the vehicle.

[68] Although the evidence in this case raises a good deal of suspicion, while it may even be likely, or even probable, that Ms. Francis was actively participating in illegal activity: either by transporting the drugs with Ms. Holness, or by selling drugs with her, or that she was simply attempting to purchase an illicit substance from Ms. Holness.

[69] In any event, I cannot find, on the totality of the evidence, that the only reasonable inference to draw is the inference that Ms. Francis had control over the illicit substances in the vehicle in addition to the knowledge of the illicit substances. It appears to me that it is possible that Ms. Francis was either a mere passenger in the vehicle, or a courier / trafficker with Ms. Holness, or Ms. Francis attempted to purchase an illicit substance from Ms. Holness, but the police intervened.

[70] In all of the circumstances, I am not satisfied beyond a reasonable doubt that Ms. Francis exercised a measure of control over the illicit substances or to put it another way, exercised some measure of influence or authority over the illicit substances in the vehicle. Again, however suspicious one may be, the evidence in its entirety does not rise to proof beyond reasonable doubt that Ms. Francis had control of the illicit substances in the vehicle on the date and time in question.

[71] As stated in the case of *LeBlanc* to establish personal, constructive or joint possession, the Crown must establish knowledge, consent and control beyond a reasonable doubt.

### **Constructive Possession**

[72] Again, for constructive possession, control does not require that the accused did in fact exercise control over the illicit substances, but rather control means the power or authority over the illicit substances. The right to grant or withhold consent is sufficient to constitute control. In other words, control is established if there is the right to grant or withhold consent. It is not necessary that the consent in fact be granted or withheld.

[73] In the present case, having regard to all of the circumstances, I am not satisfied that the evidence established that Ms. Francis had the right to grant or withhold consent to the illicit substances in the vehicle, for the reasons discussed.

### **Joint Possession**

[74] Section 4(3)(b) of the *Criminal Code* stipulates that if one of the two has possession of the illicit substance with the knowledge and consent of the other then both are deemed to have possession of it. Further to this, however, in order for the accused, Ms. Francis, to be in a position to consent, she must also have some

measure of control over the illicit substances. In terms of consent and the connected element of control, it is necessary to consider whether the accused, Ms. Francis had the ability or right to exercise some measure of influence or control over the illicit substances.

[75] On the whole of the evidence, I am not satisfied that Ms. Francis had the ability or right to exercise some measure of control over the illicit substances in the vehicle. In other words, I am not satisfied that Ms. Francis had the right to grant or withhold consent to the illicit substances in the vehicle.

### **Party to the Offence**

[76] The Crown argues Ms. Francis was also a party to the offence. While this is legally possible, notwithstanding that one does not have control of the illicit substance itself, as stated in *R. v Craig* (1997), 38 C.C.C. (2d) ( Ont. Dis. Ct.), at para. 22, wherein Boirns J. observed:

As I see it, the conceptual distinction between s. 4(3)(b) and s. 21 is that under the former, which deals with constructive possession, the Crown must establish that each accused possessed the article in question and to do so must show control. Under the latter, however, constructive possession is not in issue, and an accused may be found guilty of aiding and abetting the actual possession of another, without himself being shown to be in possession, or of having formed a purpose in common with another to commit an offence where the possession of the stolen goods is known or ought to be known to be a probable consequence of the commission of the first offence: see, for example, *R. v. Zanini*, [1966] 2 C.C.C. 185, [1966] 1 O.R. 499, 47 C.R. 195 (Ont. C.A.); affirmed [1968] 2 C.C.C., [1967] S.C.R. 715, 2 C.R.N.S. 219 (S.C.C.).

[77] I am not satisfied, having considered all of the evidence in the present case, that Ms. Francis was a party to the offences or had formed a common intention with Ms. Holness to commit an offence, where the possession of the illicit substances is known or ought to be known to be a probable consequence of the commission of an offence. I found that the evidence does not establish a common purpose on the part of the Ms. Francis and Ms. Holness to possess illicit substances, it follows that the Ms. Francis cannot be guilty pursuant to s. 21(2).

[78] There is no evidence that Ms. Francis took steps to help Ms. Holness take possession of the illicit substances, for instance co-leasing the vehicle together, knowing and intending that this would help Ms. Holness take possession of the illicit substances while still disavowing any control of the illicit substances herself. Moreover, there is insufficient evidence for me to infer that Ms. Francis provided informed assistance or encouragement to Ms. Holness with respect to Ms. Holness, possession of the illicit substances. Therefore, Ms. Francis cannot be found guilty pursuant to s. 21 of the *Criminal Code*.

## **Conclusion**

[79] For the all of the foregoing reasons, I find Ms. Francis not guilty of both offences, as the Crown has not proven beyond a reasonable doubt that Ms. Francis

was in control of the illicit substances in the vehicle on the date and time in question.

[80] In the result, therefore, I find Ms. Francis, the accused, not guilty of both offences.

[81] Accordingly, I order that she be discharged.