JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 33/2002

BEFORE: THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE PANTON, J.A.

R v HENRY RIVAS
GIOVANNI INFANTE

Mrs Jacqueline Samuels-Brown for appellants
instructed by George C. Thomas

Miss Paula Llewellyn and Miss Christine Morris for Crown

July 30, 31, August 2 and 5 and December 20, 2002

HARRISON, J.A:

The appellants Henry Rivas and Giovanni Infante were convicted on 14th May 2002, in the Resident Magistrate's Court for the parish of St James held at Montego Bay before the Honourable Resident Magistrate for the said parish of the offence of unlawful possession of money, United States currency, on 21st March 2002, contrary to section 5 of the Unlawful Possession of Property Act. Each was sentenced to four months' imprisonment at hard labour.

We heard the arguments of counsel and on 5th August 2002, we dismissed the appeals. We affirmed the conviction and sentence of each

appellant and ordered that the sentences should commence as from 25th June 2002. These are our reasons in writing.

The facts are that on the 21st March 2001, the two appellants entered the security check-point and passed through the x-ray machine at the Sangster International Airport in Montego Bay in the parish of St James. Cpl Teeshan Gordon, attached to the Narcotics office of the Jamaica Constabulary Force, having observed bulges in the area of the thighs of each appellant got up and walked towards them. The appellant Rivas looked in his direction and hurriedly took off his bag from the x-ray machine. He turned his side to him and spoke to the appellant Infante. The latter also looked in his direction, hurriedly pushed his bag off the x-ray machine and held the said bag in front of his thighs. Cpl. Gordon went up to them and identified himself as a police officer. While doing so, Cpl. Gordon noticed that the appellant Rivas was slowly putting his bag in front of his thighs, at which he was then looking. Being now suspicious, Cpl. Gordon cautioned both appellants and asked them if they had anything unlawful on their person. The appellant Rivas answered in the negative. Rivas said that the appellant Infante could not understand English. Cpl. Gordon told both appellants that he had noticed "... the bulges in their pants" and invited them to the search room.

In the room both appellants were searched. Each was wearing a pair of tights underneath his pants.

Rivas had in the tights, 21 packets of United States currency, of various denominations, totaling US$205,000.00.

Infante had, also in his tights 24 packets of United States currency, also of various denominations totaling US$221,980.00.

Asked where they got the money, Rivas said that a man brought it to their hotel room at Holiday Inn, Montego Bay. Rivas spoke to Infante, who responded and Rivas relayed the reply to Cpl Gordon. He took both appellants to the Airport Police Station.

At the police station, when questioned further, Rivas said that the money was for a friend of his named "KC" living in Venezuela and who had a house in Miami which house he sold and sent them to Jamaica to collect payment for the house. As each question was asked, Rivas spoke to Infante who replied, after which Rivas spoke to Cpl Gordon.

Cpl Gordon made a list of the serial numbers of the currency notes and placed the money in the respective bag which each appellant was carrying, and sealed each in a carton box. The packets of money found on Infante were marked exhibit 1 and those found on Rivas, exhibit 2, at the trial.

The appellant Rivas asked to speak to a lawyer. Both appellants and the money were taken to the Montego Bay Police Station. At 8:30

p.m. Mr. Shawn Reynolds, attorney-at-law, arrived and stated that he represented the appellants. He spoke to them in private for about 20 minutes, at the end of which Cpl Gordon advised the appellants that he wished to ask them further questions. Mr. Reynolds, in their presence, stated that he would reply "... on his clients' behalf." When asked, Mr. Reynolds stated, in the appellants' presence that the original owner of the house was one Sonia Mattis who lives in New York and works as a nurse in Venezuela, that the house was located at Cove District in the parish of Hanover (Jamaica), that the purchaser was a man, named Phillips of Queens, New York and that the money had been taken to them, the appellants, at the hotel by one Mr. Uriel Lyons of Green Island, Hanover.

On 22nd March 2002, Cpl Gordon went to the Casablanca and Holiday Inn Hotels, Montego Bay, making enquiries and received information.

On 22nd March 2002, Cpl Gordon went to Green Island in the parish of Hanover and spoke to one Uriel Lyons who was identified to him by one Sgt McKenzie. Uriel Lyons gave Cpl Gordon certain information. At 2:00 p.m. on the said day, Cpl Gordon returned to the Montego Bay police Station, spoke to both appellants and told the appellant Rivas that he had "... checked into the story given to me and find it to be false." The appellant Rivas retorted:

"What story I did not give you any story. The story I (sic) have the lawyer gave it to you. I did not say that."

Cpl Gordon told the appellants that as a result of his investigations he suspected that the money was stolen or otherwise unlawfully obtained. He charged them both for the offence of unlawful possession of property, cautioned the appellant Rivas who responded: "When my lawyer gets here I will give you the real story." The appellant Rivas spoke to the appellant Infante, on Cpl Gordon's instructions.

Both appellants appeared before the Court on 25th March 2002, when they were remanded in custody. They appeared before the court on 27th March 2002, 2nd April 2002, 4th February and 8th April 2002.

On the latter date the Resident Magistrate heard the evidence of Cpl Teeshan Gordon of the circumstances which reasonably caused him to suspect that the appellants possessed property which had been stolen or unlawfully obtained. This evidence, including the cross-examination, continued on 11th April 2002, and on 15th April 2002 when both appellants were ordered to account to the said Resident Magistrate by what lawful means each came into possession of the monies found in the tights each was wearing.

On 26th April 2002, in giving his account, the appellant Rivas stated on oath, inter alia, that he is a mechanic and businessman living in Venezuela and came to Jamaica on 19th March 2002, landing at the

Sangster International Airport, Montego Bay. Both Infante and himself stayed in the Casablanca Hotel for one night. They then went to stay at the Holiday Inn Hotel. From there he, Rivas, telephoned in Venezuela, one Rahpael Calderoz, who instructed him to collect US$450,000.00 at the door of his hotel from one Casey, the proceeds of sale of a house "... sold in Florida." He, Rivas, met Casey at the door of the hotel. Another man with Casey handed over to him, in Infante's presence, a bag with money. Fearing that the money would be stolen from them and that they could be killed, the appellants left and stayed at another hotel, the Cayaba on the night of 21st March 2002. He divided the money and placed US$223,000.00 "... inside the pants in the foot of the exercise pants." He and the appellant Infante went to the airport the following morning, in order to depart. With the money on his body, he reached the checkpoint. The female guard at the check-point examined the appellant Infante with a metal detector, both his and Infante's bag went through the x-ray machine. They were asked questions, taken to a room and searched. The money was found on both appellants and also in the suitcase which each man carried. Both appellants were taken to the airport police station, where he first saw Cpl Gordon. The appellant Rivas said that his friend Raphael Calderoz had offered him a free vacation to come to Jamaica to collect the money. He issued no receipt for the money, nor did he receive from Calderoz any document to collect it.

The defence called two witnesses Judith Jennings and Sylvia Young security officers at the said airport to give evidence seeking to challenge the credibility of Cpl Gordon. The defence maintained that he could not have had the requisite reasonable cause to suspect the appellants.

Judith Jennings stated that on 21st March 2002, by the use of a metal detector, she was "checking passengers coming in." She touched the ankle of each appellant in turn, felt a bulge at the ankle and called her supervisor Sylvia Young who took away both appellants. She said:

> "I really can't recall if there was police officer there. I face the passenger and my back turn to the police."

Sylvia Young, a supervisor, stated that at the request of the witness Jennings, she "did a body check" in the search room of each appellant and "felt something from the knee going down to the ankle." She asked each to remove his pants and tights, as a result of which she saw "US currency in transparent plastic" fall to the floor. Both appellants were then taken to the police station after which the witness was told by telephone of the amount of money. She made the entry, Exhibit 5:

> "... passenger Mr H Rivas and Geovani Infante were detected by security officer Judith Jennings and checked by V/L Sylvia Young of the security check point and US$450,000.00 was found on their bodies."

The appellant Infante also gave evidence of being a businessman from Venezuela, who came to Jamaica on 19th March 2002, with the

appellant Rivas, as a party to the arrangement with Calderoz to collect the money for the sale of the house in Florida and a vacation. His evidence was similar to that of appellant Rivas, in respect of their stay at the Casablanca Hotel, moving to Holiday Inn where the money was handed over to the appellant Rivas, after which they both moved to the Cayaba Hotel. There they placed the money on their bodies because of their fear of being robbed and killed. At the airport they passed through the metal detector, were taken to a room, searched and the money found. He also denied that he saw or was searched by Cpl Gordon at the airport maintaining that he first saw ~~him at the~~ police station. He was not questioned by Cpl Gordon nor did he tell him anything about the money. The appellant complained that he was threatened and assaulted and asserted, as did the appellant Rivas, that sums of US$7,500.00 and US$15,000.00 went missing from the monies that they were carrying.

They were summarily convicted on informations Nos: 9869 and 9870/02 contrary to section 5 of the Unlawful Possession of Property Act, having failed to satisfy the Resident Magistrate by what lawful means they came into possession of the said sums of money, hence the instant appeals.

Mrs Samuels-Brown, counsel for both appellants, argued for the appellant Rivas, twelve grounds of appeal.

The summary offence of unlawful possession of property is committed whenever a person is a suspected person under the Unlawful Possession of Property Act (the "Act"), in relation to goods found in his possession by any constable of the Jamaica Constabulary Force, and who fails to give to the satisfaction of the Resident Magistrate, by what lawful means he came into possession of the said goods found with him.

A "suspected person," as defined in section 2 of the Act is, inter alia:

> "... any person who:
>
> (a) has had in his possession or under his control in any place any thing being an article of agricultural ~~produce; or~~
>
> (b) has in his possession or under his control in any place any thing including an article of agricultural produce , under such circumstances as shall reasonably cause any constable or authorised person to suspect that that thing has been stolen or unlawfully obtained."

There must exist facts upon which the constable, by his observation could entertain a reasonable suspicion that the offender was in possession of something which was stolen or unlawfully obtained. The cases show that if the constable himself did not make the observation, the offender is not a suspected person under the Act and not liable to be arrested ***(R v Neville Burgess*** (1962) 5 W.I.R. 59). The Courts have held that the Act must be scrupulously adhered to.

The conduct of the offender giving rise to the suspicion of the constable must be directly related to the "thing" suspected to have been

stolen or unlawfully obtained. The rationale is that a person who reacts adversely on seeing a police officer may well be spontaneously attempting to conceal from such officer the fact that he is at that moment in possession of an article which he stole or obtained unlawfully.

"Unlawfully obtained," in section 2 of the Act, should not inevitably be construed ejusdem generis with "stolen" or obtained by deceit or dishonest means. Where for example, someone is in possession of goods, which possession is not permitted in law without a licence, and such a person has no licence, such goods are clearly unlawfully obtained. However, no dishonesty need be involved. In the case of ***Heller v Gannesingh*** (1968) 13 W.I.R. 267 the Court of Appeal of Trinidad had to construe the words "unlawfully obtained", in circumstances where the respondent was found in possession of ammunition, which he could not lawfully purchase without a licence, under the provisions of the Firearms, Ammunition & Ordinance (Trinidad). The Court allowed the appeal and remitted the case for the magistrate to call upon the respondent to account for his possession . Wooding, C.J., at page 267 said:

> "... we think that the phrase "unlawfully obtained" is not to be interpreted, so to speak, as in any sense ejusdem generis with the word "stolen" and therefore is not restricted in its use to obtaining by some dishonest means. It extends to obtaining by any unlawful means whatever."

We agree with the observations and interpretation of Wooding, C.J. in the above case of the phrase "unlawfully obtained".

The disjunctive "or" in the phrase "... stolen or unlawfully obtained" should be construed, giving to the words" unlawfully obtained" a wide interpretation, devoid of the restrictive limits of "stolen" or obtained by dishonesty or deceit.

To describe the Unlawful Possession of Property Act as a procedural Act is a recognition that it specifically mandates the steps required to be taken both by the constable and the Resident Magistrate prior to and after a prosecution has been effected under the said Act.

Section 5(1) authorises a constable to arrest a suspected person, without a warrant. On arrest, ~~the suspected~~ person, along with any goods found in his possession should be taken, forthwith "before a Resident Magistrate sitting in Court ..." (Section 5(2). If a Resident Magistrate is not sitting in Court within 48 hours, the suspected person should be taken before a Justice of the Peace, who may bail or remand in custody such suspected person to appear before a Resident Magistrate sitting in Court "at the earliest convenient date": (section 5(3)).

These statutory provisions therefore demonstrate that the arresting constable must proceed with despatch.

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 and shall, on summary

> conviction before a Resident Magistrate, be liable to a fine not exceeding two thousand dollars or to imprisonment with or without hard labour for a term not exceeding one year, and upon a subsequent conviction on a similar charge, to imprisonment with or without hard labour for a term not exceeding three years."

Although the statute is silent on the procedure to be adopted when the suspected person is first apprehended and subsequently along with the relevant goods is taken before the Resident Magistrate, the judges in several cases have supplied the guidance. In ***R v Curtis*** (1964) 6 W.I.R. 234, this Court of Appeal (per Henriques J.A.) at page 234 held:

> "... The law clearly provided for two separate procedures : first, the Resident Magistrate must determine the issue of whether a particular accused is or is not a suspected person before he is entitled to make an order for him to account; and secondly (if necessary), an order to account is made. The Resident Magistrate had erred in law in not taking evidence on oath of reasonable suspicion before making the order for the appellant to account, and this was a fatal defect which vitiated the conviction."

In ***R v Williams*** (1964) 6 W.I.R. 320 this Court following **R v Curtis** (supra) held:

> "... when a person is arrested under section 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."

It is significant to observe that section 6 of the Act authorises the constable on the apprehension of the suspected person to question him in relation to anything suspected to have been "stolen or unlawfully obtained." Section 6, inter alia, reads:

> "**6.** Whenever a constable or authorized person has reasonable cause to believe that any person has in his possession or under his control anything which the constable or authorized person has reasonable ~~cause~~ to suspect has been stolen or unlawfully obtained such constable or authorized person may require such person to disclose and permit him to inspect the contents of any sack, basket, bundle, package, vehicle or other receptacle in possession or under the control of such person."

The suspected person's response to such questions asked, is some evidence available to the Resident Magistrate which he may use in concluding that the constable had reasonable cause to regard the offender as a suspected person.

In ***R v Vincent York*** Resident Magistrates Court Criminal Appeal No. 70/61 delivered 1st April 1966 (4 Gleaner Law Report) in dismissing an appeal against a conviction for unlawful possession of money, £54, under the Unlawful Possession of Property Act, this Court (by a majority) said, (per Henriques, J.A.):

> "The question as to whether the circumstances were of such a nature as to cause the corporal to have reasonable suspicion in relation to the appellant's possession of the money and so justify his arrest under the particular section of the law, has caused the Court a certain amount of concern. 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 that 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 ..."

Lewis, J.A. in the said case, also said of the appellant:

> "... 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."

In ***R v Brown*** (1929) Clarke's Reports 301, the appellant was convicted for unlawful possession of a ton of fustic, under Law 4 of 1909, the Praedial Larceny Law. The procedure under that law was not unlike that in the instant case, authorising a police on reasonable suspicion of unlawful possession of goods to detain him and take him before a Justice of the Peace who may commit him for trial before a Resident Magistrate. If he fails to give a satisfactory account of his lawful possession the Resident Magistrate may convict him. Because of the nature of the statute and the burden on such a person, it was recognized that before arrest, the possessor of the goods should be allowed to explain his possession. Adrian Clarke, 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."

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.

Once the Resident Magistrate finds, prima facie, that the person is a suspected person, the said Resident Magistrate would order such suspected person within a reasonable time, to give an account to the satisfaction of the said Resident Magistrate by what lawful means he came into possession of the said goods.

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."

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.

Proof by a defendant called up to account, by an explanation which could be described as reasonable or possible, is not proof, on a balance of probabilities, and therefore such an account would fail, as a defence. Denning, J (as he then was) in ***Miller v Minister of Pensions*** [1947] 2 All E.R. 372, at 373-374 commented on the degree of proof required before an accused can be convicted, taking into consideration the defence as tendered. At page 372, he 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."

and specifically, in regard to proof on a balance of probabilities, continuing he said:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it

> more probable than not', the burden is discharged ...".

If, therefore, the Resident Magistrate is not satisfied that the account put forward by a suspected person has reached that degree of proof that he acquired the goods by lawful means, such person ought not to escape a conviction.

Counsel for the appellants argued the grounds in the order and manner undermentioned.

Grounds 1, 4, 5 (Rivas and Infante), 10 (Rivas) and 11 (Infante), read:

> "**1** The Learned Resident Magistrate erred in calling upon ~~the appellant to account~~ as it had not been established on the prosecution case that he was a "suspected person" for the purposes of the Act;
>
> ALTERNATELY
>
> The prosecution failed to establish that the appellant was a suspected person in terms of the Act as:
>
> (i) The basis of the suspicion must exist at the time of apprehension which under the Act must coincide with the arrest.
>
> (ii) The officer's suspicion was based on "the volume of cash, method of concealment along with the story ..." which are matters which emerged after apprehension and which in any event could not properly base reasonable suspicion.
>
> (iii) The absence of suspicion or reasonable suspicion is further demonstrated by:

(a) The informations originally sworn which spoke to the investigating/arresting officer's belief rather than any suspicion.

)b) The evidence of the investigating/arresting officer that his concern was that the appellant had contraband and not "stolen goods or goods unlawfully obtained."

(c) The delay in the formal arrests, that is, two days after the original apprehension.

4. In arriving at her facts of findings the Learned Resident Magistrate failed to take into account the varying reasons given by the officer for his suspicion.

5. The Learned Resident Magistrate erred in calling upon the appellant to account for his possession as the evidence of the arresting officer could not properly ground "reasonable suspicion" as required by the Act. Further and by illustration the delay of two days in the charging of the appellant is demonstrative of the absence of reasonable suspicion on arrest.

10. The original information was fatally defective in that it revealed no offence under the Unlawful Possession of Property Act as it did not speak to "***reasonable suspicion***". The Learned Resident Magistrate erred in allowing the prosecution to withdraw the said information after four trial dates and to proffer a new one.

11. In assessing the account given by the appellant the Learned Resident Magistrate failed to apply the correct test, that is, that prima facie the explanation given was reasonable and could be true."

Mrs Samuels-Brown submitted, correctly, that the reasonable suspicion must exist prior to the appellants' apprehension, but said further that the Learned Resident Magistrate erred in considering the appellants' answers to subsequent questioning as justifying their subsequent arrest. The mind of the arresting officer, who observed bulges on the thighs of the appellants, was directed towards the detection of narcotics, and not United States currency, and because the offence under the Act contemplates theft, deceit or other acts of dishonesty, no reasonable suspicion arose. Neither the fact of the volume of currency, nor the method of its conveyance were, by themselves bases for suspicion in the constable. The explanation of each appellant of the fear of theft is consistent with their conduct. The informations on which the appellants were initially charged were defective and the Learned Resident Magistrate erred in allowing them to be withdrawn, after having been listed on four trial dates, and new informations prepared on which they were subsequently tried and convicted.

After the evidence of Cpl Gordon the investigating officer was completed and submissions heard, the learned Resident Magistrate referred to the evidence of the said officer who, while on duty, observed the bulge to each appellant's thigh and the act of each appellant in placing his bag in front of his thigh on the approach of the said officer. She continued and said:

> "Investigating officer did not know of any US" ...[money]... "being stolen, but the volume and method of concealment operate on his mind together with the response to questions that the monies were unlawfully obtained."

This Court is of the clear view that the observance by Cpl Gordon of the bulge to the thigh of each appellant, the furtive glance of each appellant in the direction of the police officer as the latter approached them, the hurried removal of the bag by each appellant from the x-ray machine and placing it in front of his thigh, presumably to conceal the bulge from the eyes of the approaching police officer, cumulatively, was evidence of circumstances sufficient to cause reasonable suspicion in the mind of the police officer as contemplated by section 2 of the Act.

The visits by Cpl Gordon between 22nd March 2002 and 23rd March 2002, to the hotel at which the appellants had stayed and to the parish of Hanover, to make enquiries in verification of the appellant Rivas' story, were necessary to ensure fairness to the appellants; ***R v Brown*** (supra). No adverse view should accordingly arise, in that the appellants were not formally charged until 23rd March 2002. Furthermore, although informations Nos: 8967 and 8968/02 against appellant, Infante and Rivas, respectively, were laid on 23rd March 2002, both those informations were withdrawn on 2nd April 2002 when new informations Nos: 9869 and 9870/02 were laid. The appellants were tried on the latter informations. Section 10 of the Justice of the Peace Jurisdiction Act reads:

> "**10.** In all cases where no time is already, or shall hereafter be, specially limited for making any such complaint or laying any such information, in the enactment or enactments of this Island relating to each particular case, such complaint shall be made, and <u>such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose</u>.
>
> Provided that nothing shall be deemed to apply to any case triable by a Resident Magistrate in the exercise of his special statutory summary jurisdiction." (Emphasis added)

The offence under the Unlawful Possession of Property Act is triable by the Resident Magistrate in the exercise of his special statutory summary jurisdiction. The learned Resident Magistrate in the circumstances had the power to allow the prosecution to substitute new informations, as it did, against the appellants. Nor was there any prejudice occasioned thereby.

The learned Resident Magistrate correctly found, on the evidence, that Cpl Gordon's state of mind that "... the volume of cash and the method of concealment ..." inclusive of the behaviour pattern of the appellants at the x-ray machine, gave him " ... reasonable cause to suspect that the money was stolen or ... unlawfully obtained." The appellants were suspected persons in accordance with section 2.

Consequently, ground 1, 4, 5, in respect of both appellants, ground 10 (Rivas) and ground 11 (Infante) all fail.

Ground 2 on behalf of each appellant reads:

> "In her findings of fact the Learned Resident Magistrate failed to consider the credibility and cogency of the evidence of the prosecution witness, independently of the evidence called by the appellant. She thereby accepted the prosecution case on the basis of her rejection of the evidence called on behalf of the appellant. This was in fact tantamount to a reversal of the burden of proof."

Counsel for the appellants argued that the learned Resident Magistrate erred, in that she failed to review her earlier finding of reasonable suspicion in the investigating officer having heard the evidence of the defence witnesses, the port security officers. She incorrectly made no specific finding in that respect, she merely reviewed the evidence led by the defence, rejected it and "... thereby treated the prosecution case as proved."

At the conclusion of the evidence of Cpl Gordon for the prosecution, the learned Resident Magistrate noted:

> "... I am satisfied by the evidence adduced that Cpl Gordon had reasonable cause to suspect that the money was stolen or otherwise unlawfully obtained."

Later, in her finding of facts, the learned Resident Magistrate stated:

> "Before considering evidence given by (the) two men defence called Port Security Officer, Judith Jennings and Sylvia Young who gave evidence that on 21.03.02 at (the) airport, she detected something on one of the men and called her supervisor and the men (were) taken away. Her evidence does not negate the fact that Cpl.

> Gordon said he saw men when they had gone through the walk through.
>
> Miss Young said she was the one who searched the men and told them to pull their pants and the money seen was in plastic on the body of the men. The men were accompanied by Constable Mitchell and taken away by Constable Mitchell and she made an entry in Port Security diary.
>
> I cannot accept entry as true account. Her evidence is that she took the men to the search room and searched them. The entry say search was done at the check-point – monies found in the sum of $450,000.US. Miss Young did not count the money. The witness entry reflects what she was told I cannot accept the entry as being correct. This calls into question the credibility of the witness. (Emphasis added)
>
> In addition, her evidence does not negate the fact that Cpl. Gordon was in search room at the time the money was found. Cpl. Gordon's evidence is that the men were searched and monies found. Nothing these witnesses have said negate the fact that Cpl. Gordon was present when the monies were found."

The learned Resident Magistrate was there clearly stating that she accepted the evidence of Cpl. Gordon as led by the prosecution that each appellant was a suspected person, thereby embracing him as a credible witness, initially, before any defence evidence was led.

The evidence of the defence witnesses Jennings and Young had no relevance to the evidential burden on the appellants to account for their lawful possession of the said monies.

However, the learned Resident Magistrate in the process of arriving at her final verdict, specifically re-examined again the evidence of the investigating officer, Cpl. Gordon in view of the evidence of the said defence witnesses. She found, that Cpl. Gordon saw the appellants, at the check-point, contrary to what the witness Jennings had said, that Cpl. Gordon was in the search room when the money was found. This was also contrary to what the witness Young had said. She pointed out the contradiction between the entry by Young, exhibit 3, that a search was done at the check-point and Young's own evidence that she searched the appellants in the search room ~~and~~ that the said entry exhibit 3, was made as a result of what the witness Young had been told. The learned Resident Magistrate properly concluded that the credibility of the defence witnesses was questionable and that their testimony did not detract from the proven credibility of the prosecution witness, Cpl. Gordon. There is no substance to the complaint of the appellants in this regard and the ground also fails.

Grounds 3, 6 and 7, in respect of each appellant, read:

> "**3** In making her findings of fact the Learned Resident Magistrate glossed over the question of whether the investigating/arresting officer participated in the search of the appellant. This aspect of the evidence being important to the issue of "reasonable suspicion" and the credibility of the said investigating/arresting officer it was incumbent on the learned Magistrate to make a specific finding on this aspect before arriving at her verdict.

> **6.** The Learned Resident Magistrate failed to take into account or to sufficiently take into account the evidence of Young and Jennings who were called by the defence; in particular the Learned Resident Magistrate failed to consider:
>
> (a) That the evidence of the prosecution witness excluded **any** involvement of the port security officers Young and Jennings.
>
> (b) That Gordon's allegations (the prosecution case) was never put to the witnesses Young and Jennings.
>
> (c) That in fact neither the evidence of Young nor Jennings was challenged in any way by the prosecution.
>
> (d) That neither the credibility of Young nor Jennings was never attacked or questioned by the prosecution.
>
> **7.** The Learned Resident Magistrate erred in finding that the credibility of the witness Sylvia Young had been impugned by the diary entry which was admitted in evidence as exhibit 3."

Counsel for the appellants, in advancing these grounds, argued that the learned Resident Magistrate failed to consider the credibility of Cpl. Gordon, the investigating officer, as to his reasonable suspicion in view of the testimony of the defence witnesses Jennings and Young, which conflicted with that of Cpl. Gordon. She failed to appreciate that there was no conflict between the evidence of the witness Young and the diary entry Exhibit 3, that the prosecution's case should have been put to

the defence witnesses and that specifically, the conflict in respect of the said diary entry exhibit 3, should have been put to the witness Young. Because of the said omission, the learned Resident Magistrate should not have accepted the evidence of Cpl. Gordon and the appellants were deprived of their chance of acquittal. Counsel relied on ***R v Burgess*** (1962) 5 W.I.R. 59 and ***R v Hart*** (1932) 23 Cr. App. R 202.

We have already observed, in dealing with previous grounds that before the appellants were called upon to account, the Learned Resident Magistrate had ample evidence before her from which she could have, and correctly did find that the appellants were suspected persons under the Act.

In that regard, the case of ***R v Burgess*** (supra) was properly distinguished by the Learned Resident Magistrate. In Burgess' case, the unchallenged evidence was that the investigating officer, was called to the store after the appellant had been apprehended, and therefore could not say that he observed that the appellant " ... (had) in his possession ..." the clocks and knives to make him a suspected person under the Unlawful Possession of Property Act. The appeal was allowed. Cpl. Gordon did not deny that female officers were present at the relevant time. He said in cross-examination:

> "Some females were working at the security point ... I do not know the names of females working with me that day. In terms of a security I would

> not say they had first contact with Rivas and Infante."

The learned Resident Magistrate found, as a question of fact, that the evidence of the defence witness "... does not negate the fact that Cpl. Gordon said he saw the men when they had gone through the walk through." That was a finding she could properly make on the evidence before her. Furthermore, the evidence of the defence witness Young revealed, as the learned Resident Magistrate correctly found, discrepancies between her testimony and her diary entry, exhibit 3, which discrepancies could be classified as material.

It is the duty of the defence, not the prosecution, as argued by the appellants' counsel, to confront its own witness with material discrepancies that arise, on such witness' evidence, and ask for an explanation. In the absence of an explanation, the tribunal of fact is entitled to reject the evidence of the said witness on that point or in its entirety (**R v Warwar** (1970) 15 W.I.R. 298). The learned Resident Magistrate cannot be faulted as the tribunal of fact, in rejecting the evidence of both defence witnesses, in that regard. It is quite correct, as stated in ***R v Hart*** (supra) that, if on a crucial aspect, the prosecution intends to ask the tribunal of fact to disbelieve a defence witness, the prosecution should cross-examine the said witness to make it plain that his evidence is not accepted. However, in our view, no prejudice was occasioned to the appellants, in that the prosecution did not do so, in the circumstances of

the instant case. The nature of the evidence of the defence witness Jennings and the patent material discrepancy in the evidence of the defence witness Young did not require such a course.

It is significant to note that there was no challenge that each appellant had bulges to his pants. Neither was Cpl. Gordon specifically challenged that he observed each appellant attempting to conceal the said bulges with the bag that he had removed from the machine.

These grounds also fail.

Ground 9 (Rivas) and ground 10 (Infante)

> "**9.** The appellant, having been assessed as needing an interpreter it was necessary that the interpreter obtained on his behalf be established to a prima facie level to be without bias and competent. The interpreter, Cpl. Evans being a police officer was on the face of it biased in favour of the prosecution and her expertise was never established. Accordingly, the Learned Resident Magistrate erred in accepting and utilising her as an interpreter for the appellant.
>
> **10.** The original information was fatally defective in that it revealed no offence under the Unlawful Possession of Property Act as it did not speak to "reasonable suspicion." The Learned Resident Magistrate erred in allowing the prosecution to withdraw the said information after four trial dates and to proffer a new one."

Counsel here argued that the interpreters for the appellants were not shown on the record as established to be competent and the use of Cpl. Evans, a police officer as an interpreter for the appellant Rivas

revealed a bias, being a person not unconnected to the prosecution. The trial was as a consequence vitiated.

The record of the proceeding reveals to us that each interpreter was duly sworn and the evidence led in examination-in-chief and cross-examination conducted by counsel on behalf of the appellants. Subsequently, each appellant gave evidence, in direct response to the allegations, demonstrating that each understood the evidence led by the prosecution. Counsel for the appellants, in addition, made full and extensive submissions on their behalf at all relevant stages of the trial. There was no allegation by either appellant that he did not understand the evidence or the procedure employed. Neither did counsel, for the appellants object on their behalf, either to the interpretation or his clients' inability to understand or to participate at any stage of the trial. We agree with Miss Llewellyn for the Crown that the narrative of each appellant reveals a coherent sequence, that the trial was fairly conducted and that there was no miscarriage of justice. In ***Kunnath v The State*** (1993) 4 All E.R. 30, the Board of the Judicial Committee of the Privy Council, allowed the appeal of the appellant "... an uneducated peasant from ... Southern India," whose native language was Malayan and whose trial in Mauritius was conducted in English. He was represented by counsel. The interpreter, mistakenly, interpreted only portions of the proceedings but none of the evidence for the benefit of

the appellant, who in his statement to the court said that he had not understood what the witnesses had said. The headnote to the case, inter alia, at page 31 reads:

> " An accused who had not understood the conduct of proceedings against him could not, in the absence of express consent, be said to have had a fair trial and the judge by virtue of his duty to ensure that the accused had a fair trial was bound to ensure that, in accordance with established practice, effective use was made of an interpreter provided for the assistance of the accused. When a foreign accused was defended by counsel the evidence should be interpreted to the accused except when he or counsel on his behalf expressed a wish to dispense with the translation and the judge thought fit to permit the omission."

Nothing of the sort as complained of in **Kunnath v R** occurred in the instant case. We found no virtue in the said grounds.

Ground 8 (Rivas) and ground 9 (Infante) read:

> "The Learned Resident Magistrate erred in law in proceeding on a single trial of the two separate informations as:
>
> (a) This is not permissible under the Unlawful Possession of Property Act; and/or
>
> (b) There was no basis established on the crown's case so to do."

Counsel here argued that the nature of the Unlawful Possession of Property Act, which requires a suspected person to give an explanation for his conduct creates a prejudice to a co-accused implicated in a joint

trial. In the interest of fairness the Learned Trial Judge erred in proceeding on a joint trial.

Section 22 of the Criminal Justice (Administration) Act, inter alia reads:

> "**(1)** Where, in relation to offences triable summarily -
>
> (a) persons are accused of similar offences committed in the course of the same transaction; or
>
> (b) persons are accused of an offence and persons are accused of aiding and abetting the commission of such offence, or an attempt to commit such offence; ... they may be tried at the same time unless the court is of the opinion that they, or any one of them, are likely to be prejudiced or embarrassed in their, or his defence by reason of such joint trial."

In the case of ***R v King & Cox*** (unreported) R.M.C.A. No. 12/92 delivered October 5 1992, Forte, J.A., as he then was in considering the propriety of the joinder of informations at a trial ,at page 6, said:

> "At common law, therefore, the important considerations in determining whether informations can be tried together are – (i) the facts closely connected, and (ii) does the overall interests of justice require that they be tried together. In determining those factors, it is desirable that the magistrate before doing so, allow the parties to state any objection they have to this course, as such objections may have an effect on whether in the interests of justice the informations should be tried together; the overriding principle however, being whether in

> the Magistrate's opinion the overall interests of justice requires a joint trial."

In the instant case the appellants on their own evidence, travelled together from Venezuela to Jamaica, to receive and did receive one sum of money derived from a single transaction, namely, the sale of a house, from an individual. It was they who divided this sum between them, on their story, for security purposes. This was clearly one joint transaction in which both appellants were closely involved. There was no basis to raise the issue of a prejudicial joint trial. The single attorney-at-law who represented both appellants, raised no objection to the trial of both informations together at a joint trial. These grounds also fail.

Ground 12 (Rivas) and ground 13 (Infante), read:

> "The Learned Resident Magistrate failed to consider the case against the appellant separately and apart from the case against his co-accused, whereby the said appellant was deprived of his chances of acquittal."

The learned Resident Magistrate in her finding of facts, in relation to each appellant, said:

> "Geovanti Infante, I do not find him credible. He led Court to believe that Italian was his first language. He gave evidence that he was born in Venezuela, schooled there and lives there. Parents mixed Venezuelan and Italian. He speaks both languages fluently. Court does not find witness credible.
>
> Mr Rivas gives account that the men taken to the room separately. This differs from what the security officers called on behalf of defence say.

> Again I do not find him to be truthful in that regard."

Thereafter, because the account of each appellant was similar, the learned Resident Magistrate said:

> "Account given by men that they came to Jamaica on Free Ticket to collect money for Mr Caldoza the business partner of Mr J Rivas. The money is from sale of house in Florida.
>
> Contact made by phone and money taken to men in plastic bag. The bag was such that security officers at Holiday Inn could see monies in bag. The evidence is that the men became fearful that they would be robbed and they changed hotel, put money on their body and next day ~~travelled to airport.~~
>
> Evidence is that both men are businessmen, university educated they say they had fear of being robbed before they came to Jamaica . As educated business people, action could have been taken to alleviate this fear by transferring the monies electronically or other devices such as a banker's order. I do not accept that the monies were carried in this fashion to ward off thieves."

From the above text, we agree with counsel for the Crown that the said Resident Magistrate did deal with the case of each appellant separately, where necessary. These grounds also fail.

Ground 13 (Rivas) and ground 14 (Infante):

> "The conviction of the applicant is void for unconstitutionality as the Unlawful Possession of Property Act is itself unconstitutional."

Counsel for the appellants argued that the guarantees to each citizen of a fair trial and the presumption of innocence under the Constitution of Jamaica is assured by the burden and standard of proof in a criminal case being placed on the prosecution, to prove a prima facie case of an offence against an accused before he can be called upon to answer. From this the Constitution permits some derogation in that the Unlawful Possession of Property Act imposes on an accused the burden of proving particular facts where the prosecution has merely proved reasonable suspicion of an offence. The convictions are therefore void for unconstitutionality.

The Court expressly decided the issue of the complaint of unconstitutionality, when the burden of proof is reversed and placed on an accused, in ***R v Outar & Senior*** (unreported) R.M.C.A. 47/97 delivered July 31,1998. That case concerned the burden of proof placed on a person found in possession of certain minimum amounts of ganja in breach of the Dangerous Drugs Act, section 22(7), to prove that he was not a dealer in ganja. The Court in dismissing the appeal and affirming the convictions, pointed out (per Downer, J.A.) that the Constitution, mindful of the presumption of innocence and the burden and standard of proof which is usually placed on the prosecution, recognized that some statutory provisions might, in exceptional cases, require the accused to

prove particular facts to displace a statutory presumption. The proviso to section 20(5) of the Constitution of Jamaica reads:

> "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."
> (Emphasis added)

Downer, J.A., also pointed out that the reverse onus provisions of the Unlawful Possession of Property Act was, in addition, saved by section 26(8) of the Constitution.

In the instant case the Unlawful Possession of Property Act places an initial evidential burden on the prosecution to adduce sufficient evidence of circumstances to cause an accused to be statutorily classified as a "suspected person," in possession of goods suspected to have "... been stolen or unlawfully obtained." The requirement that such a suspected person give an account "by what lawful means he came by the same," is "the burden of proving particular facts ...," contemplated and provided for in the proviso to section 20(5) of the Constitution and placed on a defendant charged under the Unlawful Possession of Property Act. Again, we agree with counsel for the Crown that provisions of the said Act are in no way void as being in breach of the provisions or spirit of the Constitution. There is no virtue in these grounds which also fail.

Grounds 1 and 2 of the original grounds of appeal read:

> "**(1)** That the convictions are unreasonable having regard to the evidence and/or not supported by the evidence.
>
> **(2)** That the sentences are manifestly excessive."

In advancing this ground, counsel for the appellants argued further that the Learned Resident Magistrate failed to take into account the evidence of the appellants as it concerned the reasonableness of the investigating officer's suspicion, applied the wrong test in that the appellants in accounting need only give an explanation that was reasonable and could be true, instead of an explanation that could satisfy her of the truth. The Learned Resident Magistrate failed to examine the credibility of Cpl. Gordon as it concerned the finding of the money due to bulges at the appellants' thighs, whereas the witnesses maintained the presence of such bulging at the ankles. Failed to consider the case against each appellant separately, in that she attributed the absence of documentary proof of the ownership of the money to the appellant Infante, despite the fact that it was the appellant Rivas who claimed he was in contact with its owner. Having done so the Learned Resident Magistrate erred in failing to warn herself of the danger of using the evidence of one accomplice against the other.

It seems to this Court that the learned Resident Magistrate, having found Cpl Gordon to be a credible witness, maintained that the

unreliable evidence of the defence witnesses failed to influence her finding, nor was there any aspect of the appellants' evidence that sought to or could have challenged the material aspects of Cpl Gordon's testimony. It was a question of fact for the learned Resident Magistrate.

Furthermore, section 5(4) of the Act requires the suspected person to:

> "... give an account to the satisfaction of the Resident Magistrate by what lawful means he came by ..." (emphasis added)

the property in question. The statutory provisions require that the appellants satisfy the learned Resident Magistrate of the lawfulness of their possession. The learned Resident Magistrate correctly found:

> " As educated business people, action could have been taken to alleviate this fear by transferring the monies electronically or other devices such as a banker's order. I do not accept that the monies were carried in this fashion to ward off thieves.
>
> Having considered the evidence and consider the circumstances of the case I find the account given by Mr Henry Rivas and Giovanni Infante does not satisfy the Court on the balance of probabilities that they came by the monies lawfully.
>
> Not one iota of evidence has been produced to this Court by these men to show they came by the monies lawfully. They produced no documentary proof of ownership of money, they signed nothing for the receipt of this money. No effort was made to satisfy the Court that the monies were lawfully in their possession."

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.

As we had stated earlier, the learned Resident Magistrate did consider the case against each appellant separately. However, in so far as the learned Resident Magistrate attributed the responses of the appellant Rivas, as relevant to the case of the appellant Infante, she was in error. We did not regard the appellant Infante as an accomplice per se. He was in fact found with a substantial sum of money, and as a suspected person had an obligation to give an independent account in accordance with the Act. He was a principal offender. No accomplice warning was therefore necessary. This original ground 1, overlapped greatly, with some of the supplementary grounds in some respects. We find no virtue in the arguments and this ground also fails.

For the above reasons we came to the decision that we did.