JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 21/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

R. V. MARIO ALVAREZ

Frank Phipps, Q.C. & Miss Kathryn Phipps for appellant

Miss Lisa Palmer & Miss Tara Reid for Crown

8th, 9th December 2005 & 31st July 2006

HARRISON, P.

The appellant was convicted in the Resident Magistrates' Court for the Corporate Area held at Half Way Tree on the 16th day of November 2004 of the offence of unlawful possession of money, US$88,400.00. He was sentenced to serve a term of six months imprisonment at hard labour.

The facts are that on 3rd August 2003 at 4:30 p.m. Woman Sgt. of Police Lorraine Elliston and a party of police officers, including Assistant Superintendent Calvin Small went to premises Iris Inn, at 26 Tankerville Avenue in the parish of St. Andrew. Assistant Superintendent Small, in possession of a search warrant signed by Inspector Yates, went to an apartment on the building at the premises. He saw one Alexander Duffus, (Alex) in whose name the warrant was

issued. He read the warrant to him. The police officers entered the apartment; a bedroom was to the right and a living room on the left. The appellant, a child and three others were in the apartment. Assistant Superintendent Small and other police officers went to the bedroom to search. Woman Sgt. Elliston, searching the living room, saw the appellant kick a bag underneath a bed in the said living room. Asked by the witness what he kicked, the appellant responded "Nothing." The witness said that she became suspicious and retrieved the said bag from underneath the bed. Asked, the appellant told the witness that the bag "belonged to him." She asked the appellant what was inside the bag and he said US$90,000.00 and that it was given to him by Alex. Opening the bag in appellant's presence, the witness saw a plastic bag with nine (9) parcels of United States currency notes. The witness took the appellant to the bedroom in which Alex was and in the presence of the appellant and Assistant Superintendent Small, she told Alex that the appellant said that the money was his, Alex's. Alex "emphatically denied ownership of the money." The witness again asked the appellant whose money it was and he said "it's my money to buy fishing equipment." Asked if he was sure about the sum, the appellant said "yes, it is US$90,000.00 to buy boat engine."

The witness said "At this point I became suspicious that the money was either stolen or unlawfully obtained."

The witness took the appellant, the bag and the money to the Police Headquarters at 230 Spanish Town Road where she counted the money in the

appellant's presence. It amounted to US$88,400.00. Asked why he said it was US$90,000.00, the appellant said that he never counted it. The witness again asked the appellant how he came to be in possession of the money and the witness said that appellant, "appearing nervous and with a stutter," said:

> "... a man named Carlos come from Honduras two weeks ago and gave him the money to buy boat engine in Panama."

He further said, "mi can't own so much money and mi a work." Asked, the appellant said he was a fisherman earning J$8,000.00 per week. The bag and money were tendered and marked exhibit 1.

One Sgt. Neil told the appellant that he wanted to take a "question and answer" from him and that he had a right to have an attorney-at-law or a Justice of the Peace present. The appellant said that he did not need one as he was innocent. The witness recorded in writing 45 questions asked by Sgt. Neil and the answers to the questions given by the appellant. The appellant signed the document, exhibit 3. The witness Elliston said that "At this point I was convinced that the money accused had in his possession was either stolen or unlawfully obtained." She arrested and charged the appellant for the offence of unlawful possession of US$88,400.00. She cautioned him and he made no statement.

The appellant, asked to account, in evidence said that he lived in Montego Bay, St. James and he was a fisherman for 15 years, 11 of which he had been fishing in Jamaica. On 3rd August 2003 he was in an apartment on Mountain View Avenue and he was going to Panama to "buy fishing things." The police

came, were searching and found the money under the mattress on the bed. He told the police that it was "my money" and that he was going to Panama to "buy fishing things" and that Carlos from Honduras "brought the money for me." He never had the money in a bag beside the bed. He never kicked it underneath the bed. The money was found inside the bedroom, not in the living room. He said that he is a Honduran national living in Jamaica since 1993 and he had entered Panama six times between January 2002 and July 2003.

Mr. Phipps, Q.C. argued the following grounds of appeal:

> "1. The verdict was unreasonable and cannot be supported having regard to the evidence.
>
> 2. The proceedings at the trial were irregular where the prosecution sought several adjournments before closing its case in order to obtain further evidence, in particular, from an officer of the Financial Investigative Unit of the Ministry of Finance.
>
> 3. The learned trial judge misdirected herself in law by place (sic) on onus on the appellant to establish the truth of his account or in the alternative to satisfy the Resident Magistrate on a balance of probability."

He submitted that the appellant may only be recognized as a "suspected person" in accordance with the provisions of section 2 of the Unlawful Possession of Property Act ("the Act") if he has in his possession any article under such circumstances as to cause the constable to suspect that he had stolen or unlawfully obtained it. Consequently he would arrest him. The procedure under the Act was not followed because too much time had elapsed between his arrest

and the order to account. The learned Resident Magistrate was in error to place on the appellant the onus of proof also, and to the standard to prove the truth. Only an evidential burden lies on the appellant constitutionally, and only a balance of probabilities. His testimony revealed the source of the money which could be true and it was not rebutted on the prosecution's case. Furthermore, there is no statutory authority to deprive the appellant of the money even after his conviction. The appeal ought to be allowed. He relied on ***R v Vincent Whyte*** 12 JLR 658, ***R v Melvin Spragg*** 13 JLR 57, ***R v Lambert*** [2001] UKHL 37, ***Webb v Chief Constable of Merseyside*** [2000] Q.B. 427.

The Act is described as a procedural Act. It sets out the procedural steps that must be followed after the police officer has arrested a defendant whom he observes displaying conduct which qualifies him as a "suspected person" under the provisions of section 2 thereof.

The police constable may ask questions of the suspected person to give him the opportunity to explain his possession (see section 6 of the act). Conflicting statements may influence suspicion, in the circumstances of the particular case. In ***R v Rivas & Infante,*** RMCA No. 33/02 dated 20th December 2002 (unreported), this Court referred to the dicta of Henriques, J.A. in ***R v Vincent York,*** RMCA No. 70/61 dated 1st April 1966 (4 Gleaner Law Report), concerning a conviction for unlawful possession of money, namely:

> "... I am satisfied, however, from a close examination of the evidence, particularly, the fact that the appellant gave two conflicting statements as to his possession of the money, and looking at the evidence

> against the general background of the evidence in the case, I am satisfied that the corporal was justified in arresting the appellant under the Unlawful Possession Law ..."

and of Lewis, J.A.

> "... when questioned he gave two different explanations, and I think that might be just enough to create reasonable suspicion and to entitle the police to take him into custody."

and I said at page 15:

> Conflicting answers from a person in possession of goods to a constable's questions, as authorized by section 6 of the Act, is therefore some material from which the said constable may suspect that the goods were unlawfully obtained."

In ***R v Brown*** (1929) Clark's Reports 301, the appellant was convicted of unlawful possession of a ton of fustic under Law 14 of 1909, the Praedial Larceny Law. Adrian Clark, J., at page 306, said:

> "In a great number of cases, however, the reasonable cause of suspicion is completed only by the unsatisfactory nature of the replies made to police enquiries. It is clear that the police or other authorized persons must be allowed to make enquiries from persons in possession of agricultural produce – indeed I think any person ought to be given an opportunity of explaining his possession before he is arrested." (Emphasis added)

The constable is required thereafter "as soon as possible after the arrest" to take him "before a Resident Magistrate sitting in Court" (Section 5(2), but if not sitting:

> "... within forty-eight hours after the arrest of a suspected person, the constable or authorized person

> shall take the suspected person before a Justice who may bail the suspected person to appear at the earliest convenient date before a Resident Magistrate sitting in Court, or may remand the suspected person in custody to be brought at the earliest convenient date before a Resident Magistrate sitting in Court."

Thereafter the section stipulates no specific time limit to be accorded to the suspected person by the Resident Magistrate to account for the possession of any articles. Section 5(4) reads:

> "(4) If the suspected person does not, within a reasonable time to be assigned by the Resident Magistrate, give an account to the satisfaction of the Resident Magistrate by what lawful means he came by the same, he shall be guilty of an offence against this Act ..." (Emphasis added)

However, both the hearing and the accounting must be effected "within a reasonable time," with expedition.

In ***R v Rivas & Infante*** (supra), I said at page 16:

> "The onus of proof is therefore on the person charged, once he has been ordered to account, to prove on a balance of probabilities that he acquired the goods in question by lawful means. His account, to the satisfaction of the Resident Magistrate, must not only be true but must also be satisfactory in the light of the existing law and basic legal principles." (Emphasis added)

This statement was made in the context of the immediately preceding paragraph that a confession of possession by means of an illegal activity even if "true" could not be seen as proof to the satisfaction of the Resident Magistrate. That would not be a "lawful means." The said paragraph reads:

> "The account must therefore be 'to the satisfaction of the Resident Magistrate.' An explanation by the suspected person that he obtained goods by means of his involvement in an unlawful activity such as the sale of drugs or other similar activity could not be held to be satisfactory to a Resident Magistrate. Money or goods obtained from the sale of drugs, an illegal activity, would not be money or goods obtained '... by ... lawful means."

It was never intended to suggest that the evidential burden placed on a defendant under the statute was elevated to the degree of proof of truth. At page 38, I said:

> "The fact that the account of the appellants' could be true is insufficient. If one comes to the conclusion on an examination of the defence that it is possible, i.e., could be so, but highly improbable, the defence has failed. (**Miller v Minister of Pensions)** (supra). On the balance of probabilities, the learned Resident Magistrate applied the proper test."

"Could be true" is referable to "possibilities."

In ***Miller v Minister of Pensions*** [1947] 2 All E.R. Denning, J (as he then was) at page 372, said:

> "The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In ***R v Brown,*** supra Adrian Clark, J stating what was the degree of proof on a defendant in the circumstances, at page 307 said:

> "It was argued that the defendant having given before the Resident Magistrate an explanation of his possession which was at any rate a reasonable one, the burden of proving his innocence was prima facie discharged so as to shift the burden of proving his guilt back on to the prosecution.
>
> It is true that the language of Law 4 of 1909 in this respect is strong. It is for the suspected person to 'satisfy' the Resident Magistrate that his possession was 'honest.'
>
> Nevertheless, I think the ordinary rule must apply and that the Resident Magistrate should be prima facie 'satisfied' by any explanation which is reasonable and could be true; not necessarily only by one that convinces him of its truth."

Brown, J at page 304, said:

> "I venture, however, to think that though the burden of proof is on the prisoner, the evidence must be viewed reasonably, and if it appears that the account given by the prisoner is one which appears to be reasonably true, he should not be convicted."

The defendant under the Act has an evidential burden. If the explanation given is to the satisfaction of the Resident Magistrate in that it is reasonable and probably true he should not be convicted.

In ***R v Outar and Senior*** RMCA No. 47/97 dated 31st July 1998, this Court, in an appeal from a conviction for the possession of dangerous drugs, recognized and affirmed that the presumption of innocence lies in favour of the accused. The reversed onus of proof that may be constitutionally placed on him, by section 20(5) of the Constitution of Jamaica being:

> "... the burden of proving particular facts."

is an evidential burden only. Such a reverse onus is placed on a suspected person under the Act.

In the instant case the learned Resident Magistrate stated the nature of the evidence which led her to find that he was a suspected person. At page 41 of the transcript, she said:

> "The accused was called on to account not only because of his agitation and nervousness but the varying answers he gave as to how he came into possession of the money and the vehement denial of Young-Diffis (sic) to having given the money to accused and the observation of him nudging the bag under the bed, his income from fishing (JA$8,000.00) and his lack of detail about who Carlos was. Also was the boat engine for him or for Carlos?"

Learned Queen's Counsel argued, as ground one, that there was no evidence that when the appellant was in possession of the money the arresting officer had any suspicion that the money was stolen or unlawfully obtained . He stated that too much time had elapsed between the initial suspicion and when he was arrested, and it was only after the questioning by Inspector Oneil at the Narcotics Headquarters that the suspicion arose in the arresting officer's mind. We do not agree.

The arresting officer said, in examination-in-chief at page 15:

> "While conducting the search I noticed that accused used his right foot to kick something under the bed. I became suspicious and I asked him what was that he had kicked under the bed and he said nothing."
> (Emphasis added)

and at page 16:

> "After Duffus denied owning the money, I asked accused whose money it was and he said 'it's my money to buy fishing equipment.' I asked him if he was sure about the sum and he said yes it is US$90,000.00 to buy boat engine.
> At this point I became suspicious that this money was either stolen or unlawfully obtained." (Emphasis added)

and at page 17:

> "When at Narcotics Headquarters I asked accused how he came into the possession of the money and he appeared very nervous. He was agitated and had a stutter in his speech.
>
> When accused said he couldn't own so much money and was working, I asked him what kind of work he was doing and he told me he is a fisherman. I also asked him what he earns as a fisherman and he said J$8,000.00 per week.
> This made me even more suspicious since he was not able to tell me anything more than the first name of the person whom he got the money from. (Emphasis added)
>
> As a result of all of this I spoke with Sergeant O'Neil and introduced accused to him."

These passages demonstrate that there was ample evidence of an initial suspicion in the mind of the arresting officer when she saw the appellant kick the bag under the bed. Thereafter there was a continuing suspicion in the said officer's mind. The case of ***R v Vincent Whyte*** (supra) is distinguishable, in that the arresting officer, at no time saw the appellant display any suspicious acts in relation to the item of exhibit, namely, the fire extinguisher. In the instant case, the delay in arresting the appellant until he reached the Narcotics

Headquarters, created no breach of the statute. There is no merit in this ground.

In respect of ground three learned Queen's Counsel argued that the learned Resident Magistrate wrongly placed an onus on the appellant to prove his innocence by requiring him to establish the truth of his account beyond a reasonable ground.

Section 5(4) of the Act, obliges a suspected person to:

> "... give an account to the satisfaction of the Resident Magistrate by what lawful means he came by the (money, in this case)." (Emphasis added)

As stated previously, this burden on the appellant was an evidential one only, and the standard is on a balance of probability. The learned Resident Magistrate at page 43, said:

> "The account given by an accused must satisfy the Magistrate as to how he came into possession of the property. It must not only be satisfactory it must also be true.
>
> This accused gave a number of explanation (sic) to the police and by his own evidence as to how he came into possession of the money viz
>
> 1. Carlos gave it to him to purchase items for Carlos.
> 2. Carlos gave it to him to purchase items for himself to start fishing again.
> 3. Alex gave him the money.
> 4. He could have it as he was working as a fisherman earning JA$8,000.0 per week.
>
> It is interesting who Carlos is. The accused was unable to give his last name, he has no contact phone number or specific address for him – Carlos calls him.

> Carlos is the vague character who comes in a boat from the Cays and gives him US$90,000.00.
>
> I accepted Sergeant Elleston as a truthful witness. I found it strange that the accused contention that the money was found under a mattress by a male officer was not put to her.
>
> I found that the accused even as he gave his evidence vacillated about the source of the money."

It is correct to argue, that by the use of the words "... not only be satisfactory but must also be true," simpliciter, it is placing an onus on the appellant to prove the truth of his account. Nowhere, however, does the learned Resident Magistrate say that the standard of proof must be beyond reasonable doubt. By thereafter narrating the conflicting statements of explanation given by the appellant, the learned Resident Magistrate was demonstrating the improbability of the reasonableness of the explanation in the circumstances. She was not thereby seeking to place on the appellant a higher burden of proof than is required. She said, on page 45:

> "On a balance of probability I did not find his explanation credible or believable."

Learned Queen's Counsel referred to the case of ***R v Lambert*** (supra) in which their Lordships of the House of Lords considered the point that the trial judge wrongly directed the jury that the appellant had a legal as opposed to an evidential burden, when relying on a defence under section 28(2) and (3)(b) of the Misuse of Drugs Act to prove "on a balance of probabilities ..." that he had known that the bag contained a controlled drug. The appellant relied on a

provision in the Misuse of Drugs Act that the said Act "must be read and given effect to in a way which is compatible with the Convention rights," and argued that section 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, set out in Schedule 1 of the Human Rights Act 1998, which recites the presumption of innocence, was violated by the direction to the jury that a legal burden was on the defendant. Their Lordships agreed that the section should be read in such a way to show that the burden of proof on a defendant was an evidential one only. However, in dismissing the appeal against conviction their Lordships held at page 578 that:

> "... even if the trial judge had given a direction to the jury that the burden was only an evidential burden, the jury would have reached the same result."

As to the nature of the evidential burden, Lord Hope, at page 607 said:

> "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."

We agree with Miss Palmer for the prosecution that the words used by the learned Resident Magistrate, that the account must "... not only be satisfactory but must also be true" were referable to the learned Resident Magistrate's belief in the truth of his statement in the circumstances of this particular case.

The transcript shows that the appellant gave to the arresting officer several differing explanations, in respect of the money:

> (1) Alex gave it to him – Alex denied this in his presence

(2) It is my money to buy fishing equipment

(3) A man named Carlos came from Honduras two weeks ago and gave him the money to buy boat engine in Panama.

(4) Asked again "... he appeared very nervous. He was agitated and had a stutter in his speech.".

(5) In examination-in-chief,

(i) "I would have given the fishing things to Carlos when I came back to Jamaica from Panama but I have had no contact with him."

(ii) "The money was mine to buy fishing equipment for myself."

The issue of truth was inescapable, in the circumstances of this case, bearing in mind the several conflicting statements made by the appellant.

It is more prudent and correct that the burden on the defendant be expressly described as an evidential one proven on a balance of probabilities. In accordance with the Act the "account" under section 5(4) "... to the satisfaction of the Resident Magistrate by what lawful means..." the defendant came into possession of the money is an evidential burden only. In that regard, in order to succeed, the account given by the defence should be not only "reasonable" but also " probably true."

However, in the circumstances of this case as their Lordships held in ***R v Lambert*** (supra), it is our view that even if the learned Resident Magistrate had expressly stated that she advised herself that the burden on the defendant was an evidential one simpliciter, she "would have reached the same result."

This ground therefore fails.

No arguments were advanced in support of ground two.

Learned Queen's Counsel argued further that there was no statutory provision for the police or any other authority to deprive the appellant of the money US$88,400.00 even after his conviction for unlawful possession of such property. The Crown has no right to such property. He relied on ***Webb v Chief Constable of Merseyside Police*** [2000] Q.B. 427. He also argued that section 44 of the Constabulary Force Act did not confer such a power.

Miss Palmer for the prosecution submitted that section 44 did permit the said money to be detained, as an exhibit. She reasoned that the true owner may seek to establish his claim.

Section 44 of the Constabulary Force Act inter alia reads:

> "44. If any goods or money charged to be stolen or fraudulently obtained shall be in the custody of any Constable by virtue of any warrant of a Justice ... it shall be lawful for any Magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof, or in case the owner cannot be ascertained, then, if such goods shall be of a perishable nature, to make such order with respect to such perishable goods as to such Magistrate shall seem meet, but if such goods be not of a perishable nature, then to order such goods to be detained in the custody of the Police to be dealt with as hereinafter provided:
>
> Provided always that no such order shall be a bar to the right of any person or persons to sue the party to whom such goods or money shall be delivered and to recover such goods or money from him by action at law, so that such action shall be commenced within

> twelve calendar months next after such order shall be made."

Section 45 of the said Act makes provision for the Commissioner of Police to lodge such moneys with the Accountant General, subject to the right of the true owner to establish a claim thereto within one year of such lodgment.

Webb's case established that where there is no statutory authority to do so, money may not be expropriated by a public authority. Neither is there any statutory power to so confiscate money, the proceeds of drug dealing, where the person entitled to possession was not convicted of a drug trafficking offence.

In the instant case, the essence of the conviction of the appellant under the Act is a finding that the said money was "stolen or unlawfully obtained." The appellant would have failed to satisfy the Resident Magistrate on a balance of probabilities, that he obtained it lawfully. He therefore had no right to retain it. Consequently, section 44 of the Constabulary Force Act which permits a Magistrate, "If any money charged to be stolen or fraudulently obtained..." to be "... detained in the custody of the Police...", expressly authorized the said learned Resident Magistrate to order that the said sum of US$88,440.00 be detained. This argument of the appellant therefore fails.

This Court cannot fail to observe, as Mr. Phipps, Q.C., referred to in passing, that there was some delay in the proceedings in this case. The appellant was arrested on 3rd August 2003, brought before the Court on 5th August 2003 but the hearing in this matter did not commence until 5th March 2004 – seven months after arrest. This type of delay is absolutely undesirable

and fails to recognize that because of the unusual nature both of the statute and the procedure, a much more prompt dealing with such a case is required. ***R v Williams*** [1964] 6 WIR 320 attempts to convey the urgency of the procedure. It was held:

> "...when a person is arrested under s. 5 of the Unlawful Possession of Property Law and is brought before a Resident Magistrate, the Resident Magistrate's duty is to make a judicial inquiry to determine whether there is reasonable ground for suspecting that the person so brought before him was in unlawful possession of the article found in his possession. This presupposes not only that evidence in chief will be given on oath but that the defendant should be given an opportunity to probe that evidence by cross-examination with a view, if he so desires, of establishing that he was not in fact in possession of the article, or that there was no reasonable ground for suspicion." (Emphasis added)

Although no time limits are established by section 5 of the Act, nor by the said case, the intent is that the "judicial enquiry" be commenced "when (the) ... person is brought before the Resident Magistrate" preferably forthwith or within days of appearing before the Resident Magistrate. An enquiry commenced months after first appearance could hardly satisfy the spirit of the statute.

Learned Queen's Counsel also submitted that the sentence of imprisonment of six months hard labour was manifestly excessive.

Ordinarily, applying the proper principles of sentencing this sentence would not qualify as manifestly excessive in the circumstances of this case. The learned Resident Magistrate considered the fact that the appellant had no previous conviction, was a husband and father resident in Jamaica from 1993

and exercised her discretion in his favour. However, in her findings of fact at page 45 she said:

> "Much was made of his frequent travels to Panama suggesting that he was transporting money to Panama. What is instructive about this is that he could afford to travel at US$600.00 for airfare so frequently whilst earn (sic) JA$8,000.00 per week.
>
> I was not unmindful that it is not the purpose for which the money was to be used that was in issue but the explanation of the purpose goes to the credit of the witness and only revealed a shifty individual who I had difficulty believing."

A reference to "frequent travels to Panama ... transporting money ..." is not appropriate to the circumstances of this case of unlawful possession of money simpliciter. In that regard the learned Resident Magistrate relied on a wrong premise prior to the imposition of the sentence. In the circumstances the sentence is manifestly excessive.

The appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of six (6) months imprisonment at hard labour is set aside and a sentence of three (3) months imprisonment at hard labour is substituted instead.