JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 14/2007

BEFORE: **THE HON. MR JUSTICE PANTON, P.**
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON J.A

ASHAN SPENCER v R

Mrs Jacqueline Samuels-Brown and Mrs Tamika Jordan for the applicant
Miss Sasha – Marie Smith for the Crown

27 January and 10 July 2009

MORRISON, J.A.

Introduction

1. The applicant and Mr Tysuir Lloyd were convicted on 19 January 2007, after a trial before Norma McIntosh J in the High Court Division of the Gun Court, of the offences of illegal possession of firearm and two counts of robbery with aggravation. The applicant was sentenced to five years imprisonment at hard labour for illegal possession of firearm and to seven years imprisonment on each of the counts of robbery with aggravation. The sentences on the robbery counts were ordered to run concurrently, but consecutive to the sentence for illegal possession of firearm.

The facts

2. On 18 January 2006, at approximately 8:00 pm in the evening, Mr Christopher Ballentine was standing at the gate of his home in

Meadowbrook Estate in the parish of St Andrew. With him was his friend, Mr Baldwin Walker, who was leaning on his parked car, a Toyota Corolla registration no. 1205 DZ. These two gentlemen, who were within touching distance of each other, were, according to Mr Ballentine, "just there talking". The area was illuminated by two street lights which were nearby. While standing there, they saw two men coming "around the corner" about one gate away from where they were and one of the men came directly to Mr Ballentine and held him up with a gun. The other man also had a gun, which he pointed at Mr Walker. After a brief struggle, Mr Ballentine's cellular telephone was taken from him by one of the men and both men then drove off in Mr Walker's car. Both men wore caps, with which, according to Mr Ballentine, they attempted to cover their faces.

3. The police were immediately notified and the following day, after a twenty minute car chase in the south-western section of the city, the applicant and another man were apprehended as they alighted from a white Toyota Corolla motor car, registration no. PB 7673, in the vicinity of Nanse Pen on the Spanish Town Road. This car was in due course identified by Mr Walker as the same Toyota Corolla that had been taken from him by the two men at Mr Ballentine's gate on the evening of 18 January 2006.

4. On 25 January 2006 and on 4 February 2006 Mr Ballentine attended identification parades, at which he identified the applicant and Mr Lloyd respectively as the men who had taken his cellular phone and Mr Walker's car on 18 January 2006. Both men were charged with illegal possession of firearm and robbery with aggravation.

5. The applicant in his defence challenged the evidence identifying him as one of the robbers and set up an alibi. In an unsworn statement, he stated that on the evening of 18 January 2006 he was at home with his mother between 6:00 p.m. and 10 p.m., having his hair washed, blow dried and oiled. When this operation was finished, he went to his own bedroom with his girlfriend. On the following day, he was asked by a friend to run an errand in the friend's car for Mr Lloyd, who was another friend, and it was while he was so engaged, driving his friend's car accompanied by Mr Lloyd, that he had a "slight accident" with another car on Spanish Town Road which led ultimately to his arrest. The applicant's mother gave evidence in which she supported his alibi that he was with her at the material time, having his hair washed, blow dried, oiled and, she added, twisted.

6. Both the applicant and Mr Lloyd were convicted and sentenced, as already noted.

The appeal

7. This is a renewed application for leave to appeal, a single judge of the court having on 12 May 2008 refused leave. Mr Lloyd, who also applied for leave to appeal, is no longer before this court, his matter having been disposed of separately before the commencement of the hearing of this matter.

8. On behalf of the applicant, Mrs Samuels-Brown sought and was granted leave to argue five supplemental grounds of appeal, which were as follows:

> "1. The Learned Trial Judge ought not to have called upon the Appellant to answer the charges as at the end of the prosecution's case the evidence of identification was so weak and tenuous as to fall short of establishing a prima facie case against the appellant and/or it was dangerous to proceed further with the case.
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> 2. The Learned Trial Judge failed to apply the mandatory warning relative to identification evidence to the facts of the case; in that the Learned Trial Judge failed to have regard to the patent weaknesses in the identification evidence vis a vis the Appellant, being, inter alia:
>
> a) The brief opportunity for observation
>
> b) The position of the assailant (later identified as the Appellant) relative to the witness identifying him.
>
> c) The difficult circumstances under which identification took place.

> d) The discrepancy between the evidence of the two prosecution witnesses as to the description of the assailant.
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> 3. The Learned Trial Judge cast doubt on and rejected the alibi defence of the Appellant on bases which were non-evidential and/or speculative. Accordingly the Learned Trial Judge fell into error and the Appellant did not receive a fair trial.
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> 4. The Learned Trial Judge failed to apply the law regarding alibi evidence to the case in that having found that the Appellant's alibi was false the Learned Trial Judge, ipso facto, treated this as strengthening the prosecution's case. As a consequence the Appellant's chances of acquittal were impaired and/or he did not receive a fair trial.
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> 5. In sentencing the appellant the Learned Trial Judge erred in law as a separate sentence ought not to have been imposed for the offence of illegal possession of a firearm; alternatively the sentence ought to have been ordered to run concurrently with the other sentences."

9. Grounds 1 and 2 both raise issues as to the identification of the applicant and were taken together by Mrs Samuels-Brown, who submitted that Mr Ballentine had had no more than a fleeting glance and no full or frontal view of the robbers, who were in any event wearing caps at the material time. She submitted further that at the end of the prosecution's case the only evidence against the applicant other than the weak identification evidence was the evidence of his having subsequently been found in possession of the stolen car, which could not by itself

amount to prima facie evidence of larceny. It was incumbent on the prosecution to "adduce evidence of circumstances of the possession which tend to establish guilt." To do otherwise, Mrs Samuels-Brown contended, "would amount to a reversal of the burden of proof and accordingly a breach of the constitutional protection of [the] presumption of innocence."

10. But even if there was a case to answer, Mrs Samuels-Brown submitted further, "the weaknesses in the [identification] evidence remained live at the end of the case" and it could not be demonstrated that the judge had applied the warning which she gave herself to the evidence and those weaknesses. In those circumstances, there being no other evidence to establish guilt beyond a reasonable doubt, the applicant was entitled to an acquittal.

11. Mrs Samuels-Brown also took grounds 3 and 4 together, both having to do with the trial judge's treatment of the applicant's alibi. The submission was that the judge "unfairly cast doubts" on the defence of alibi on bases that were "non-evidential and/or speculative". Further that the judge erred in treating her rejection of the alibi as false as a factor which strengthened the prosecution's case against the applicant.

12. On ground 5, Mrs Samuels-Brown submitted that the trial judge had erred in ordering that the sentences on counts 2 and 3 should run

consecutively to the sentence on count 1, the offences having all arisen from the same set of facts. In these circumstances, she submitted, the sentences ought to have been ordered to run concurrently.

13. Finally, in her written submissions, Mrs Samuels Brown also made submissions on the grounds of appeal originally filed by the applicant himself, which were as follows:

> "(a) **Misidentity by the witness** – the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> (b) **Lack of Evidence** – I was exposed to the witnesses prior to the identification parade by the police. The prosecution failed to present any form of material evidence to support the charges of robbery with aggravation.
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> (c) **Miscarriage of Justice** – the learned trial judge should not have allowed such unreliable and poor quality evidence as reason for conviction.
>
> (d) **Conflicting testimonies** – that the prosecution witnesses presented to the court conflicting testimonies which amounts to perjury thus calls into question the soundness of the verdict."

14. Mrs Samuels-Brown submitted that the judge had overlooked or explained away weaknesses in the prosecution's case, in particular with regard to the evidence of identification and the applicant's complaint that he had been exposed by the police to the witnesses prior to the identification parade.

15. Miss Smith for the Crown submitted that there had been sufficient evidence to establish a prima facie case against the applicant and that the prosecution was entitled to rely on the doctrine of recent possession in this regard. She directed our attention to a number of passages in the summing up to make the point that the judge "did demonstrate that she applied the law to the facts relative to the identification evidence". The judge had, Miss Smith submitted further, delivered a "reasoned summation" and she was fully entitled to have regard to the evidence of the applicant's recent possession of the stolen car.

Grounds 1 and 2

16. It is not irrelevant to observe, we think, that at the close of the case for the prosecution at the trial a no-case submission was not made on the applicant's behalf. This was, in our view, a sensible decision on the part of counsel who appeared for the applicant at the trial (not Mrs Samuels-Brown) in the light of the evidence adduced by the prosecution. Mr Ballentine's evidence was that he had the applicant and the other robber under observation for "about a minute" during the robbery. Despite the caps which the men had "trying to cover their face" he was nonetheless able to see a part of the applicant's face ("from his eyes down"), by way of the illumination provided by the two streetlights, one of which shone directly over Mr Ballentine's gate. Despite the fact that the applicant was the person standing closest to Mr Walker, Mr Ballentine's evidence

was that he was an arm's length away and that he had been observing the robbers from the time they came around the corner, as from the moment he saw them he "expect something wrong". He was able to recall that the appellant had "an Afro hairstyle, some of it coming down... in his face" and that he was the taller of the two men.

17. While there was some question in cross-examination as to the exact position of Mr Ballentine in relation to the applicant during the robbery, and while Mr Ballentine did accept that he was frightened and that the entire incident happened "very quickly", it appears to us that the evidence at the end of the Crown's case was clearly of sufficient quality in terms of the opportunity for observation of the robbers and the other attendant circumstances for the matter to be left to the jury to determine whether the applicant had been correctly identified. Put another way, that evidence could not, in our view, be said to have had a base so slender as to make it "unreliable and therefore not sufficient to found a conviction" (***Daley v R*** (1993) 43 WIR 325). All of the matters of which Mrs Samuels-Brown complains were, in our view, matters best left to the jury's determination, as experienced counsel who appeared for the applicant at the trial obviously thought they were.

18. We will return to the impact of the applicant having been found in possession of Mr Walker's car (see paragraphs 25-29 below), but we would

only say at this stage that it was also a factor which, in our view, the judge was entitled to take into account in determining whether the prosecution had made out a prima facie case against the applicant. It follows from this that ground 1 cannot in our view succeed.

19. As regards ground 2, we do not understand Mrs Samuels-Brown to complain about the trial judge's general directions on identification, which were in the following terms:

> "And...I deal now with the evidence of identification, which to my mind, requires separate treatment as the adequacy of that evidence is one of the main issues to be determined in this trial. This would include considerations of the fairness of the identification parades held. Have these two accused men been fairly and correctly identified as the two men who, while in each other's company and acting together, pulled firearms on the two complainants, putting them in fear and robbing Mr. Ballentine of his cellular telephone and Mr. Walker of his 1995 Toyota Corolla motorcar?
>
> I first warn myself of the special need for caution before convicting, in reliance on evidence of visual identification. This is because there have been wrongful convictions in the past based on mistaken identifications. It is well recognized that even an honest witness may make a mistaken identification, and here both accused are saying that the Prosecution's witnesses are mistaken, I must therefore consider carefully all the features of the identification evidence – the lighting conditions, for instance, the time which the witness had to view the assailants, from what distance, whether there was anything obstructing the witnesses view, was there any particular reason for the witness to take note of the assailants and the length of time between the incident and the subsequent

> identification of the persons whom the witness says are these two accused men.
>
> Consideration of the identification evidence in this case must also include a determination of issues such as the impact on it, if any, of the doctrine of recent possession: the effect of the alibi defence of each accused all taken together with the overall issue of credibility."

20. But Mrs Samuels-Brown's real complaint is that the judge failed to apply this warning to the facts of the case, especially in the light of what she described as the "patent weaknesses" in the identification evidence, as regards the brief opportunity for observation of the robbers by Mr Ballentine, the position of the person identified as the applicant in relation to Mr Ballentine, the difficult circumstances under which the identification took place and the discrepancy between Mr Ballentine and Mr Walker as to the description of the assailant.

21. Having given herself the general warning set out at paragraph 19 above, the trial judge immediately proceeded to an analysis of the evidence, which she had already summarised in detail earlier in her summing up. She dealt firstly with the issue of the lighting, pointing out that there had been no challenge to the prosecution's evidence that the area in the vicinity of Mr Ballentine's gate that night "was well lit". There has been no real challenge to this conclusion, which was obviously justified by the evidence, although Mrs Samuels-Brown did question the judge's apparent reliance on the evidence of additional lighting, not

mentioned by Mr Ballentine, described by the police officer as having been observed by him when he arrived on the scene later that evening. The trial judge then went on to consider the other aspects of the identification evidence as follows:

> "Mr. Walker is unable to assist on the issue of identification because he clearly was unable to take note of his assailant. He said he was told not to look and he obeyed and it would seem that he was too frightened to pay any attention to the features of the man who was engaging his friend in a struggle. As far as the distances of the two men from them are concerned, however, he does support the evidence of Mr. Ballentine that they were in close range. The one who accosted him came right up to him so that when he had first turned to look, he had been able to see the firearm in his hand.
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> Mr. Ballentine said he saw this man pointing the weapon on his friend from a distance of a little more than an arm's length. He demonstrated how the weapon was pointed in the man's outstretched arm. He had first stopped in the middle of the street and was behind Mr. Walker. Now, Mr. Ballentine identified that man as Spencer. He was the taller of the two and that night, his hair was in an Afro style. Some of the hair came down in his face but he was able to see a part of his face from his eye down to his toe. He saw the side of the firearm Mr. Spencer was pointing at Mr. Walker - he was standing sideway pointing it at Mr. Walker, standing about an arm's length from him. He could see the trigger of the gun.
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> Unlike Mr. Walker who did not pay any particular attention to the two men as they came on the scene, Mr. Ballentine said he was expecting

something to happen when he saw the men turn on to the Close because it is a small Close and he knows the residents – a police, a pastor, an insurance man for instance and he never thought these two men were going to any of the residents in the close. So he *was* paying attention to them. That is where he resides - Mr. Walker was only visiting. He had turned to face the other man who was approaching them on the side of the road where they stood talking, so that Mr. Walker was now behind him.

According to Mr. Ballentine he was in touching distance of the car on which his friend was leaning. The entire incident from they first came around the corner on to the Close to when they drove off in Mr. Waker's car lasted about one and-a-half to two minutes and of that time he saw the faces of the two men for about a minute.

Some seven days later he was able to point out Mr. Spencer at an identification parade and about a month later Mr. Lloyd, from the evidence of the Sergeant who conducted the parade, the witness took care to view the line-up carefully before making the identification, Both witnesses disagreed with the suggestion that they had gone to the Hunt's Bay Police Station before the identification parade and had been shown the accused Spencer and Lloyd whether one or both, the police saying, 'si him there', thus enabling him to point them out on the identification parade. It is to be noted, however, that although in cross-examination both were said to have been given this assistance, Mr. Walker was still unable to point out the two suspects.

Now, although Mr. Ballentine said there was nothing to obstruct his view of the men he also said that the one who approached him, identified as Mr. Lloyd had on a cap. Now it is not quite clear whether he was saying that they both had on caps trying to cover his face. The peak of the cap was turned down but he could still see their faces,

> He had also said that Spencer's hair was somewhat in his face and he was seeing his face from the side. This would tend to weaken his evidence of the identification of Spencer but in the case of Lloyd he was close enough to him for them to be struggling for his keys, so he would have had more of an opportunity to see his face, cap notwithstanding, and be able to recognize him if seen again especially within a short time of seven days."

22. It appears to us that in this passage the judge gave careful consideration to most of the factors complained of by Mrs Samuels-Brown. With regard to the opportunity for observation, the judge noted the relatively short period during which the robbery took place, but also took into account, as she was entitled to do, Mr Ballentine's evidence that he began to pay particular attention to the men from the moment they came around the corner, they being obvious strangers to the small immediate neighbourhood. With regard to the position of Mr Ballentine in relation to the man who he said was the applicant, the judge did acknowledge that, on his account, there was a point at which Mr Walker and that man were behind him, but she was obviously satisfied from Mr Ballentine's evidence of when he first saw this man, as also his proximity to Mr Walker ("an arm's length"), that he was in all the circumstances able to make a correct identification, which was confirmed by the result of the identification parade held a week later.

23. The trial judge accepted that the fact that, according to Mr Ballentine, the robbers both had on caps, apparently trying to cover their

faces, as also that the applicant's hair was somewhat in his face, which meant that he was seeing his face from the side, "would tend to weaken his evidence of the identification of [the appellant]". This then was an explicit acknowledgement of what the judge perceived as a weakness in the identification. But she went on:

> "That less than 24 hours later these two men were found in possession of the vehicle, identified by Mr. Walker as the stolen vehicle, to my mind serves to strengthen the Prosecution's evidence of their identification as the two men who committed the offences charged. This evidence is further strengthened by their false alibis. Each accused has concocted a story about his whereabouts on the night of the 18th of January in an effort to deceive this court and these deliberate falsehoods also strengthens the Prosecution's identification evidence. They have lied to this court as to how they came into possession of that car. There is no challenge to the evidence that the car was stolen, so in effect what the Defence is asking the court to believe is that a car stolen a matter of hours ago, was being treated so casually that it is being driven openly and loaned to others basically, the area which certainly is not that far away from where the offence took place. I reject the whole account as a fabrication."

24. In having regard to the evidence of the applicant's undisputed recent possession of the stolen car as a factor tending to strengthen or confirm his identification as one of the robbers, Mrs Samuels-Brown contended, the trial judge fell into further error. In the first place, she submitted, where identification evidence is weak or unreliable, "it cannot

be bolstered by matters not relating to the opportunities or circumstances of observation." Secondly, and more fundamentally, the doctrine of recent possession is in any event "in derogation of the constitutional protection of presumption of innocence and by virtue of which the burden of proof in [a] criminal trial rests on the prosecution".

25. Mrs Samuels-Brown referred us to Blackstone's Criminal Practice (1993) for the following statement of the doctrine of recent possession (at paragraph F3.26):

> "In cases of handling and theft on proof or admission of the fact that the accused was found in possession of property so shortly after it was stolen that it can fairly be said that he was in recent possession of it, the jury should be directed that such possession calls for explanation, and if none is given, or one is given which they are convinced is untrue, they are entitled to infer, according to the circumstances, that the accused is either the handler or the thief and to convict accordingly (***Schama*** (1914) 84 LJ KB 396; ***Garth*** [1949] 1 All ER 773; ***Aves*** [1950] 2 All ER 330; ***Williams***[1962] Crim LR 54). **However, the burden of proof remains on the prosecution, and if, therefore, the explanation given by the accused is one which leaves the jury in doubt as to whether he came by the property honestly, the prosecution have not proved their case and the jury must acquit (*Aubrey* (1915) 11 Cr App R 182; *Brain* (1918) 13 Cr App R 197; *Sanders* (1919) 14 Cr App R 11; *Hepworth* [1955] 2 QB 600)**" (emphasis supplied - see paragraph 27 below).

26. It is always important to bear in mind, we think, that what Archbold 2007 describes (at paragraph 21-125) as "the so-called doctrine of recent possession" is really "no more than the application of common sense". It is "purely evidentiary in effect" (per Fraser JA in ***Ghany v R*** (1967) 12 WIR 372, 393). As the extract from **Blackstone** cited by Mrs Samuels –Brown emphasises, the burden of proof remains with the prosecution, a point which this court was also at pains to underline in ***R v Francis*** (1964) 6 WIR 316, in which it was held to have been wrong for the trial judge to tell the jury that "If a person is in possession of stolen property recently after stealing it lies on him, subject to what he might say later, to account for his possession and if he fails to do so satisfactorily, he may reasonably be presumed to have come by it dishonestly." As Lewis JA pointed out (at page 317), "This statement suggests erroneously that the onus of satisfying a jury of his innocence is upon the prisoner."

27. ***R v Aves*** [1950] 2 All ER 330, a case referred to by Lewis JA in his judgment, makes it clear that, where the only real evidence against an accused person is his possession of recently stolen goods, if the explanation offered by him leaves the jury in doubt whether he knew the property was stolen, they should be told that the case had not been proven and the verdict should be not guilty. It is of interest to note that in the 2007 edition of Blackstone's, the passage highlighted in the quotation

set out at paragraph 25 above has been slightly recast (at paragraph F3.42) to make this very point clear, with specific reference to ***R v Aves*** as authority in support.

28. ***R v Alfred Flowers*** (Supreme Court Criminal Appeal No. 4/97, judgment delivered 14 July 1998), a case cited by Miss Smith, is a decision of this court in which the possession by the applicant of recently stolen goods was treated as a factor which bolstered the visual identification evidence in a case of capital murder. That was a case in which the applicant, who was admitted to hospital suffering from gunshot wounds after the murder, was found in possession of a wallet which had been taken from the deceased's step-father at the time of the robbery which resulted in the murder. The applicant's defence was an alibi and the trial judge directed the jury on the doctrine of recent possession and went on to tell them how they might regard the finding of the wallet in the applicant's possession:

> "Now on the question of the wallet you must bear in mind what I told you about the doctrine of recent possession. Now the possession of articles found on the accused tend [sic] to negative alleged mistakes in identification of him by Crown's witnesses, so you bear that in mind."

29. Delivering the judgment of the court, Patterson JA said this (at page 21):

> "It is quite clear to us that on the facts presented to the jury, and the failure of the applicant to give a credible explanation, the jury would have been justified in inferring that he was one of the robbers that robbed Mr. Douglas and shot the deceased. It was the only reasonable inference to be drawn in the circumstances."

30. That conclusion appears to us to be one firmly based in both logic and common sense. We accept that even in a case in which reliance is placed on the doctrine of recent possession, the identification evidence must itself be of sufficient quality to enable the judge to leave the case to the jury. But once that threshold is reached, as in our view it clearly was in this case, it appears to us that, subject to Mrs Samuels-Brown's constitutional point, there should be no obstacle treating evidence of unexplained (or unsatisfactorily explained) possession of recently stolen goods as a factor bolstering the evidence of visual identification. That, it seems to us, is also a matter of common sense.

The constitutional point

31. Section 20(5) of the Constitution of Jamaica provides as follows:

> "(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:
>
> Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question

imposes upon any person charged as aforesaid the burden of proving particular facts."

32. Mrs Samuels-Brown referred us to a number of Commonwealth authorities on the effect of comparable constitutional provisions in the context of various statutory provisions seeking to impose reverse burdens on defendants in criminal cases ("'reverse', because the burden is placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor" - per Lord Bingham of Cornhill in **Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No.4 of 2002)** [2005] 1 All ER 237, 243.)

33. In **Attorney General of Gambia v Momodou Jobe** [1984] 1 AC 689, the Privy Council considered the effect of section 8(5) of the Gambian Special Criminal Court Act 1979, which made it an offence for any person to fail to come before the court to prove that property seized from him by the police had been acquired lawfully and also made it an offence if he failed to prove that he lawfully acquired the property. It was held that this provision was "a plain and flagrant infringement" of the section of the Gambian constitution (section 20(5)(c)) which enshrined the principle th every man was to be presumed innocent until the contrary was pro (see the judgment of Lord Diplock at page 703).

34. In ***Attorney General of Hong Kong v Lee Kwong-kut*** [1993] 3 WLR 329, the Privy Council considered the effect of section 30 of the Hong Kong Summary Offences Ordinance, which provided as follows:

> "Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of $1,000 or to imprisonment for three months."

35. The question was whether this section contravened article 11(1) of Hong Kong Bill of Rights Ordinance 1981, which, like section 20(5), enshrined the presumption of innocence. It was held that, while there might become permissible exceptions to the general rule that the prosecution has the burden of proving the guilt of defendant (see, for instance ***R v Edwards*** [1975] QB 27, 39-40, dealing with the proof of exceptions, exemptions, provisos and the like in cases of express statutory prohibition and ***Woolmington v Director of Public Prosecutions*** [1935] AC 462, 481, in relation to the defence of insanity), the substantive effect of section 30 was to place an onus on the defendant to give an explanation as to his innocent possession of the property, failure to do which was the most important element of the offence. The section therefore amounted to an unjustifiable contravention of article 11(1) (see, to similar effect in respect of virtually identical statutory and constitutional provisions, the

decision of Conteh CJ in the Supreme Court of Belize in ***Palacio v Garbutt and Others,*** Inferior Court Appeal No. 3 of 2005, judgment delivered 8 October 2005).

36. In ***Vasquez v R, Oniel v R*** [1994] 3 All ER 674, the Privy Council held that, as the absence of provocation was an essential ingredient of the offence of murder, section 116(a) of the Criminal Code of Belize, which placed the burden of proof of provocation on a charge of murder on the defendant, was in breach of section 6(3)(a) of the Constitution of Belize, which expressly preserved the presumption of innocence.

37. And finally, in ***Attorney General of Antigua and Barbuda v Goodwin and Others*** (1999) 60 WIR 249, the Court of Appeal of the Eastern Caribbean States held that section 11 of the Business Licence Act, which made it an offence once any person believed by the relevant minister to be carrying on business failed to produce a licence under the Act, contravened the presumption of innocence guaranteed by section 15 (2)(a) of the Constitution of Antigua and Barbuda. The effect of section 11 was that, upon the minister's belief that a person is carrying on business, that person was obliged to prove his innocence by production of a licence, the distinction between this and the ***R v Edwards*** (supra) kind of case being that section 11 did not prohibit the doing of any act, subject to exemptions or provisos or the like.

38. The common feature in all of these cases, it seems to us, is that the impugned statutory provisions sought to place the legal burden of proof in respect of a critical element of the offence charged on the defendant. They were all struck down or modified because they constituted unjustifiable departures from the ordinary rule that it is primarily the responsibility of the prosecution to prove the guilt of the defendant to the required standard (see Lord Woolf's valuable discussion on this, in a comparative context, in ***Attorney General of Hong Kong v Lee Kwong-kut*** at pages 337-344). It is of interest to observe that, as a consequence of the Human Rights Act 1998, the question of whether a reverse burden imposed by Parliament constitutes an unjustifiable infringement on the presumption of innocence is now a live one in the United Kingdom as well (see now the leading case of ***Sheldrake v DPP,*** supra).

39. We are of the view that these cases are clearly distinguishable from the instant case where the operation of the doctrine of recent possession does no more, as has been seen, than to allow the prosecution to rely on an evidential presumption, the failure to rebut which by the defendant is not necessarily decisive of the case for the prosecution against him. To the contrary, it is clear that, even where the doctrine applies, the burden of proving the case against the defendant remains squarely on the prosecution (see paragraphs 25-27 above).

40. We would therefore conclude that Norma McIntosh J was fully entitled to take into account the evidence of the applicant's possession of the recently stolen car and his explanation therefor as factors which strengthened the identification evidence (which was itself of acceptable quality) against him.

41. This was therefore a case, in our view, where the trial judge not only warned herself in appropriate terms of the need for caution in approaching identification evidence, but demonstrably applied that caution to the identification evidence as well as the other evidence in the case which tended to support or confirm the correctness of the identification of the applicant as one of the persons who held up and robbed Messrs Ballentine and Walker at gunpoint on the evening in question. We accordingly think that ground 2 must fail as well.

Grounds 3 and 4

42. Ground 3 complains of the trial judge's rejection of the applicant's alibi. That alibi, it will be recalled, came from the applicant himself in his unsworn statement and was supported by his mother's evidence. The judge reminded herself (correctly) that "it is entirely for the tribunal of fact to make up its mind as to what, if any, weight is to be attached to the unsworn statement ... and to evaluate the evidence of the alibi witness ...". It is clear that the judge attached no weight whatsoever to the applicant's statement. She also found specifically that his mother's

"demeanour in the witness box was not that of a truthful witness... and her evidence was a complete fabrication". In our view, these were matters entirely for the judge as the trier of fact.

43. The complaint in ground 4 is that the judge erred in stating in her summing up that the identification evidence against the defendants was "further strengthened by their false alibis". In ***R v Turnbull*** [1976] 3 All ER 549, 553, Lord Widgery CJ said this:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not itself prove that he was where the identifying witness says he was".

44. Expanding on this, in ***Oniel Roberts & Christopher Wiltshire v R*** (Supreme Court Criminal Appeals Nos. 37 & 38 of 2000, judgment delivered 15 November 2001), Smith JA (Ag) (as he then was) stated that one of the circumstances in which the direction concerning the rejection

of alibi by the jury is applicable is "where the fact of the rejection of alibi is identified by the judge as capable of supporting the evidence of identification" (page 20).

45. It seems to us that Norma McIntosh J clearly had all of this in mind when she said this in her summing up:

> "I am mindful that even if I reject their alibi defence that does not, without more, lead to a finding of guilt. There may be many reasons for a false alibi – there may be a genuine mistake about dates for instance and even if the alibi is rejected as untrue, the mere fact an accused has lied about his whereabouts, that of itself prove [sic], that he was where the identifying witness said he was. So, I must return to the Prosecution's case and consider it along with what each accused has told the court to see if the Prosecution has proved its case against each to the required standard, always bearing in mind that they have nothing to prove."

46. It is against this background that the judge then went on to make the statement, about which complaint is made, that the evidence of identification was "further strengthened by their false alibis". In our view, in the light of ***Turnbull*** and ***Roberts & Wiltshire***, the judge's comment on the effect of the alibis was entirely unexceptionable in the circumstances of this case.

47. We are accordingly of the view that grounds 3 and 4 must fail as well.

The other grounds

48. Before going to ground 5, which relates to the question of sentence, we should say for completeness that we have also considered the original grounds filed by the applicant, which were not abandoned. It is sufficient to say that we do not think that there is any merit in these grounds. There was no evidence to support the applicant's contention in ground (b) that he was exposed to the witness prior to the identification parade and we have already expressed our view that the prosecution evidence was neither so unreliable nor of poor quality to have required the judge to treat it as incapable of supporting a conviction (ground c).

49. Finally on ground 5, we were referred by Mrs. Samuels-Brown to the decision of the Privy Council in ***Director of Public Prosecutions v Stewart*** (1982) 35 WIR 296, in which it was held that, where a defendant was convicted on two counts arising out of the same facts, as a matter of principle substantial sentences should not be imposed on both counts. In the instant case, the applicant was in fact convicted on three counts arising out of the same facts, but was sentenced to five years imprisonment on count 1 and seven years imprisonment on each of counts 2 and 3, the sentences on the latter two counts to run concurrently, but consecutively to the sentence on count 1.

50. In these circumstances, we agree with Mrs Samuels-Brown that there was no basis for a consecutive sentence in this case and that the

sentence should be varied to make it clear that the sentences on counts 1, 2 and 3 are to run concurrently.

Conclusion

51. In the result, the application for leave to appeal against conviction is refused. However, the application for leave to appeal against sentence is granted and the hearing of the application is treated as the hearing of the appeal, which is allowed to the extent that the sentence of the court below is varied, so that the sentences on counts 1, 2 and 3 are to run concurrently. These sentences are to run from the date of conviction, that is, 19 January 2007.