[2012] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 20/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

RONIQUE RAYMOND v R

Patrick Bailey, Alando Terrelonge and Miss Kristina Exell instructed by Bailey Terrelonge Allen for the applicant

Miss Annette Austin for the Crown

11, 12 October; 2 December 2011 and 2 March 2012

McINTOSH JA

[1] Ronique Raymond (hereafter "the applicant") was convicted in the High Court Division of the Gun Court on 1 February 2010 for the offences of illegal possession of firearm, assault at common law, robbery with aggravation and assault with intent to rape. He was sentenced that same day to serve two years imprisonment for each of the assaults and 10 and 15 years, respectively, for the offences of illegal possession of firearm and robbery with aggravation. Aggrieved by his convictions and sentences he sought the leave of this court to appeal and, when leave was refused on 4 May 2011 by

the single judge who first reviewed his application, he exercised his right to renew it before a panel of three judges. So it was that the renewed application came before us on 11 and 12 October 2011 and, after hearing the arguments, we reserved our decision delivering same on 2 December 2011, wherein we treated the application as the appeal, allowed the appeal, set aside the convictions and entered a verdict and judgment of acquittal. These are the promised reasons for our decision.

The Trial

[2] The facts, in brief, are that on 20 June 2009, at about 1:00 pm, the complainant, a student from the parish of Saint Ann, was in Kitson Town in the parish of Saint Catherine, where she had travelled to meet a lady whom she had met via the internet. She was in the company of a friend, S.C. and, following instructions she had received from the lady, she met up with a young man -"the escort" - who was to accompany them to the lady's location. As they made their way along a short cut a gunman pounced upon them, holding the complainant at the top of her shirt and while holding the gun at the back of her head, forced them further along the short cut. When they reached to a clearing he stopped them and then robbed the complainant of her Nokia 2600 Classic cell phone, a stainless steel ring with two steel grooves in it, a red digital camera with a black camera case and a white battery charger, all of which she had in a black Jansport bag and cash in excess of $4,000.00. He also searched S.C. and took from her a brown wrist watch, two cell phones and a red thumb drive. The escort was also searched but she did not see if anything was taken from him. The complainant said

they were all kneeling on the ground with their hands held behind their heads during the robbery.

[3] The gunman next called the complainant to stand in front of him, then to kneel and perform oral sex on him and she did as she was told because he was pointing the gun at her. During the entire ordeal which lasted "about an hour or two" she and S.C. (who had undressed as the gunman had instructed) were ordered to perform several acts of a sexual nature, with the gunman, with each other and with their escort. Eventually, the gunman brought the activities to a halt and told them to return to the path from which they had deviated. S.C. dressed and they walked in single file as he had instructed and, when they reached to the main road, they discovered that the gunman was no longer behind them and had disappeared. Their escort took them to his mother's house where S.C. had a shower and the complainant washed/rinsed out her mouth. Then, with the assistance of funds from their escort they took a taxi and made their way back to the parish from whence they had come.

[4] The complainant subsequently made a report to the police and investigations led to the applicant being placed on an identification parade where she was the witness. She identified him as the man who had assaulted her on 20 June 2009 and he was arrested and charged with the offences for which he was later convicted.

[5] The complainant's testimony was that the applicant wore a handkerchief across his nose during the entire assault which allowed her a view of his eyes only. She also testified that after viewing the men on the parade she had focused her attention on two

of them but she had asked that all of them be instructed to hold out their hands and her evidence was that the suspect was asked three times to hold out his hands. This appeared to have been of significance to her as she noted that he was the only one who was requested to do so three times because of his failure to hold out his hands in the way that the others did. Then, after the third effort, she pointed him out as her assailant. She had also asked for the men to speak certain words and she purported to recognize his voice after the utterance though she did not know him before and was hearing him speak for the first time that day.

[6] At the time the applicant attracted the attention of the police in their investigation into this matter, he had in his possession a Nokia cell phone which the complainant subsequently identified as her property. Certain other items were found at his home including a ring which the complainant also identified as belonging to her and the learned trial judge accepted that these were indeed among the items which were stolen at the time of the commission of the offences.

[7] The prosecution also adduced evidence from the complainant's mother to whom she had related her not soon to be forgotten ordeal; two officers who dealt with her report at the Centre for Investigation of Sexual Offences and Child Abuse (CISOCA), namely Sergeant Lowe-Cox and Constable Kimeisha Smith, the latter visiting the locus in quo with the complainant and subsequently showing her the recovered items; Sergeant Clive Mullings who conducted the identification parade; and Corporal Careen Sutton who arrested and charged the applicant. Nothing turned on the evidence of

these witnesses save that the defence sought to highlight the absence from Sergeant Mullings' evidence of any reference to the suspect holding out his hands three times as the complainant testified.

[8] The applicant gave sworn evidence in which he denied involvement in the commission of the offences and explained that the cell phone was given to him to sell by a friend whom he called Kevin but whose real name was Everton Stewart. It was given to him in a bag and although he had looked in the bag he was not really able to say what it contained. In cross examination, however, he did admit to signing an inventory of the items as having been removed from his house. He said he had told the police about Kevin, when first accosted in this matter and had taken them to Kevin's house in Kitson Town but Kevin was not found. He said that Kevin was a person who was reporting at the Guanaboa Vale Police Station and that a warrant was then out for his arrest. When asked why he took a bag from such a person, he responded, "Well, Your Honour, that is the only thing, that is the only mistake that I do why I am involved in this matter."

[9] The applicant further testified that he was not in the area in question on Saturday 20 June 2009. He went to Kitson Town on the Sunday, which was Father's Day and attended church there. His mother lives in Kitson Town and he would go there whenever she needs him. He would go twice per week, on Wednesdays and Sundays. Crown Counsel then asked, "So you said that you were not in Kitson Town on the Saturday" and he responded, "I don't quite remember where I was". Then he was

asked, "But you remember that you were not in Kitson Town" to which he responded in the affirmative.

[10] The learned trial judge found that the quality of the complainant's evidence of the identity of her assailant was satisfactory and placed reliance on her evidence of voice recognition, clearly concluding that this, when added to the other evidence adduced by the prosecution, including the finding of the complainant's property in his possession some nine days after the robbery, enabled her to return a verdict adverse to the applicant.

The Appeal

[11] Mr Terrelonge sought and was granted leave to abandon the original grounds of appeal filed with the application and to argue instead 10 supplemental grounds which were formulated as follows:

> "(1) The Learned Trial Judge erred and misdirected herself, in that she failed to appreciate and failed to warn herself that the testimony of the purported voice identification of the Appellant [sic], by the Complainant, was of no evidentiary value, in that, in eliminating the nine (9) men on the Identification Parade down to two (2), that was, in and of itself, a manifestation of the Complainant's uncertainty as to the identity of the lone gunman whose voice she claimed to have heard at the time of the incident, the subject of the charges below.
>
> (2) The Learned Trial Judge erred and misdirected herself as to the testimony of [sic] Complainant in relation to the purported identification of the hands of the

Appellant [sic], as, the Complainant purported to identify the hand(s) of the Appellant, purely on the basis of the unique circumstance that, according to her, unlike the other men on the Identification Parade, the Appellant was the only person required to hold up his hands three (3) times.

(3) The Learned Trial judge misdirected herself in failing to caution herself on the manifest contradiction of the Complainant's testimony with that of Sargeant [sic] Mullings (who conducted the Identification Parde [sic]) on the vital issue of the holding out of the hands by the men on the said parade.

(4) The Learned Trial Judge erred in failing to consider, or to properly consider, the state of the mind of the Complainant who was at times terrified, fearful and nervous either at the time of the incident or at the identification Parade, which state of mind must have affected the Complainant's powers of observation.

(5) The Learned Judge erred and misdirected herself in failing to warn herself of the dangers of the Complainant's evidence on the matter of identification, as, at all material times the gunman had his head covered with a tam and the gunman's face, below his eyes, was covered by a handkerchief, leaving only his the [sic] eyes visible; and the Complainant testified that there was nothing specific about the eyes of the gunman.

(6) The Learned Trial Judge erred and misdirected herself in failing to appreciate that with a handkerchief covering his mouth the gunman's voice would have been muffled, garbled and distorted and any attempt at voice identification would therefore be impossible.

(7) The Learned Trial Judge erred and misdirected herself in failing to appreciate that being in possession of stolen goods, or goods otherwise unlawfully obtained, does not, without more, render the person in

possession of those goods as the person who stole or committed the robbery of the goods in the first place.

(8) The Learned Trial Judge erred in failing to uphold the no case submission made on behalf of the Appellant [sic] at the close of the Crown's case.

(9) That having regard to the totality of the evidence and the deficiencies in relation to the purported identification the verdict of guilt was manifestly unreasonable and unsafe and ought therefore to be set aside.

(10) The Learned Trial Judge erred and misdirected herself, in that she failed to properly apply the principles dealing with the defence of alibi, when she stated that the mere fact that the accused has lied about where he went, proved that he was where the Prosecution [sic] witness said he was; and that if she rejects the defence of alibi she can conclude that that is support for the evidence of identification and that the accused man is therefore guilty."

The Arguments

[12] Counsel reduced these fulsome grounds of appeal, for the purposes of argument, to three main issues: - (1) the identification of the applicant as the assailant (grounds one to six and nine); (2) the misapplication of the doctrine of recent possession (ground seven) and (3) misdirection on the defence of alibi (ground 10). Ground eight was not pursued.

Issue one - Identification

[13] Mr Terrelonge submitted that the complainant had given no description of her assailant's eyes whether in terms of their colour, shape or size, or of any distinguishing

marks or features of his hands, yet she purported to be assisted by them to identify him on the parade. Counsel further referred to the complainant's evidence of the attire of her assailant (that is, the tam coming down to just above the eyebrows and the handkerchief covering the nose and the lower portion of his face), submitting that the only facial feature of the assailant exposed to her were his eyes and her evidence was that there was nothing specific about them. Counsel also argued that the men on the parade were not dressed as the assailant was on the day of the assault so as to enable the complainant to have the view of his eyes that she had then. Additionally, it was Mr Terrelonge's contention that the learned trial judge failed to take into account her state of mind at the time of the incident as her evidence was that she was frightened, crying and in fear for her life. Even at the parade she said she was confused and she demonstrated some uncertainty and confusion before making the identification, he argued.

[14] A further contention was that the learned trial judge failed to note and/or to reconcile the discrepancy between the evidence of the complainant and the officer who conducted the parade. Two different versions were given in relation to the narrowing down of the men on the parade to two and the holding out of their hands, both of which were not mentioned by Sergeant Mullings and the learned trial judge ought to have addressed that in her summation, giving her reasons for accepting one version over the other.

[15] Finally, on the issue of identification, it was Mr Terrelonge's submission that no reliance ought to have been placed on the evidence of voice identification as the handkerchief across the nose of the assailant would have produced a muffled effect on the voice and this was not simulated at the parade as none of the men wore handkerchiefs when required to say the words requested by the complainant and if the learned trial judge found this to have been of no effect, she was duty bound to say so because this was material. Additionally, he contended, the purported recognition was based on a single utterance by the men on the parade. There was a duty on the learned trial judge in cases of voice identification, counsel argued, to caution herself in terms even stronger than the required **Turnbull** warning for visual identification and she ought to have rejected this evidence as being of no value. Counsel relied on the case of ***Davies v The Crown*** [2004] EWCA 2521 paragraph [29] where their Lordships indicated that:

> "…voice identification (or here, more precisely, recognition) evidence needs to be approached with even greater care than visual identification or recognition evidence. But the general principles governing identification stated in **Turnbull** applied to both."

In any event, it was his contention that the complainant's identification of the applicant as her assailant had nothing to do with either his eyes or voice but that he, unlike the other men on the parade, had to be asked to hold out his hands three times. Counsel submitted that the evidence of identification was so weak and erratic that the learned trial judge ought to have rejected it.

[16] Miss Austin's response on behalf of the Crown was that although the eyes and hands of the assailant were important to the complainant, the learned trial judge had placed no reliance on them in arriving at the conclusion that the applicant had been correctly identified as her assailant. Counsel submitted that when the complainant said there was nothing specific about the eyes of her assailant, this did not mean that she did not take note of them. The parade was not really helpful to her, Miss Austin submitted, because the men did not wear tams and handkerchiefs so she had to take time to carefully observe them. It seems clear that the hands were not the decisive factor for her, counsel argued. She walked down the line then asked them to speak. It was a mental exercise to which she referred when she spoke of narrowing the men on the parade down to two, Miss Austin argued and the sergeant who conducted the parade would not have been able to speak to that. It is a question for the court to say whether the applicant had been properly identified in this unorthodox way, counsel submitted, as the complainant said that this was the means she had to identify him.

[17] Miss Austin turned next to the issue of voice identification, referring us to the case of ***Rohan Taylor and Others v R*** SCCA Nos 50-53/1991, a decision of this court delivered on 1 March 1993 and submitting that it contains a correct statement of the law relating to voice identification. She drew our attention particularly to page 13 where Gordon JA who delivered the decision of the court had this to say:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent, there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the

> voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act…"

This indicated that the focus was on familiarity, counsel said. There is no requirement for distinctive features and in this regard, the learned trial judge had counted the number of times the assailant spoke, Miss Austin submitted and had arrived at a number in excess of what the complainant recalled as she recalled only seven to 10 times while the learned trial judge counted 27 times from the record. Counsel also referred us to the decision of this court in ***Siccaturie Alcock v Reginam*** SCCA No 88/1999 delivered on 14 April 2000 where the complainant had recognized the voice of the applicant who had spoken some 13 times during the commission of the offence and the court had accepted that as a sufficient base for identification in the particular circumstances of that case, approving ***Rohan Taylor and Others v R*** as authority in voice identification cases.

[18] It was Miss Austin's further submission that there is no rule requiring the trial judge to warn herself in relation to the reception of evidence of voice identification as contended for by the applicant and, at the end of the day, it really was a question of fact for the learned trial judge to decide who or what she believed.

Issue two - The Doctrine of Recent Possession

[19] Arguments were advanced on this issue by Mr Bailey. He contended that the learned trial judge misapplied the doctrine of recent possession as she clearly formed

the erroneous view that being in possession of articles recently stolen was *ipso facto* proof that the possessor of the items was a participant in their robbery. Counsel relied on the case of ***R v Schama; R v Abramovitch*** [1914-15] All ER Rep 204, 205 in support of his argument that even though the learned trial judge rejected the defence and accordingly, the applicant's explanation, she had a duty to return to the prosecution's case to satisfy herself that the case against the applicant had been proven and she ought not to have returned a verdict of guilt merely because she found that he was in possession of the stolen goods. He referred us to the case of ***Fox v Patterson*** (1948) JC 104 in support of his further argument that in order to raise a presumption of guilt the possession of the stolen items must not only be recent but must be accompanied by other incriminating evidence linking the possessor to the robbery.

[20] Counsel pointed out that when confronted by the police about the phone which he actually had in his possession on a visit to the police station in another connection, the applicant had said that the phone was his. He did not back away from it and in owning it, there is an inference that he had nothing to hide, Mr Bailey argued. The applicant gave an account for his possession that was capable of verification, counsel submitted (though it is to be noted (i) that the officer to whom he spoke denied that any such account was given to him, providing nothing to verify; (ii) that he also denied being taken to the alleged address of Kevin and (iii) that the questions put to the officer in cross examination were lacking in specificity). Further, counsel argued, in assessing the applicant's explanation the learned trial judge failed to ask herself the appropriate question, that is, not only if it is true but also whether it could reasonably be true and

for this he again relied on ***R v Schama; R v Abramovitch***. It was his contention that the identification evidence was so tenuous that the learned trial judge ought not to have found the possession of the items to be supportive of that weak identification, in light of the applicant's reasonable explanation.

[21] Even if the learned trial judge was entitled to find that the applicant was guilty of possession of stolen items, Mr Bailey continued, that did not entitle her to find him guilty of illegal possession and of assault and for this submission he referred us to a dictum from Lord Justice-General (Clyde) in the case of ***Cameron v H.M. Advocate*** 1959 JC 59, 64 that:

> "If a charge of physical assault on another person were involved as well as theft, there would, in my opinion, be no warrant in principle, nor in authority, for applying the doctrine of recent possession in proving the charge of assault…"

The Lord Justice-General based his opinion on the observations of Lord Fleming, who, in ***Christie v H.M. Advocate*** 1939 J C 72 had said:

> "While I quite accept the view that the *de recenti* possession of stolen property in regard to which no reasonable explanation is given may be regarded as sufficient proof of all forms of theft, as at present advised I am not prepared to hold that it is sufficient proof of any crime which involves the use of violence."

[22] Finally, referring us to the case of ***Franklyn Morgan v Regina***, SCCA No 151/2006 an oral judgment delivered by this court on 19 February 2009, Mr Bailey invited the court to conclude that the learned trial judge misdirected herself and came

to an unsupported verdict so that the applicant's convictions and sentences should accordingly be set aside.

[23] Miss Austin also found support in the ***Franklyn Morgan*** case, for her submissions on the learned trial judge's application of the doctrine of recent possession to the instant case. She referred us in particular to paragraph 10 of the judgment of the court delivered by Morrison JA where his Lordship had this to say:

> "The rule is well established … that if a person is found in possession of recently stolen goods and offers no satisfactory explanation to account for his possession of the goods or offers an explanation which the jury is satisfied is not true, the jury may infer that he either stole the goods or received them knowing it [sic] to be stolen …"

Miss Austin submitted that the court made a distinction between cases where the prosecution is relying on evidence of recent possession only and cases where there is other evidence providing a nexus between the applicant and the offences charged. The latter case could support a conviction while the former could not. It was Miss Austin's contention, however, that in the instant case there were circumstances which provided that nexus and she invited the court to look at the circumstances of the applicant. The phone was found in his possession and the watch, thumb drive and ring were found in his house. At first, he had denied knowledge of them but admitted signing the inventory by the police relating to the items taken from his house which included the very items he denied. His explanation was that the phone was given to him to sell and although he had looked in the bag given to him he did not know what it contained. The learned trial judge was entitled to treat the applicant's evidence in the same way that all other

evidence in the case was treated and to come to a finding that he was not speaking the truth, she argued.

[24] It was Miss Austin's further contention that the case of ***Cameron v H.M. Advocate*** was not to be relied on for any proposition that recent possession cannot be relied on in circumstances involving violence and found support for this view in the ***Franklyn Morgan*** case. Counsel submitted that when taken together, the identification of the applicant as the assailant, his recent possession of the stolen items, the false alibi (dealt with below) and his unsatisfactory explanation, the learned trial judge, as the tribunal of fact found that the case was proved. The complainant could not have known about the circumstances of the applicant – that, for instance, he had connections with the area - and counsel submitted that on the totality of the evidence the applicant was properly identified and his conviction was sound.

Issue three – The Defence of Alibi

[25] Mr Bailey submitted that the learned trial judge misdirected herself in concluding that a rejection of the applicant's alibi defence resulted in a finding of guilt. To so find was to shift the burden of proof from the prosecution to the applicant and that was erroneous. He referred us to the case of ***R v Johnson*** [1961] 3 All ER 969 where it was held that "If an accused puts forward an alibi as an answer to a criminal charge he does not thereby assume a burden of proving the defence, but the burden of proving his guilt remains throughout on the prosecution." The learned trial judge, he argued, was therefore plainly wrong when she stated that "the mere fact that the accused has

lied about where he went, proved that he was where the Prosecution witness said he was."

[26] However, Miss Austin disagreed with Mr Bailey's submission and referred us to the case of ***Ashan Spencer v R*** SCCA No 14/2007, a judgment of this court delivered by Morrison JA on 10 July 2009, as supportive of her submission that the rejection of a false alibi can lend support to evidence of identification. In short, it was Miss Austin's submission that the learned trial judge's decision was not based only on voice identification and recent possession but also on the rejection of his alibi defence. It was clear that what the learned trial judge was saying was that the identification was bolstered by the rejection of the alibi and his sworn evidence, she argued.

Analysis

[27] There is no gainsaying that the quality of the identification evidence in this case was not ideal. The complainant used three factors to assist her in making the identification of the person who assaulted her, namely, his eyes, his hands and his voice. She described how she was able to look into his eyes as she knelt in front of him and he was talking to her and looking down at her while she did his bidding. She recalled three such instances lasting some three to five minutes each and, at page 27 of the transcript, in her evidence in chief, she said she was able to see the eyes of her assailant as she knelt before him at a distance of about 7 inches from him.

[28] At page 66 of the transcript, however, the following telling exchange took place between the judge and the complainant in relation to her identification of her assailant on the parade:

> "Her Ladyship: You said at one point you stopped and looked in the eyes of the men, is there anything about the eyes?
>
> A: I can't say specifically, but at the time of the incident the gunman had looked at me directly and looked in my eyes.
>
> Her Ladyship: Specifically?
>
> A: I don't know if he was looking in my eyes but I was looking straight into his. There wasn't anything specifically distinct about the eyes … ."

She also said that while she was in that kneeling position in front of her assailant, she was crying a lot. These were indeed difficult circumstances and her ability to effectively view the eyes of her assailant, not only from her kneeling position, engaged in the particular activity she described, but also in an upward gaze, through tearful eyes, while holding his penis as he instructed, must have been greatly impaired.

[29] Additionally, there was no evidence of any opportunity the complainant had to see the hands of her assailant so as to be aided in any way in her identification of him. In fact, it was her evidence that she was not able to see both hands, only that part of the hand holding the gun in what she agreed had the appearance of a fist. The other hand was to his side and she never saw it. Further, she testified in cross examination that she gave no description of her assailant's hands to the police and did not

remember what they looked like, nor did she remember how to describe them when she gave her statement to the police. At page 65 she said she had no specific reason for asking that the men on the parade put out their hands: " … it was just a case that I had two persons … and I wanted to use something else other than the eyes and the voice particularly because most of them had their hands at their side at the time". There seems to be some merit in Mr Terrelonge's submission that she identified the applicant based on his attitude towards the showing of hands at the identification parade as, in answer to a question from the judge about whether the hands assisted her to identify the suspect, she said it did because "when they came down to number 6 he was the only person they had to ask to put up his hand two or three different times".

[30] The case of ***Siccaturie Alcock v Reginam*** did not really provide support for Miss Austin's submission that there was sufficient evidence of voice identification upon which the learned trial judge could rely. In that case, the Court of Appeal, while approving the governing principles on voice identification set out in ***Rohan Taylor and Others v R***, (supra), accepted that there could be voice recognition in circumstances where the opportunity to hear and become familiar with the voice of the assailant occurred at the time of the commission of the offence. The learned trial judge in the instant case was therefore entitled to take note of the number of instances as unfolded in the transcript when the assailant spoke to the complainant and to rely on her count as opposed to the complainant's estimation of that number inasmuch as the learned trial judge accepted the complainant's evidence of all the opportunities she had to hear

the voice of her assailant during the incident. However, that would only be cogent evidence if, on the occasion of recognition, there were sufficient words spoken.

[31] In ***Siccaturie Alcock*** the judge had counted 13 instances when the accused had spoken during the incident and at the time when that complainant purported to recognize his voice he had engaged her in conversation, challenging his identification as her assailant, which was sufficient to afford her an opportunity to make the recognition. In the instant case, however, one utterance at the identification parade was all that the complainant used in her recognition and in those circumstances reliance could not properly be placed on that evidence. It is also important to note that the Court of Appeal, while accepting that there was evidence of voice identification in ***Siccaturie Alcock,*** pointed out that there was also evidence of sufficient opportunity for the complainant to see the applicant's face to be able to identify him subsequently and that "the evidence of voice identification was not decisive to the conviction" but was to be considered with the rest of the evidence in the case.

[32] Another unsatisfactory feature of the evidence of voice identification in the instant case was the fact that the handkerchief over the mouth of the assailant at the time of the incident may have impacted the sound of his voice and this was not simulated on the parade. No questions were asked of the complainant in that regard and the learned trial judge, in accepting the evidence of voice identification, gave no indication that this factor was considered.

[33] There would therefore be a need for a careful analysis of the evidence to see what, if any, support there was for this weak identification evidence. According to Miss Austin that was to be found in the evidence of recent possession of the stolen items, the rejection of the explanation by the applicant as to how he came into their possession as well as the rejection of the applicant's alibi defence and his sworn testimony.

[34] It is clear from the authorities that the doctrine of recent possession could only avail the Crown if there was reliable evidence which could provide a nexus between the robbery on 20 June 2009 and the discovery of the stolen items in the possession of the applicant some nine days later (see ***Franklyn Morgan v R***). In ***Ashan Spencer v R*** Morrison JA had this to say at paragraph 30:

> "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 … it appears to us that … 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."

After a close review of the evidence and the authorities, we concluded that that threshold was not reached in the instant case so that the doctrine of recent possession did not avail the prosecution and the learned trial judge erred in placing reliance on it.

[35] Additionally, we find merit in the complaint set out in ground seven. Inasmuch as the stolen items were recovered some nine days after the robbery, counsel for the

applicant had argued that the learned trial judge had failed to consider that the applicant may have been a receiver of stolen goods and not the actual robber. Because of the weakness of the evidence of identification, the evidence of recent possession could be seen as the cornerstone of the prosecution's case providing the necessary link between the applicant and the robbery. This brings to mind a passage to be found in Archbold 2001 at paragraph 21-126, a portion of which is extracted below:

> "Every case depends on its own facts. There is no magic in any given length of time however it is submitted that in many cases where the only evidence is that of recent possession it would be impossible to exclude the possibility that the defendant was merely a receiver of the stolen property."

The nature of the stolen items was such that in nine days they could have passed hands, requiring consideration to be given to that possibility. In the same paragraph the learned author pointed out that there may be other bits of evidence which the prosecution may seek to pray in aid to establish a nexus between the defendant and the offence, such as any connection which the defendant may have with the complainant or with the place where the offence was committed. The prosecution did seek to show a connection but that link was not of sufficient strength to establish that nexus, in our view and we were in agreement with the applicant's counsel that in the circumstances the learned trial judge ought to have exposed her thinking on the possibility that the applicant may have been a receiver as opposed to the actual robber.

[36] We turn now to the complaint relating to the learned trial judge's treatment of what has been referred to as the applicant's alibi defence. The authorities are clear that

in order to raise this defence a defendant must not only state that he was not where the prosecution's witness said he was but must also state where he was at the date and time in question (see ***Oniel Roberts, Christopher Wiltshire v R*** SCCA Nos 37 and 38/2000). In his evidence this applicant simply stated that he was not in Kitson Town on the day in question and went on to say, "I don't quite remember where I was." This therefore was no alibi defence and the learned trial judge erred in classifying it as such. However, we are not convinced that the learned trial judge's words were accurately recorded at page 182 of the transcript where it reads as follows:

> "There may be reason to put an alibi genuine mistaken about this. So only if I am satisfied that this Court pro–fabrication to deceive the court I may find support for the identification evidence. The mere fact that the accused has lied where he went proved that he was where the Prosecution witness said he was."

Inasmuch as there was no alibi defence, however, and no need for any direction on the treatment of such a defence, the learned trial judge may simply be taken to be conveying her rejection of the defence actually put forward by the applicant.

Conclusion

[37] In the final analysis, we were of the opinion that there was merit in the arguments advanced on the weaknesses in the quality of the identification evidence and the failure of the Crown to establish that the doctrine of recent possession was of any assistance in providing a link between the applicant and the offences charged. We accordingly concluded that, in all the circumstances, the verdict was unsafe and ought to be set aside and made the order noted in paragraph [1] above.