



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Brake*, 2019 NLCA 20

Date: April 3, 2019

Docket Number: 201701H0077

BETWEEN:

DENNIS BRAKE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, White and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Bank

Appeal Heard: October 25, 2018

Judgment Rendered: April 3, 2019

Reasons for Judgment by: White J.A.

Concurred in by: O'Brien J.A.

Dissenting Reasons by: Welsh J.A.

Counsel for the Appellant: Stephen P. Orr and Matthew Drover

Counsel for the Respondent: Elaine Reid

White J.A.:

BACKGROUND

[1] Dennis Brake was charged with one count of possessing cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19

[2] The charge stemmed from police surveillance of another individual, Darren Pittman. Police were investigating Mr. Pittman for trafficking in cocaine. On the morning of June 22, 2016, Mr. Pittman was under surveillance by a team of police officers in several unmarked vehicles as he drove from Marystown, NL to Paradise, NL. Police observed Mr. Pittman acquire a brick of cocaine from another individual in Paradise, NL.

[3] Upon acquiring the cocaine, Mr. Pittman was kept under police surveillance as he began to drive back to Marystown. The investigating officers were using an iPad to capture data about the location of cell phones being used by four suspects, including Mr. Pittman and Mr. Brake.

[4] The police intended to arrest Mr. Pittman along the Burin Peninsula Highway. However, approximately 10 minutes before Mr. Pittman arrived in Goobies, NL, the iPad alerted police that Dennis Brake's cell phone was in Goobies. The police then revised their plan and decided to arrest Mr. Pittman in Goobies to avoid the possibility of losing track of the cocaine.

[5] In Goobies, two officers stopped near the gas pumps in front of the building and backed up to stay out of sight of Mr. Pittman. Another officer was facing Mr. Pittman's car in the parking lot at the western end of the building, two or three spaces away. While the officer was watching Pittman, Mr. Brake approached Mr. Pittman's car from the right.

[6] Mr. Brake opened the passenger door of Mr. Pittman's car and got in. Mr. Pittman got out, walked to the rear of the car, and opened the trunk. He closed the trunk and got back in the driver's seat of the car. Mr. Pittman then moved the car. He drove in a left arc, around to a point where the car was behind a parked tractor trailer. The officer could then only see the part of Mr. Pittman's car visible under the tractor trailer. She saw the driver's legs get out of the car, walk to the rear of the car, the trunk opened and closed, and then the driver returned

to the driver's seat. Then the car moved ahead, and turned left, coming back to the passenger vehicle parking area, but not to the original position.

[7] One of the officers then pulled his car in front of Mr. Pittman's car and he and another officer went to the passenger door of Mr. Pittman's car. Mr. Brake was sitting in the passenger seat, partially turned towards Mr. Pittman. The officer opened the car door, and told the accused to show his hands, and to get out of the car. He did so. There was a gray plastic shopping bag on the floor in the foot well of that seat. That bag contained the brick of cocaine.

[8] Mr. Brake testified that he assumed Mr. Pittman wanted him to go to Goobies and give him a ride to Marystown. Part of that assumption was that Mr. Pittman had arranged a ride from St. John's to Goobies. Mr. Brake borrowed his mother's car to drive over 90 minutes on the assumption that Mr. Pittman, for whom he was working for little pay, might need a ride back to Marystown. When he got to Goobies, Mr. Pittman was there with a car. Mr. Brake testified that he did not ask Mr. Pittman why he had asked Mr. Brake to drive from Marystown to Goobies, when Mr. Pittman had transportation.

[9] When Mr. Pittman drove the car behind a tractor trailer, got out of the car, and went behind the car, Mr. Brake testified that he assumed that Mr. Pittman was urinating behind the car. Mr. Brake testified that he did not see a package, and, had there been a package like the one described, he would have assumed that it was a trash bag. Mr. Brake further testified that he had no involvement in cocaine trafficking.

[10] The trial judge determined a key issue to be whether or not Mr. Brake knew that there was a kilogram of cocaine in the gray shopping bag. He relied upon the expert opinion of a Constable Emberley in finding "it would appear that the sequence of events (the accused gets in the car, they drive behind the tractor trailer, Mr. Pittman gets the cocaine from the trunk, and they drive around to the parking lot again) is consistent with the supplier Mr. Pittman trusting the accused to know about the presence of such a large amount of cocaine" and also found "it follows that a person (or persons) in possession of a kilogram of cocaine is in possession of the cocaine for the purpose of trafficking it".

[11] The trial judge ultimately concluded "this is a circumstantial case, in which the logical inferences to be drawn from the evidence are consistent only with the guilt of the accused". He entered a conviction.

ISSUES

[12] The issues in this appeal can be summarized as:

1. Are the trial judge's reasons sufficient?
2. Did the trial judge commit an error of law in applying the test for possession?

[13] Mr. Brake indicated in his notice of appeal that he was also seeking leave to appeal his sentence but confirmed at the hearing that he is no longer seeking such leave.

ANALYSIS

Sufficiency of reasons

[14] The Supreme Court of Canada addressed the duty to give reasons in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869. The Court explored the issue further in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 and laid out the functions of reasons and the test for determining whether reasons are sufficient, as summarized by Justice O'Brien in *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65:

[151] In *R.E.M.* the Supreme Court outlined, at paragraph 11, the three functions of reasons for judgment in a criminal context; namely that they "tell the parties affected by the decision why the decision was made", they "provide public accountability of the judicial decision", and they "permit effective appellate review".

[152] The Supreme Court in *R.E.M.* reviewed various authorities on the sufficiency of reasons and made the following observations:

[35] In summary, the cases confirm:

- (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, ...
- (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. ...
- (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence,

the submissions of counsel and the history of the trial to determine the “live” issues as they emerged during the trial.

(Emphasis in original.)

[15] Mr. Brake contends that the trial judge’s reasons were not sufficient because he failed to consider the appellant’s evidence and failed to apply the test for weighing the credibility of an accused’s evidence as outlined in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[16] It is trite law that the trial judge need not refer to the *W. (D.)* test nor explicitly outline the test. What is important is that the judge give reasons sufficient to allow the parties to know why a verdict was reached and to permit appellate review. As stated by Deschamps J. in *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C. R. 499:

[29] ... The approach set out in *W. (D.)* is not a sacrosanct formula that serves as a straitjacket for trial courts. Trial judges deliver oral judgments every day and often limit their reasons to the essential points. It would be wrong to require them to explain in detail the process they followed to reach a verdict. They need only give reasons that the parties can understand and that permit appellate review: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, and *R. v. Burns*, [1994] 1 S.C.R. 656. In the instant case, the judge, by stating that she did not believe Mr. Boucher, was implicitly addressing the first two steps in *W. (D.)*.

[17] Further, in *R.E.M.* the Court emphasized that:

[45] Just as it is reasonable to infer that the trial judge seized the import of the evidence, it is generally reasonable to infer that the trial judge understands the basic principles of criminal law at issue in the trial. Indeed, for this reason it has repeatedly been held that “[t]rial judges are presumed to know the law with which they work day in and day out”: *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not required to recite pages of “boilerplate” or review well-settled authorities in detail, and failure to do so is not an error of law. ...

[18] In his reasons, the trial judge summarized Mr. Brake’s testimony concluding that Mr. Brake’s evidence was equivocal and detailed the deficiencies:

[27] The evidence of the accused was equivocal: he assumed that Pittman wanted him to go to Goobies to meet Pittman, and give him a ride to Marystown. Part of that assumption was that Pittman had arranged a ride from St. John’s to Goobies. He

borrowed his mother's car to drive over 90 minutes on the assumption that his boss, for whom he was working for little or no pay, might need a ride back to Marystown. When he got to Goobies, Pittman was there with a car. Despite this, the accused did not ask Pittman why he had invited the accused to drive from Marystown to Goobies.

[28] When Pittman drove the car behind a tractor trailer, got out of the car, and went behind the car, the accused assumed, without any indication of the sort from Pittman, that Pittman was urinating behind the car. The accused did not see a package, did not recall seeing a package, and, had there been a package like the one described, he would have assumed that it was a trash bag.

[19] The trial judge noted that there was a live issue as to whether the accused knew the cocaine was there and if so whether it was there with his consent (the issue of control is addressed below).

[20] The trial judge then summarized the evidence of the expert witness, Constable Emberley, explained why he accepted his evidence while noting that Emberley's opinion was sound.

[21] The trial judge concluded, "I am persuaded by the evidence here that the accused was a party to the actual possession of the "brick" of cocaine which the police found next to his feet in the foot well of Pittman's car".

[22] It is evident from the trial judge's reasons that he did not accept the evidence of the accused and it is equally evident that he accepted the expert witness evidence and based his findings upon that. The trial judge's reasons in this case are sufficient and satisfy the functions of reasons as outlined above. From reading the reasons as a whole and in the context of the evidence, the arguments and the trial, the trial judge's basis for his verdict are intelligible and, capable of appellate review. I would dismiss this ground of appeal.

Application of the Test for Possession

[23] Section 686(1)(a) of the *Criminal Code* outlines when an appeal may be allowed:

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,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

...

[24] Mr. Brake argues the judge erred in his application of the tests for circumstantial evidence and possession which resulted in a wrong decision on a question of law.

[25] Mr. Brake was charged with possession of cocaine for the purpose of trafficking under of the *Controlled Drugs and Substances Act*. Possession is defined in section 2 of the *Act* as:

2(1) possession means possession within the meaning of subsection 4(3) of the *Criminal Code*;

[26] The definition of possession in section 4(3) the *Criminal Code*, RSC 1985, c. C-46 is:

4(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 custody and possession of each and all of them.

[27] Possession can be either personal (section 4(3)(a)), constructive (section 4(3)(a)(i) and (ii)) or joint (section 4(3)(b)).

[28] The trial judge correctly identified the elements of each type of possession that the Crown must prove beyond a reasonable doubt:

[30] S. 4 of the *Criminal Code* provides that possession may be actual, joint, or constructive. Actual possession requires contemporaneous knowledge, consent, and control: see *R. v. Hess* (No. 1) (1948), 94 C.C.C. 48 (B.C. C.A.) and *R. v.*

Beaver (1957), 118 C.C.C. 129 (S.C.C.). It follows that, before the accused can be found guilty of actual possession of the “brick” of cocaine, the Crown must establish beyond reasonable doubt that he voluntarily had knowledge of it and exercised some control over it.

[31] Joint possession also requires proof of knowledge, consent, and some measure of control: see *R. v. Fisher* 2005 BCCA 444.

[32] In *R. v. Colvin* (1942), 78 C.C.C. 282, 58 B.C.R. 204 (B.C. C.A.), the British Columbia Court of Appeal dealt with the meaning of "consent" in the context of joint possession under a predecessor of s. 4(3)(b). In that case, the two accused persons were found with another in the other's room in which morphine was also found. They were acquitted at trial on the basis that, although they had knowledge of the presence of the drug in the room, the Crown was required to establish they had a right to exercise some measure of control over it and their mere acquiescence did not establish any such right. At para 20, O'Halloran J.A. said as follows:

The "knowledge and consent" which is an integral element of joint possession in sec. 5 (2) must be related to and read with the definition of "possession" in the previous sec. 5 (1) (b). It follows that "knowledge and consent" cannot exist without the co-existence of some measure of control over the subject-matter. If there is the power to consent there is equally the power to refuse and vice versa.

[33] In *R. v. Morelli*, 2010 SCC 8, 2010 SCC 8 (S.C.C.) at para. 17, Fish J. summarized the requirements of constructive possession as follows:

Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keep the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

[34] Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the presence or nature of those objects: see *R. v. Amado*, [1996] B.C.J. No. 1943 (B.C. S.C.), *R. v. McIntosh*, 2003 CarswellOnt 1099 (O.S.C.J.), and *R. v. Tsang*, 2014 BCSC 1055, 2014 BCSC 1055 (B.C. S.C.)

[29] As can be seen from the trial judge's reasons, knowledge and control must be proven beyond a reasonable doubt to establish any of the three types of possession under section 4(3). The Supreme Court of Canada made this point in *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 15:

15 For the purposes of the *Criminal Code*, "possession" is defined in s. 4(3) to include personal possession, constructive possession, and joint possession. Of these three

forms of culpable possession, only the first two are relevant here. It is undisputed that knowledge and control are essential elements common to both.

[30] The trial judge's findings on the elements of consent can be seen from the following excerpts of his reasons:

[35] The evidence in this matter is that the accused got into the passenger seat of Pittman's car. Pittman got out, went to the trunk, opened and closed the trunk and got back in the car. Pittman then drove the car around to a position behind a parked tractor trailer truck. There, he got out, went to the trunk, opened and closed it a second time, and got back in the driver's seat. Then he drove the car around to the parking area again and parked. At that point, the police approached the vehicle. They took the two occupants out of the car, and found a grey plastic shopping bag containing a "brick" of cocaine in the passenger side foot well, where the accused's feet had been. The accused would have been in close proximity to the grey plastic shopping bag for less than a minute.

[36] On this evidence, there is a live issue about whether the accused knew that there was a kilogram of cocaine in the gray shopping bag. Even if he knew it was there, was it there with his consent, or, like Colvin, above, was he merely acquiescing in the presence of it? This is where the evidence of the expert witness is pivotal.

...

[44] In the context of the opinion provided by Cst. Emberley, it would appear that the sequence of events (the accused gets in the car, they drive behind the tractor trailer, Pittman gets the cocaine from the trunk, and they drive around to the parking lot again) is consistent with the supplier Pittman trusting the accused to know about the presence of such a large amount of cocaine.

...

[47] ... I am persuaded by the evidence here that the accused was a party to the actual possession of the "brick" of cocaine which the police found next to his feet in the foot well of Pittman's car.

...

[52] This is a circumstantial case, in which the logical inferences to be drawn from the evidence are consistent only with the guilt of the accused. A conviction is entered.

(Emphasis added.)

[31] As stated by the trial judge, control is an essential element to a finding of possession. The trial judge found that Mr. Brake had knowledge of the cocaine; his reasons do not include a finding that Mr. Brake had control of the drugs.

[32] To enter a conviction when all elements of an offence have not been established beyond a reasonable doubt constitutes an error of law. As stated by the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1:

39 [...] After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[33] While the Crown acknowledges that the trial judge's reasons do not include a finding on control, they argue that it is a logical inference in light of the evidence referred to by the trial judge.

[34] In reaching his conclusion that Mr. Brake had actual possession (i.e. personal possession) of the cocaine, the trial judge stated that the expert evidence of Constable Emberley was "pivotal". Constable Emberley was qualified as an expert "in the use, availability, distribution, packaging, sale, price and value of cocaine."

[35] In dealing with the evidence of Constable Emberley, the trial judge described secretive practices of drug dealers. He referred to a large number of drug transactions taking place in parking lots and to Mr. Pittman moving his car to behind the tractor trailer being consistent with a drug dealer seeking to avoid surveillance and robbery by other dealers.

[36] The judge refers, in his decision, to the case of *R. v. Dunn* (2014 NLTD(G) 151, 359 Nfld. & P.E.I.R. 270) as an example of a court having previously accepted Constable Emberley's opinion that it would be "unusual" for a drug trafficker to allow certain items to be in the presence of another "who was not also involved in trafficking". This is the same type of opinion evidence Constable Emberley gave in the present case, which was relied upon by the judge to convict Mr. Brake.

[37] The judge stated:

[45] ... For example, in *R. v. Dunn*, 2014 NLTD(G) 151, Burrage, J. said, at para 24 that "...given the propensity for home invasions and the secretive behaviour of drug traffickers, it was also Constable Emberley's opinion that it would be "unusual" for a

trafficker to have the items seized on 8 June 2012 present in the presence of someone else, who was not also involved in the trafficking.”

[38] *Dunn*, however, dealt with very different circumstances. Mr. Dunn was found, with others, in a dwelling house which was raided by police, who found various items consistent with drug trafficking (including drugs, scales, a cutting agent, large amounts of cash etc.). The judge also found there was evidence Mr. Dunn lived in the house.

[39] In *Dunn*, the Court described the circumstances, and Constable Emberley’s opinion:

[23] Constable Emberley testified that home invasions amongst drug dealers are a common occurrence and, as a result, drug traffickers are secretive about the location of their cash and drugs.

[24] It was Constable Emberley’s opinion that the quantity of cocaine found, the large amount of Canadian currency comprised largely of \$20 bills, presence of scales, Creatine, plastic bags and weapons were all consistent with the trafficking of cocaine rather than personal use. Further, given the propensity for home invasions and the secretive behaviour of drug traffickers, it was also Constable Emberley’s opinion that it would be “unusual” for a trafficker to have the items seized on 8 June 2012 present in the presence of someone else, who was not also involved in the trafficking.

...

[64] Constable Morgan described an individual matching the description of Dunn entering 85 Mayor Avenue on 7 June 2012. The following day the front entrance to that residence was placed under surveillance from 1:30 p.m. until the time of police entry at 5:15 p.m. During this period Dunn was not seen entering or leaving the home, yet he was present at the time the police arrived. It is not known for how long Dunn was present prior to the police entry.

[65] What is a proven fact is at the time of Constable Walsh’s entry he observed Dunn, together with Ryland and Hammond in the living room. All three were then in the presence of 8 grams of cocaine in plain view on the coffee table (the knowledge of which, but not control, is conceded by Dunn). In addition, also in plain view on the coffee table was \$4,965 comprised largely of \$20 bills, a set of digital scales (of the type commonly used by drug traffickers according to Constable Emberley), an open bottle of Creatine (used to “cut” or reduce the potency of cocaine) and two knives.

...

[70] Constable Emberley testified that raids among drug dealers are common and it would be unusual for the items seized on 8 June 2012 to be in the presence of someone not in the possession and trafficking of drugs.

Notwithstanding the very different factual circumstances in *Dunn*, the trial judge appears to rely on the reasoning and conclusion of the judge in that case:

[47] Like Burrage, J., I am persuaded by the evidence here that the accused was a party to the actual possession of the “brick” of cocaine which the police found next to his feet in the foot well of Pittman’s car.

[40] The trial judge relied on Constable Emberley’s evidence in finding that the actions of Mr. Pittman were indicative of “Pittman trusting the accused to know about the presence of such a large amount of cocaine.”

[41] However, this conclusion is with respect to the actions and intentions of Mr. Pittman, not Mr. Brake. The trial judge made no specific finding on control, and it is not a logical inference from the evidence. A finding that Mr. Pittman trusted Mr. Brake to know about the cocaine does not lead to an implied conclusion that Mr. Brake had control of the cocaine.

[42] In some situations, a trial judge’s reasons may be capable of showing that both knowledge and control were considered and established, despite not including an explicit finding on both points. However, that is not the situation in the present case.

[43] Absent a finding of control, the trial judge erred in applying the legal test for possession. This is an error of law sufficient to set aside the conviction.

SUMMARY

[44] The trial judge’s reasons were sufficient to allow for appellate review. I would dismiss that ground of appeal. However, I would allow the appeal on the basis that making a finding of possession without making a finding on the required element of control constitutes an error of law. I would order a new trial pursuant to section 686(2)(b) of the *Code*.

C. W. White J.A.

I Concur: _____

F. P. O’Brien J.A.

Dissenting Reasons by Welsh J.A.:

[45] The issues on this appeal are two-fold: (1) Are the trial judge's reasons sufficient; and (2) Did the trial judge commit an error of law in applying the test for possession? Regarding the first, I agree with the decision of White J.A. dismissing that ground of appeal (paragraph 22, above). For the following reasons, I do not agree with his determination that the trial judge erred in law in applying the test for possession. I would, therefore, dismiss the appeal.

[46] Mr. Brake submits that the verdict is unreasonable on the grounds that: (1) the evidence is circumstantial and does not provide the basis for a finding of guilt beyond a reasonable doubt; and (2) Mr. Brake's possession of the cocaine was not proven beyond a reasonable doubt. It is convenient to deal with these together.

[47] The relationship between a reasonable verdict and circumstantial evidence is discussed in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000. Cromwell J., for the Court, explained:

[55] A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence

[56] ... The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

A reasonable doubt is based on "reason and common sense". The Crown is not required to provide proof "to an absolute certainty" or to negative "every conjecture" (*Villaroman*, at paragraph 50).

[48] In assessing Mr. Brake's involvement in the offence, the question of his presence in Mr. Pittman's vehicle must be considered. In *R. v. Jackson*, 2007 SCC 52, [2007] 3 S.C.R. 514, Fish J., for the majority, referred to the proposition as "entirely sound" that "the mere presence at the scene of a crime does not prove culpable participation in its commission" (paragraph 3). Fish J. continued:

[3] ... [That proposition] is of little assistance to the appellant, whose conviction does not rest on his *mere presence* at the scene of the crime. It rests, rather, on the cumulative effect of his apprehension at the scene, the rejection of his explanation for being there, the particular nature of the offence, the context in which it was committed, and other circumstantial evidence of his guilt. ... [Italics in the original.]

A similar comment would apply to this appeal. The trial judge recognized that Mr. Brake's defence "was one of innocent association", but, based on the whole of the evidence, he was satisfied that Mr. Brake's guilt was proven beyond a reasonable doubt (decision of the trial judge, at paragraph 1).

[49] In determining whether a person is in "possession" of an item, section 4(3) of the *Criminal Code*, which applies equally to offences under the *Controlled Drugs and Substances Act*, is apposite:

For the purposes of this Act

(a) a person has anything in "possession" when he has it in his personal possession or knowingly

...

(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.

[50] In assessing whether the trial judge erred in relying on the circumstantial evidence to conclude that the Crown had proven Mr. Brake's guilt beyond a reasonable doubt, the amount and form of the cocaine, described as a one kilogram "brick", and the circumstances of the meeting between Mr. Brake and Mr. Pittman are particularly relevant when considered in conjunction with evidence of the police officers.

[51] In considering the circumstantial evidence, the trial judge accepted the evidence of Constable Emberley, who, having worked exclusively in the investigation of drug offences since 2009, was qualified as an expert "in the use, availability, distribution, packaging, sale, price, and value of cocaine" (decision of the trial judge, at paragraph 37). Constable Emberley gave his expert opinion that this amount of cocaine, in a brick, was indicative of the "supplier level" of

trafficking, and that the individual would be extremely secretive and guarded about it. He testified that a person with a kilogram of cocaine in his vehicle is not going to allow anyone else in the vehicle unless the other person is involved with the trafficking or transportation of it. That evidence was considered by the trial judge in the context of how Mr. Brake met up with Mr. Pittman and Mr. Pittman's activities while Mr. Brake was in the vehicle where the cocaine was situated.

[52] The event began on the afternoon of June 22, 2016 with multiple police officers in unmarked police cars involved for the purpose of ultimately arresting Mr. Pittman, who had been under surveillance, for trafficking in drugs. The police first observed Mr. Pittman putting a brick of cocaine into the trunk of his car. He was followed as he drove to Goobies. While following Mr. Pittman, the police became aware that Mr. Brake, who was also under surveillance, but not expected to be involved on that day, was also driving to Goobies.

[53] After both had arrived at Goobies, Mr. Brake got into the passenger seat of Mr. Pittman's car. The evidence was that, until then, Mr. Pittman had been under constant surveillance and had not opened the trunk of his car. After Mr. Brake got into the car, Mr. Pittman was seen going to the trunk, opening then closing it, and returning to the driver's seat before driving behind the restaurant and out of sight. It was reasonable for the judge to infer that Mr. Pittman was intending to bring the brick of cocaine from the trunk into his car, but decided to be more careful by moving the vehicle to behind a parked tractor trailer where it would be more difficult to observe him.

[54] The officer who was watching the driver's side of Mr. Pittman's car could only see the part of the car that was visible under the tractor trailer. The trial judge accepted the evidence that:

[13] ... She saw the driver's legs get out of the car, walk to the rear of the car, the trunk opened and closed, and then the driver returned to the driver's seat. Then the car moved ahead, and turned left, coming back to the passenger vehicle parking area, but not to the original position.

[55] The police then approached Mr. Pittman's car. The judge accepted the testimony that:

[14] ... [Mr. Brake] was sitting in the passenger seat, partially turned towards Pittman, and smoking. The passenger door was not closed, but resting against the frame of the door. [The officer] opened the car door, and told [Mr. Brake] to show her

his hands, and to get out of the car. He did so. There was a gray plastic shopping bag on the floor in the foot well of that seat. That bag contained the “brick” of cocaine.

[56] Mr. Brake testified that he worked occasionally for Mr. Pittman, operating heavy equipment, doing mechanical work and driving to St. John’s for parts. He said he owed Mr. Pittman about \$700 for snow clearing that Mr. Pittman had done for Mr. Brake’s mother, but that debt had been paid by mid-June, 2016. Mr. Brake provided no records of when he worked for Mr. Pittman, or how much or when he was to be paid. He testified that, about noon on June 22, 2016, Mr. Pittman sent him a text asking if he was “interested in going to Goobies” (decision of the trial judge, at paragraph 20). Mr. Brake said Mr. Pittman did not say why he wanted him to go to Goobies, and that he did not ask. He testified that he assumed Mr. Pittman had a ride from St. John’s to Goobies and wanted him to pick him up there to continue the drive to Marystown. Mr. Brake testified that he had to borrow his mother’s van because he did not have the money to purchase fuel for his truck.

[57] In his testimony, Mr. Brake agreed that he got into the front passenger seat in Mr. Pittman’s car and further that (decision of the trial judge):

[24] Then, said [Mr. Brake], Pittman backed out of the parking stall, and drove the car to a position between two tractor trailer trucks in the back of the parking lot. Pittman got out, he said, and went behind the car. Pittman did not say why he was doing this; [Mr. Brake] assumed that he was urinating behind the car. Despite the fact that there were public washrooms in the gas station, he said that he has often relieved himself in the back of the parking lot. Then, said [Mr. Brake], Pittman got back in the car, and drove around the truck, and back to the original parking spot. He had nothing in his hands, according to [Mr. Brake].

[25] [Mr. Brake] said that there was nothing under or between his feet in the passenger side foot well of the car. Then he said that he did not remember seeing any package in the foot well. Then he said that, if there was a package in the foot well leaning against the centre console, he did not see it. He added that, had there been a plastic bag there, he would have assumed it was there for trash.

[26] [Mr. Brake] concluded his cross-examination by saying that he definitely did not see any package in the foot well, that he did not recall seeing a package there, and that he had no involvement in cocaine trafficking.

[58] The trial judge concluded that Mr. Brake’s testimony was equivocal. I would draw from the judge’s summary, at paragraphs 27 and 28, that he was satisfied that Mr. Brake’s evidence was not believable. For example:

[27] ... He borrowed his mother's car to drive over 90 minutes on the assumption that his boss, for whom he was working for little or no pay, might need a ride back to Marystown. When he got to Goobies, Pittman was there with a car. Despite this, [Mr. Brake] did not ask Pittman why he had invited [him] to drive from Marystown to Goobies.

[28] When Pittman drove the car behind a tractor trailer, got out of the car, and went behind the car, [Mr. Brake] assumed, without any indication of the sort from Pittman, that Pittman was urinating behind the car. The accused did not see a package, did not recall seeing a package, and, had there been a package like the one described, he would have assumed that it was a trash bag.

[59] Mr. Brake's evidence was tested against evidence of the police officers who testified that, after he had driven to a place behind a tractor trailer, Mr. Pittman went to the back of the car. He opened and closed the trunk, where the cocaine was situated. This would not seem consistent with him going there for the purpose of urinating. Further, while Mr. Brake was equivocal about the presence of the package, the officers testified that the brick of cocaine was, in fact, located in the foot well of the passenger seat. It was clear that the judge did not accept Mr. Brake's testimony.

[60] The judge might have taken a different view if Mr. Brake had been more forthright and had not changed his testimony regarding a package in the foot well, or if he explained that, when Mr. Pittman came back to his seat after opening and closing the trunk, he placed a package by Mr. Brake's feet, but that he had no idea what the package contained.

[61] To provide a broader context for the events that took place, the trial judge turned to the evidence of Constable Emberley (decision of the trial judge):

[41] Cst. Emberley described the practice of drug dealers, and drew a sharp distinction between street level dealers and suppliers. While the former have to rely on high numbers of customers to move their product, the latter tend to be extremely secretive, and very selective as to who is allowed into their fold. In the city of St. John's, according to Cst. Emberley, drug dealers get robbed every day. As a result, having a large quantity of drugs on hand makes the supplier a vulnerable target. This renders the drug supplier business very secretive.

[42] A large number of drug transactions take place in parking lots. Cst. Emberley said that there are multiple reasons for choosing a public venue like a parking lot for a drug transaction. These include the fact that there are many people passing through the parking lot, the drug dealer can watch for police surveillance and anyone who might rob him of the product, and the multiple avenues of escape in the event that he has to flee. Cst. Emberley has seen many drug transactions take place in parking lots.

[43] Cst. Emberley said that the movement of Pittman's car around to behind the tractor trailer before retrieving the kilogram brick of cocaine from the trunk of the car is consistent with the drug trafficker trying to avoid both surveillance by the police and robbery by other drug dealers. He also said that, in his experience, drug traffickers at the supplier level are so secretive that only their partners are allowed to know where their large amounts of drugs are kept.

[44] In the context of the opinion provided by Cst. Emberley, it would appear that the sequence of events ([Mr. Brake] gets in the car, they drive behind the tractor trailer, Pittman gets the cocaine from the trunk, and they drive around to the parking lot again) is consistent with the supplier Pittman trusting [Mr. Brake] to know about the presence of such a large amount of cocaine.

[45] Constable Emberley's opinion is sound, and has been accepted many times by our courts. ...

...

[47] ... I am persuaded by the evidence here that [Mr. Brake] was a party to the actual possession of the "brick" of cocaine which the police found next to his feet in the foot well of Pittman's car.

[62] Based on the circumstantial evidence, the trial judge was satisfied that Mr. Brake had knowledge of the cocaine, that he consented to possession of the cocaine, and that he, together with Mr. Pittman, had control over the cocaine. (Regarding the elements of possession, see *R. v. Bonassin*, 2008 NLCA 40, 278 Nfld. & P.E.I.R. 45, at paragraph 26.)

[63] In reaching this conclusion, the trial judge considered the whole of the circumstances together with the evidence of Constable Emberley who described the secretive manner in which a person having a brick of cocaine could be expected to act. If Mr. Brake was not intended to be involved in transporting the cocaine, and thereby becoming involved in its trafficking, there was no reason for Mr. Pittman to retrieve the cocaine from the trunk of his car. Indeed, until he had Mr. Brake's agreement to take control of the cocaine, Mr. Pittman would have no reason to retrieve it and place it in the foot well where Mr. Brake was sitting. Further, based on their surveillance, the evidence of the police officers was that the first opportunity Mr. Pittman had to take the cocaine out of the trunk was after Mr. Brake got into the car and Mr. Pittman moved the car to a position behind a tractor trailer where it would be difficult to observe him and where he would be able to see who might be observing him.

[64] All these factors led the trial judge to conclude that Mr. Brake knew that Mr. Pittman had a quantity of cocaine, that he consented to take possession of the cocaine, and that, when the police officers intervened, Mr. Brake and Mr. Pittman had joint control over the cocaine. The judge was satisfied that this was the only reasonable conclusion available on the totality of the evidence. I agree.

[65] As set out above in *Jackson*, Mr. Brake's mere presence in the car is not the basis for the trial judge's determination to convict him of possession of cocaine for the purpose of trafficking. Rather, the judge relied on the whole of the evidence, including the cumulative effect of his apprehension at the scene, the rejection of his explanation for being there, the particular nature of the offence, the context in which it was committed, and other circumstantial evidence of his guilt.

[66] I am satisfied that there is no basis on which to conclude that the trial judge erred in convicting Mr. Brake, having determined, based on the whole of the circumstantial evidence, that the elements of the offence were proven beyond a reasonable doubt.

[67] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.