

# EVIDENCE OF CASH AND LIFESTYLE IN DRUG CASES: A GUIDE THROUGH THE MAZE

## 1.0 INTRODUCTION

The 'maze' referred to in the title of this article are the several issues raised in numerous English cases concerning the relevance and admissibility in drug cases of sums of cash found in the possession of the accused and/or his lavish lifestyle.

This article attempts to identify these issues and summarize the approach of the English Courts to these issues. It is hoped that this will be useful because, as far as the writer is aware there are no West Indian cases on these issues but given the prevalence of drug cases in the West Indies, they are likely to be addressed soon in our courts.

## 2.0 THE ENGLISH AND JAMAICAN OFFENCES COMPARED

### 2.1 *The Relevance of the English Cases*

The English Court of Appeal decisions referred to in this article concern trials of drug charges and convictions before a jury.

The charges considered in most of these Court of Appeal decisions are charges of possession of the drug in question with intent to supply. There are therefore two elements of these English offences firstly, possession of the drug in question and intent to supply.

These English cases it is submitted, can provide guidance on the relevance of cash and lifestyle, despite the difference in the wording of drug offences under the Jamaica Dangerous Drugs Act "the Act".

### 2.2 *The Issue of Possession in the English and Jamaican Legislation*

Knowledge is an ingredient of possession in the English offences and so too, in respect of the Jamaican offences under the Act.

Under section 7(C) possession of ganja is a separate offence. Under section 8(B) of the Act possession of the "dangerous drugs" referred to in Part IV of the Act, including cocaine, morphine etc are separate offences in respect of each of the drugs in question.

It is submitted that the principles in the English decisions concerning the relevance and admissibility of cash and lifestyle as to the ingredient of possession in the English possession with intent to supply cases are also relevant to possession offences in Jamaica. Knowledge is an ingredient of possession in both instances and so the question is whether cash and lifestyle are probative of this. This and related issues are considered in part 3 of this article.

### 2.3 *The Issue of Intent to Supply in the English and Jamaican Legislation*

Equally, it is submitted that the English decisions concerning the issue of intent to

## 2.0 THE ENGLISH AND JAMAICAN OFFENCES COMPARED (Cont'd)

### 2.3 **Presumption of Dealing under our Act**

It should be noted in relation to the dealing offences under the Act that section 22 (7) indicates that possession of more than the specified quantities therein for each of the drug specified means that an accused is deemed to be dealing in that drug unless the contrary is proved by him.

In R v Outar & Senior RMCA 47/97 (decided 31/7/98) it was held that this section places a legal burden on an accused to prove that he was not dealing in the drug in question (where he is proved to be in possession of more than the specified amount). However it does not, it is submitted, alter the conclusion that the English decisions are relevant. This is so because the prosecution may still seek to strengthen its case by relying on evidence of cash and lifestyle in order to persuade the Court that an accused has not discharged his burden to prove that he was not dealing or lack of intent. This of course, assumes that the English cases establish cash and lifestyle are relevant to the issue of an intent to supply and this issue is dealt with in Part 4 of this article.

### 2.4 ***The Significance of Jury Trial in the English Cases***

The English decisions considered in this article concern trials before a jury. Although it is possible under the Act to try the offences mentioned before the Circuit Court they are most often tried in the Resident Magistrates Court by a Resident Magistrate exercising special statutory summary jurisdiction. This, it is submitted, does not affect the relevance of the English jury cases because they may provide guidance nevertheless as to how a Resident Magistrate should approach the questions of relevance and admissibility during a trial and in framing his findings of fact under section 291 of the Judicature (Resident Magistrates Act). It is submitted that if the principles in the English cases apply to our jurisdiction then it is arguable that a Resident Magistrate in setting out his findings of fact should demonstrate his awareness and application of these principles.

## 3.0 THE ISSUE OF POSSESSION

### 3.1 ***Is Evidence of a Cash find Relevant to the Issue of Possession? If not should the judge give a special direction to the jury as to this.***

The answer to the first of these two questions is that evidence of a cash find will not generally speaking be relevant to the issue of possession but exceptionally it can be. The answer to the second of these two questions is yes. If in a possession with intent to supply case evidence of a cash find is admitted to prove the intent to supply the judge should direct the jury that it is irrelevant to the issue of possession. (other than those exceptional cases where the cash find is relevant to possession)

In some of these cases the possession of the drugs is the real issue in that the accused may deny knowledge of the drugs whether found on him in his luggage or premises.

### 3.0 THE ISSUE OF POSSESSION (Cont'd)

The Court held that in the particular circumstances of the case in Guney, the evidence of the cash found was relevant and rightly admitted. At pages 266 – 267 the Court said:

“The question whether evidence is relevant depends not on abstract legal theory but on the individual circumstances of each particular case ... Accordingly although evidence of cash and lifestyle may only rarely be relevant where the charge is simple possession, we are unable to accept that as a matter of law such evidence must, automatically, be excluded as irrelevant...

... where possession with intent is charged, there are numerous sets of circumstances in which cash and lifestyle evidence may be relevant and admissible to the issue of possession itself, not least to the issue of knowledge as an ingredient of possession ...

... The coincidence that his cash was physically close to firearms and drugs which belonged to someone else, and that the appellant either lied or gave inconsistent explanations about the source of the cash when interviewed, were ... all matters for consideration by the jury when considering the defence that he was ignorant of the presence of the drugs and firearms and therefore not knowingly in possession of them”.

### 3.2 ***In addressing the issue of relevance to possession should the court isolate that issue from that of intent to supply?***

The answer to this is no.

In Guney the court also disapproved of a tendency to artificially compartmentalize possession with intent cases by addressing the issue of relevance and admissibility of evidence as to the ingredients of possession and intent to supply separately. In Guney it was accepted at trial that if contrary to his defence it was proved that he was in possession of heroin then it was open to the jury to infer an intent to supply it. The Court of Appeal however, made it clear that this concession had no bearing on the issue of admissibility of the cash found. It said at page 267:

“Even if evidence of cash and lifestyle were automatically excluded in cases where simple possession is alleged, it would not follow from the sensible forensic tactic of conceding the intent to supply that cash and lifestyle evidence in cases alleging possession with intent should be excluded”.

In R v Griffiths (1998) Crim LR 567 the Court also disapproved of this approach and cited Guney with approval in doing so. In this case, the appellant was convicted of possession of heroin with intent to supply. The Court of Appeal

### 3.0 THE ISSUE OF POSSESSION (Cont'd)

In reference to this evidence the Court of Appeal held:

"It was unarguable that such evidence could not afford any probative value where the issue is possession. When such evidence is admitted as part of a case against somebody who is charged with possession with intent to supply it is vitally incumbent on the judge to spell out the restricted use that the jury may make of such evidence – that it is not and cannot be relevant to the issue of whether or not the defendant was in possession of the drug".

Halpin was followed in R v Richards (1997) Crim. L.R 497 and R v Edwards (1998) Crim. L.R 207.

However in R v Edwards the Court expressed the hope that an opportunity would arise for the Court to reconsider the matter. The report of the case states:

"It was observed in passing that the members of the Court entertained some doubts as to the principle suggested in some of the cases mentioned to the effect that paraphernalia or evidence of expenditure could never be indicative or persuasive in respect of possession. The Court suggested an example in which there was evidence of frequent brief visits by different young men to an address, who then leave carrying small packages. The property was searched and a large sum of money and some drugs were found. The occupant of the house had been unemployed for years. In such a case, it seemed to the Court contrary to common sense that the judge should tell the jury to ignore these matters when directing the jury on possession. It was preferable that the jury should be invited to look at the overall picture and draw such inferences as seemed proper as to whether the occupant of the house knew that there were drugs there and was in a position to dispose of them. Where a defendant was shown to be conducting a flourishing business as a drug dealer it might be reasonable to infer that he had knowledge of and control over supplies of drugs found at his premises. Such evidence would not, of course, be conclusive and there may be other evidence showing that such an inference should not be drawn or that it was unsafe to draw it. It was to be hoped that an opportunity would arise for the Court to consider the matter."

The court took up this invitation in R v Guney (1998) 2 Cr. App R 242. In this case the Court of Appeal was not prepared to accept that evidence of cash and lifestyle ought automatically to be excluded in relation to the issue of possession.

In this case the appellant was convicted below of possession of heroin with intent to supply. The real issue in the case, however, was possession because the appellant contended that the heroin was planted in his home, perhaps by two former business partners, where it was found by the police. The police also found £2,500.00 in cash and an unlicensed firearm and ammunition in the

#### 4.0 THE ISSUE OF INTENT TO SUPPLY (Cont'd)

the purpose of supplying them... no doubt that the finding of a large quantity of cash is capable of being relevant to an issue the jury had to consider in this case, and we reject the submission that this evidence was admissible because it was irrelevant".

However, in R v Batt (1994) Crim L.R 592 the appellant's appeal against his conviction of possession with intent to supply was allowed on the basis that the evidence of a cash find ought not to have been admitted. The cannabis was found by the police in a rabbit hutch in his garden and the police also found £150.00 in a kettle in the kitchen and evidence of this was admitted at the trial.

The appellant's appeal was allowed on the basis that the evidence of the cash was not probative of the offence because money could not have anything to do with intent to supply in the future. The cannabis that had been found; while it could have a highly prejudicial effect. B was not charged generally with drug dealing; it may have been a 'hallmark' of such dealing as the Crown contended to have a float to assist the trade, but it was also a hallmark of propensity to supply or past or future supplying generally. The judge did not direct the jury as to how to treat the evidence of the money and the conviction was not safe.

#### 4.2 ***What has been the approach of the Court on this issue since Batt and Wright?***

There has been a clear trend by the court since Batt to follow the approach in Wright on the issue of intent to supply where large amounts of cash are found. There have been several cases since Wright where the Court has upheld the admission of money and lavish lifestyle on the issue of intent to supply and on this basis the convictions in these cases have been upheld. These cases include:

- (a) R v Nicholas (1995) Crim L.R 943  
Evidence of £600.00 and a mobile phone found on the appellant on charge of possession of crack cocaine with intent to supply.
- (b) R v Okensanya (1995) Crim L.R 941  
Evidence of £8,000.00 in cash found on the appellant, £1,783.00 found on his wife which he agreed was his and of money in three bank accounts on charge of possession of controlled drugs with intent to supply. The court held that this evidence was relevant to the issue of intent to supply and to rebut the appellant's false explanation of having so much cash in his car.
- (c) R v Brown (1995) Crim L.R 716.  
Evidence of £912.00 found in the appellant's possession on a charge of possession of crack/cocaine with intent to supply.
- (d) R v Grant (1996) 1 Crim App R 73  
Evidence of £912.00 found in the appellant's possession on charge of possession of crack/cocaine with intent to supply.

#### 4.3 ***Is Batt distinguishable from Wright?***

### 3.0 THE ISSUE OF POSSESSION (Cont'd)

#### 3.3 *Where coaccused run 'cut throat' defences in drug cases and possession is in issue, is evidence of a cash find relevant and admissible as to credibility?*

The answer to this is yes.

In R v Scott (1996) Crim. LR 652 the appellant was convicted of possession with intent to supply controlled drugs found in a car in which he and his coaccused were passengers. The appellant had £311.00 on him and his coaccused had 58p.

At trial the only issue was possession with each accused running 'cut throat' defences.

On appeal the only question was whether evidence of the appellant's possession of money (and other drug paraphernalia) should have been admitted at trial.

The appeal was dismissed and it was held that this evidence was rightly admitted and that the coaccused was entitled to rely on this evidence as affecting the appellant's credibility.

### 4.0 THE ISSUE OF INTENT TO SUPPLY

#### 4.1 *Is the evidence of a cash find relevant to the issue of intent to supply?*

The answer to this is yes according to the case of R v Wright and cases following it where large quantities of cash are involved but no according to the case of R v Batt.

The starting point in an analysis of this issue is a comparison of the cases of R v Wright and R v Batt both decided in the same year but each coming to different conclusions on the relevance of the finding of cash to the issue of intent to supply.

In R v Wright (1994) Crim L.R 55 the appellant was convicted of possession of cannabis with intent to supply. The cocaine was found in his flat along with £16,000.00 and a gold necklace worth £9,000.00. It was held on appeal that the evidence of the cash and the necklace was rightly admitted.

The report of the case does not set out the text of the judgment of Bedlam J. but a portion of that judgment was referred to with approval in R v Grant (1996) 1 Cr. App R 73. In justifying the reception of the evidence in Wright - Bedlam J. said :

"Substantial capital in hard cash is essential for someone who is minded to deal in these drugs, and so it comes about that those who carry on the trade are frequently found to have in their possession large amounts of cash."

#### 4.0 THE ISSUE OF INTENT TO SUPPLY (Cont'd)

(a) R v Grant

Evidence of £912.50 found in possession of appellant on his person on charge of possession of crack cocaine with intent to supply.

(b) R v Simms (1995) Crim. L.R 304.

Evidence of £8,455.00 found in the appellant's house on charge of possession of crack with intent to supply.

#### 4.6 ***What is the nature of the direction required where evidence of cash is admitted as to the issue of intent to supply?***

In R v Grant the Court reviewed the authorities in this area and indicated the necessity for and nature of the direction that is required. Lord Taylor C.J at p/78 said:

"Where such evidence was admitted it was incumbent upon the judge to give a direction to the jury as to the way in which they should approach the question of whether the finding of the money is probative of the necessary intent. ... In our judgment it

is necessary, in the circumstances, for the judge to indicate that any explanation for the money which has been put forward by way of an innocent explanation by the accused would have to be rejected by the jury before they could regard the finding of money as relevant to the offence. Again the jury should be directed that if there was any possibility of the money being in the accused's possession for reasons other than drug dealing, then the evidence would not be probative. If on the other hand, the jury were to come to the conclusion that the presence of the money indicated not merely past dealing, but an ongoing dealing in drugs, then finding the money, together with the drugs in question, would be a matter which the jury could take into account in considering whether the necessary intent had been proved".

#### 4.7 ***Does the judge have a discretion to exclude the evidence of a cash find?***

It is submitted that the answer to this is yes.

The distinction in the direction proposed in R v Grant (see 4.6 above) between evidence of money being probative of an ongoing dealing in drugs as distinct from a past dealing indicates the prejudicial effect that this kind of evidence can have.

The question that arises therefore is whether a judge has a discretion to exclude evidence of this nature. The existence of a discretion at common-law to exclude prosecution evidence if its prejudicial effect outweighs its probative value is well recognized and was affirmed in R v Sang [1980] A.C 402.

#### 4.0 THE ISSUE OF INTENT TO SUPPLY (Cont'd)

lifestyle represent the fruits of previous offences, and that the defendant is likely to be guilty because he has

committed similar offences in the past. This is the 'forbidden chain of reasoning' that the rule against evidence of bad character and other misconduct generally prohibits. If this prejudicial tendency exceeds the probative value of the evidence, the evidence ought to be excluded in the judge's discretion".

The case of *R v Gordon (1995) Crim L.R 142* is instructive as to the kind of evidence the Court will regard as prejudicial.

The appellant was convicted of possession of a crack cocaine with intent to supply. His defence was that it was planted. When his home was searched savings books relating to accounts totalling £18,500.00 was found and £4,200.00 in cash. A BMW motorcar that the appellant was driving and a mobile telephone were both registered in different people's names. When questioned about his means the appellant denied any interest in a house which in fact had been left to him and which he rented out.

On appeal the Court held that the evidence was superfluous, irrelevant and prejudicial. In particular the court held that:

- (a) A drug dealer buying from his supplier is not going to get credit by offering a house a security. The investigation of the appellant's title to the house that he inherited some years before, and the lies he told about it, could not be relevant to the charge.
- (b) The presence of active building society accounts (opened years before) could be relevant to forestall a defence argument in relation to the loose cash that the accused did not trust banks. What was irrelevant and inadmissible was cross-examination as to past credits and withdrawals which could only found an inference of past drug dealing (opposed to present and active drug dealing). The jury were given no help as to how they should approach the savings and the house. If they convicted on the inference of past dealings, they would have been wrong.
- (c) The possession and use of mobile telephones and BMW cars is part of the stereotype of not only drug dealers, but also the young and upwardly mobile. Registration of property in the name of another may be standard practice for drug dealers, but it is also standard practice for those who wish to frustrate their creditors. As there was no evidence of the telephone or the car being used for drug dealing, they were matters which, even if possibly relevant, were so much on the fringe of the inquiry that the evidence of them should not have been admitted. If it did go in, a careful direction was required.

The court held that marginal evidence such as these items mentioned above



#### 4.0 THE ISSUE OF INTENT TO SUPPLY (Cont'd)

The Court held that there was nothing improper with this line of cross-examination and held that there was no basis to say the conviction was unsafe on this ground. At p/80 it said:

“The matter was pursued at what may be thought to be unnecessary length but in our judgment it was not an improper line of cross-examination. The fact that at the end nothing emerged to show that the appellant was paying his girlfriend’s bills is neither here or there”.

#### 5.0 CONCLUSION

The trouble that the English Courts have had wrestling with the issues concerning relevance of money and lifestyle in drug cases reinforces the point made by the Court in Guney that:

“The question whether evidence is relevant depends not on abstract legal theory but on the individual circumstances of each particular case...”

It will be interesting to see how our Courts deal with the relevance of this kind of evidence if and when it comes up for consideration.