

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION**



Neutral Citation Number: [2025] CIGC (Crim) 22

Case Number: SCA 3 of 2025

ADRIAN FREDERICK SCALES

V

THE KING

**Appearances: Mr. Jonathon Hughes, Counsel for the Appellant
Mr. Martin Mulgrew, Counsel for the Respondent**

Before: Hon. Justice Emma Peters

Submissions Heard: 30th May 2025

Ruling Delivered: 13th June 2025

RULING ON APPEAL AGAINST CONVICTION

Introduction

1. At a retrial in January 2025 (the original conviction having been quashed by Richards J following a previous appeal), the Appellant Adrian Scales was convicted by the Summary Court (Hon. Magistrate Allard) on a single charge of importing 0.09g of fentanyl into the Cayman Islands. He has in total spent the equivalent of a 28-month sentence in custody in connection with this matter. He now appeals that conviction pursuant to section 165 of the Criminal Procedure Code (2021 Revision).

2. On the date of his conviction the Appellant entered an oral notice of appeal pursuant to section 166(2) of the Code. His perfected grounds of appeal are that:
 - a. The learned Magistrate misapplied the burden of proof with respect to the *mens rea* element of the offence.
 - b. As a result of this error, the resultant conviction is unsafe and unsatisfactory.

The legal provision this appeal concerns



3. Section 9(1)(a) of the Misuse of Drugs Act (2017 Revision) states:

“Where it is proved beyond reasonable doubt that a person imported anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing...”

Submissions on behalf of the Appellant

4. It is submitted by the Appellant and accepted by the Respondent that since the passage into law in the UK of the Human Rights Act 1998 (which imported the European Convention on Human Rights into UK domestic law) and the Bill of Rights under the Cayman Islands Constitution Order, Courts in both jurisdictions have made it clear that these provisions must be read in a way that is compatible with basic human rights, including the presumption of innocence.
5. In *De Acosta* [2006 CILR 362], the Cayman Islands Court of Appeal provided the following guidance on the issue at [8] – [9]:

‘8. Before parting with this appeal, the court on its own motion referred counsel to the reasons of the magistrate where she stated:

“I am satisfied that the Crown has established beyond a reasonable doubt that the defendant imported the cooler which contained the cocaine into the Cayman Islands. Pursuant to s.9(1)(a) of the Misuse of Drugs Law (2000 Revision) the presumption is raised that the defendant was aware of the

presence of the cocaine in the cooler. There is a burden on the defendant to prove the contrary.

It is a settled principle that the defendant's burden is lighter than the prosecution's and consequently the standard to be met by the defendant is on a balance of probabilities."

9. This direction should no longer be given. The directions which should now be given to the jury (or a judge sitting alone), in applying the words "to prove" and "if he proves" should be that the burden of proof remains on the prosecution throughout. If sufficient evidence is adduced on behalf of the defendant to raise the issue of knowledge, it will be for the prosecution to show beyond a reasonable doubt that the defence is not made out by the evidence (see R. v. Lambert (3), ([2002] 2 A.C. 545, at para. 42, per Lord Steyn; ibid., at para. 94, per Lord Hope; and ibid., at para. 192, per Lord Hutton). The directions to be given on the burden of proof as stated in R v. Lambert were approved and adopted in the case of R. v. Darrell (2) in the Bermudan Court of Appeal.'

6. The learned Magistrate in this case deals with the issue at paragraphs 23 and 29 - 45 of her verdict judgment, wherein she acknowledges the case of *De Acosta*. Criticism is made of the manner in which she applies that burden at paragraph 44 of her verdict ruling.
7. The substance of the Learned Magistrate's findings on this point are that the Appellant, in proffering no more than "bare denials" failed to adduce sufficient evidence to raise the issue of knowledge, and therefore did not do enough to engage section 9(1)(a).
8. At paragraphs 44 and 45 she stated as follows:

"It seems to me therefore, that for the Defendant to avail himself of the defence under section 9(1) (a), more than a bare denial must be necessary, for him to satisfy the De Acosta "sufficient evidence" burden test. I take the view that Mr. Scales' bare denial falls short of this "sufficient evidence" standard and section 9(1)(a) does not assist him. I am satisfied therefore, and I am sure that S. 9(1) (a) applies and that there is a presumption that Scales knew that the Fentanyl was in the Ziplock bag in his backpack when he imported the backpack on 4th of October 2022, and that Scales has not satisfied the sufficient evidence burden needed to displace this presumption."



9. The defence submits that there is a fundamental error in this part of the judgment, an error that they say is so central to the burden and standard of proof on the only issue in the case (that of knowledge) that the error, if there is one, should be considered fatal to the conviction.
10. They say that the Learned Magistrate has sought to characterise the defendant's case as "no more than a repeated denial." Whereas the reality was that the Appellant raised the fact that he had recently loaned his backpack to a friend not only, the defence say, in significant detail in his oral evidence under oath at trial, but also when he was initially confronted by CBC officers at the airport.

11. CBCO Drake Watson in his evidence in chief stated as follows:



"I was present when West asked Scales questions. When questioned about the substance, he said it wasn't his backpack, he lent it to a friend so the substance wasn't his. There were other comments made, but that's the one that stood out to me. That's the only one I can recall."

12. In his evidence to the Court (it is said both at his trial and re-trial), the defendant gave an account about the loaning of his backpack to a friend. In his evidence in chief at the retrial he said as follows, as recorded in the Court's official record:

"I came to Cayman with luggage plus a backpack. Two and a half weeks before, I was playing basketball with a friend in Maryland. D'Andre Mitchell. 5 on 5 basketball. We had a regular game every weekend in evening. We were going to get something to eat and D'Andre asked to borrow my bag to put his shoes in. He had two pairs. One to play and one not to play. I gave him my bag. He had it for a week and a half.

I told him I was travelling and needed my bag. I got it back and then 4 days later, I travelled (Counsel gets a bag and presents to the witness)

This is the bag, yes. That's the bag I lent D'Andre. I put a charger, some water, a couple snacks and a sweater. It has a lot of pockets and compartments. I never thought to check it, we've loaned each other things."

13. Having considered all of this material, the Learned Magistrate concluded that she did, “not consider that his bare denial of knowledge and ownership of the baggie can be considered “sufficient” to satisfy that De Acosta burden.”
14. Mr. Hughes submits that this was wrong both factually and legally. He suggests that factually the appellant’s case went much further than a “bare denial,” with dates, names and locations put forward in support of his account and that by saying what he did both upon arrest and at trial that the Appellant had in fact discharged the evidential burden placed upon him.
15. The Learned Magistrate correctly observed that in *Lambert* (as approved by the CICA in *Da Acosta*) the evidential burden operates as follows:

“But an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court, which, if believed, could be taken by a reasonable jury to support his defence.”

16. The defence submissions are that the Appellant’s case included evidence which, if believed, could be taken by a reasonable jury to support his defence. The defence position is that it matters not what findings the Magistrate thereafter made as to the veracity and credibility of that evidence if the Learned Magistrate did not direct herself correctly in the first place. The question to be asked was whether it could be taken by a reasonable jury to support his case, if believed by that hypothetical jury.

Submissions on behalf of the Respondents



17. In responding to the appeal on behalf of the DPP, Mr. Mulgrew submitted that the test the Court had to apply, following *Da Acosta*, was as follows:
 - a. have the prosecution adduced evidence that makes the court sure that the defendant imported the drugs;
 - b. if yes, the court must then consider the issue of knowledge, or lack thereof. The issue of lack of knowledge, is only engaged if the defendant raises sufficient evidence to rebut the statutory presumption of knowledge. Section 9(1)(a) does place a burden on the appellant, albeit an evidential burden as opposed to a legal persuasive burden of proof;

- c. if the defendant has not raised sufficient evidence to engage the issue of knowledge, then the issue of knowledge of the drugs is proven by virtue of section 9(1)(a); and
- d. if the appellant has raised sufficient evidence to rebut the presumption, having considered all of the evidence in the case, including the evidence raised by the defendant in relation to the issue of knowledge, is the court sure that the defendant did have knowledge of the drugs, the overall burden of proof being on the prosecution.

18. The Respondents submit that the Learned Magistrate correctly applied the law relating to the burden and standard of proof when she directed herself:

“It is of course, for me, when weighing up the evidence, to decide whether the Prosecution has satisfied me, so that I am sure, that Mr. Scales is guilty of the sole offence. In weighing up and assessing the evidence, I can decide to reject some aspects of the evidence of a witness, while accepting other aspects. If I have any reasonable doubt on the Prosecution's case, I must acquit Mr. Scales, resolving that doubt in his favour. As part of my assessment, I do not have to decide on every disputed point that may have arisen between the parties, but only those that are relevant to the issues. The fact that I have not referred to every single aspect of the evidence, does not mean that I have not considered all the matters raised at trial.”

19. She then observed at para. 38 (applying the principle, in De Acosta):

“if sufficient evidence is adduced on behalf of the Defendant to raise the issue of knowledge “, as “it will be for the Prosecution to show beyond reasonable doubt that the Defence is not made out by the evidence”.



20. The Crown's position is that The Learned Magistrate was correct to conclude there was a burden under section 9(1)(a) placed upon the appellant. It is an evidential burden, not a persuasive burden. She was correct to identify that the overall burden remained on the prosecution to prove guilt beyond a reasonable doubt and directed herself accordingly. The real issue, say the Crown, is whether the Learned Magistrate correctly applied the sufficient evidence test.

21. They say that required a qualitative assessment of all of the evidence at the conclusion of the evidential stage of the trial. Such a qualitative assessment was carried out by the Learned Magistrate, she being both the tribunal of fact and law [Para. 40-42]:

I have listened very closely to the evidence of CBCO West and Watson about these statements made by Scales when confronted with the baggie. I have also listened very carefully to Defendant Scales' description of his interaction with those CBCO officers.

I take the view, that the only evidence that goes to Scales' knowledge, is his denial that he knew of the Ziplock bag, and what the substance in the Ziplock bag was. His mention of the loan of the backpack does not by itself go to the issue of knowledge.

When his details that he provided at trial are examined closely, it is no more than a repeated denial of (a) knowledge of the baggie, and (b) denial that it was his i.e. a repeated attempt to distance himself from it.

Is that "sufficient evidence" such as to raise the issue of knowledge set out in 22 section 9(1)(a)?

I do not consider that his bare denial of knowledge and ownership of the baggie can 24 be considered "sufficient" to satisfy that De Acosta burden.

22. The Respondents accepted that there was a valid question as to whether the conclusion that there was insufficient evidence to satisfy the evidential burden in respect of s.9(1)(a) was correct however they submitted that, when the conclusions were approached more holistically, then it was clear that there was no error. They submit that whilst perhaps arguably conflating the two stages, the Learned Magistrate could not be faulted given that she carried out an extensive and detailed analysis of the evidence and then asked herself whether there was sufficient evidence upon which the presumption could be rebutted. She concluded, quite properly says Mr. Mulgrew, that the burden had not been discharged by the appellant.
23. The Respondents submit that this Court should be careful not to go behind findings of fact made by the Learned Magistrate given that she, having heard the evidence in full, was best placed to test the sufficiency of the evidence.

This Court's ruling on the appeal against conviction



24. The Learned Magistrate took great care to direct herself at various stages correctly as to *De Acosta* and *Lambert* and the law in relation to the application of s.9(1)(a). She made clear at para

29 of her judgment that she was satisfied so that she was sure that the appellant had the requisite knowledge.

25. Had she stopped there Counsel for both the appellant and the respondent accept that she may not have been faulted.
26. Counsel for the appellant however submits that by going on to consider s.9(1)(a) and concluding that the appellant had not put forward “sufficient evidence” to satisfy the De Acosta burden, she thereby misdirected herself on the fundamental issue of the burden and standard of proof in respect of the central and indeed only issue in the case of knowledge.
27. The learned Magistrate described the evidence given by the appellant on the point as “no more than a repeated denial”. Mr. Hughes asks rhetorically what more could he have done?
28. I was invited to consider the case of *Henvey v H.M. Advocate* [2005] HCJAC where the High Court of Justiciary in Scotland dealt with s28 of the Misuse of Drugs Act 1971 (recognised to be the statutory equivalent of s.9(1)(a) in this jurisdiction and the very legislation that the case of Lambert concerned).
29. The *Henvey* case is summarised by the Learned Editors of Blackstone’s at B19.111. At sub paragraph 3 -5 of that summary the following was said by the High Court in Henvey:

As was pointed out by the Lord Justice General in Salmon ... subsection 2 does not require that the accused must necessarily have given evidence. As he observed: “Doubtless that would often be the simplest mode of proof, but the necessary evidence might come for example from a mixed statement or from witnesses speaking to what the accused was told was in the container or to the accused’s apparent astonishment when the contents of the container were revealed and found to be a controlled drug”.

It is important to bear in mind that the question of whether the evidential burden has been discharged is a question whether there is sufficient evidence for the purposes of the relevant subsection, for which it requires to be assumed that the evidence relied on is believed. Hence as we have noted, Lord Hope spoke of the need for the accused to put evidence before the court “which if believed could be taken by a reasonable jury to support his defence”. That is a matter for the trial judge who would require to direct the jury accordingly.



If that is the case the Crown requires to meet that defence and to satisfy the jury beyond reasonable doubt that it should be rejected. If the jury believes evidence that the accused neither knew of nor suspected nor had reason to suspect the existence of the relevant fact he must be acquitted. Even if they are not prepared to go so far as to believe that evidence but are left in reasonable doubt about the matter he must also be acquitted.

30. In any court where the Judge is both judge of law and fact it is troublingly easy to conflate those roles. The Learned Magistrate in the case was careful to set out the legal directions that she had given herself with clarity.
31. I am afraid, however, that I agree that she appears to have conflated her roles when setting her position at paras 41 – 44 of her ruling. The conclusion that is justifiably criticised is that of her concluding that there was insufficient evidence to raise the issue.
32. The evidence the appellant gave at trial in combination with the evidence of him denying knowledge and raising the issue of the loan of the backpack at the airport were, respectfully, enough to satisfy the burden since if they had been believed they could have been taken by a reasonable jury (or other fact finder) to support his defence.
33. Therefore to characterise his “repeated denials” as to knowledge as falling short of amounting to sufficient evidence to raise the issue of knowledge in my view represents a fundamental error of law.
34. At para 44 of her ruling the Learned Magistrate said:



“It seems to me therefore that for the Defendant to avail himself of the defence under s.9(1)(a) more than a bare denial must be necessary for him to satisfy the De Acosta “sufficient evidence” burden test. I take the view that Mr. Scales bare denial falls short of this “sufficient evidence” standard and s.9(1)(a) does not assist him.”

35. Had the Learned Magistrate directed herself that, the defendant having made those denials as to knowledge and as to the whereabouts of the backpack both in evidence at trial and at the airport upon arrest, did amount to sufficient evidence to engage the s.9(1)(a) provisions (or put another

way to satisfy the De Acosta test) but then that having considered that evidence (as fact finder) she then rejected it and remained sure that he had the requisite knowledge, I do not consider that she could be faulted.

36. But I accept that by concluding the sufficient evidence threshold had not been passed and therefore the s.9(1)(a) “defence” could not “assist him” an error was made on the fundamental issue of the burden and standard of proof of knowledge which, in this case, was the only matter in issue.
37. That being my conclusion, I rule that such an error relating to the burden and standard of proof on such a central issue must be fatal to the conviction.
38. Accordingly, I conclude that counsel for the appellant is correct when he characterises the resultant conviction as unsafe and unsatisfactory and I therefore must allow the appeal.

The deployment of the proviso

39. The Crown’s position during the appeal hearing was that even if the court concluded that the Magistrate had erred, the Respondent submits that there was sufficient evidence to convict the appellant and the only likely outcome of the trial would have been a conviction. The question as set out in section 181 of the Criminal Procedure Code is that even if I am of the view that the point raised in the appeal might be decided in favour of the appellant, I may dismiss the appeal if I consider that no substantial miscarriage of justice has occurred.
40. I have very carefully considered the proviso and whether the circumstances in which I have concluded the Learned Magistrate erred should nonetheless lead to my concluding that there has been no substantial miscarriage of justice. I have concluded that when the error relates to the burden and standard of proof, where the burden lies and what the standard is, that those are all questions so fundamental, so intertwined with the golden thread of justice that an error such as this should not be cured by the deployment of the proviso.



A Second Retrial?

41. The Appellant has spent 17 months in custody (14.5 months following his first conviction and 2.5 months following his second), the equivalent of serving a 28-month sentence.
42. He is not from the Cayman Islands and has no family here, having originally arrived to visit his mother, who was working here as a teacher, but has since departed the Islands. The defence submit that he has now been stuck in the jurisdiction since his arrest in October 2022, and the emotional toll of another trial of a man who is of previous good character would be excessive.
43. The defence correctly submitted that the legal principles for consideration here were that:

“the broad public interest in the administration of criminal justice leads us to the clear view that a second re-trial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred and in which the evidence that the defendant committed the crime on any fair minded objective judgment remains very powerful.”

44. I agreed, having indicated the outcome of this appeal against conviction in open court on 9th June 2025, that the Crown should have time to consider whether to seek a second retrial. On the 13th June 2025 the Crown indicated in court that having considered all of the relevant authorities they would not seek a re-trial in this matter.
45. They observed that whilst in this case they considered that they would have been have justified in taking the decision to seek a third trial, that having taken into account the factors as outlined in *DS v The Judges of the Cork Circuit Court and the DPP* [2008] IESC 37 and the fact that neither the defendant nor the Crown has contributed in any way to the sequence of events that has led to the current situation, that their decision had been made based on those factors and the likely delay.



Conclusion

46. For the reasons stated above the conviction is quashed and there will be no retrial. The Appellant is released from his bail conditions and is free to leave the jurisdiction as soon as his passport situation enables him to do so.

Dated the 13th day of June 2025



**The Hon. Justice Emma Peters
Judge of the Grand Court**