

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 21/2007

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

**FREDDY LEONEL GALUE MOLINA,
MONICA TAPIAS PENA,
JEAN CARLOS MOLINA MONTALVO,
GLORIA PLAICO OBREGON**

V.

REGINA

Miss Jacqueline Cummings and Aon Stewart, instructed by Archer, Cummings & Company for the Appellants.

Dirk Harrison, Deputy Director of Public Prosecutions (Ag.) and Miss Dahlia Findlay, Assistant Crown Counsel for Crown.

October 9, 10, 12, 2007 and June 27, 2008

DUKHARAN, J.A. (Ag.)

The appellants were convicted on the 28th July 2006 in the Resident Magistrate's Court for the Corporate Area held at Half Way Tree for the offence of unlawful possession of money, U.S. \$802,200, contrary to Section 5 of the Unlawful Possession of Property Act. They were each fined Two Thousand Dollars (\$2,000) or 6 months imprisonment at hard labour.

After hearing arguments on the 9th and 10th October, 2007 we dismissed the appeals and promised to reduce our reasons in writing. This we now do.

The Prosecution's Case

In outline, the case presented by the prosecution was that on the 15th May, 2006 the appellants and a minor, who are residents of Colombia, were traveling together and were preparing to board a flight en route to Colombia at the Norman Manley International Airport in Kingston. As they approached the security checkpoint they were under observation by Woman Special Corporal (W/Spl./Cpl.) Dionne Crossdale who was attached to the Narcotics Division and assigned to the airport. She said whilst observing them they looked uneasy, nervous and hesitant. The appellant Monica Tapias Pena (Monica) turned back and walked in the opposite direction. The appellant Freddy Leonel Galue Molina (Freddy) held on to her hand and pulled her back. This aroused the suspicion of W/Spl./Cpl. Crossdale who said she became suspicious that they might be carrying something illegal and that it might be in their luggage. The appellants each had one piece of luggage. W/Spl./Cpl. Crossdale moved to the x-ray machine at the checkpoint. She observed that the appellants were perspiring on their foreheads (despite being in an air-conditioned area) and the appellant Freddy used his thumbs to wipe perspiration from his forehead. All four appellants put their suitcases (hand luggage) on the x-ray machine. It was observed that in addition to clothing there was a dark dense area to the base of each suitcase.

W/Spl./Cpl. Crossdale said her state of mind was that she thought that they might be carrying something illegal which might be drugs. The appellant Freddy was asked what was in the suitcase and he said clothing. All four appellants were taken to the Narcotics Office nearby where the four suitcases were searched. Each bag contained clothing and personal items and all with false compartments. Cash totaling U.S. \$802,200 was found concealed in the false compartments wrapped in transparent tape. The appellant Freddy had U.S. \$226,700 in his suitcase as well as U.S. \$2035 on his person. The appellant Monica had U.S. \$222,050 in her suitcase plus U.S. \$13,580 on her person. Gloria Obregon's (Gloria) suitcase contained U.S. \$123,500 plus U.S. \$9000 on her person with some packaged similarly to that in the suitcase. Jean Carlos Montalvo (Jean Carlos) suitcase had \$230,000, plus U.S. \$2851 on his person.

The appellant Freddy admitted that the money in the other three suitcases belonged to him and the other appellants knew nothing about it. When questioned he said the money was given to him by a man in his hotel room in Negril. He said he could not see the man's face because it was dark. All four appellants were arrested and charged for unlawful possession of money.

The Defence

The appellants were ordered to account by what lawful means they came into possession of U.S. currency found in their suitcases and on their person. The appellant Freddy gave sworn testimony to the following effect. He said he

owns property in Colombia which includes cars, houses and a cattle farm. He sold the cattle farm because he was being threatened by extortionists who wanted money from him. Because of threats on his life he decided to leave Colombia. He came to Jamaica with his wife Monica and the other two appellants. He took over U.S. \$800,000 with him from Colombia, packaged in the bottom of suitcases. He said the other appellants got their suitcases from him. He admitted telling the police that he got the money from a man in a hotel room but that was a lie.

The appellant Monica in an unsworn statement denied knowledge of money in her suitcase. The other appellants, Obregon and Montalvo also made unsworn statements and gave no explanation as to how they came into possession of the money.

Grounds of Appeal

The appellant sought and was given permission to argue supplemental grounds of appeal. They are as follows:

- "1. The learned Resident Magistrate erred when she held that the Defendants/Appellants were suspected persons under the provisions of Section 5 of the Unlawful Possession of Property Act.
2. The learned Resident Magistrate erred when she called upon the Defendants/Appellants to account to her satisfaction by what lawful means they came into possession of all the money found in their possession.

3. The learned Resident Magistrate erred when she held that the officer's suspicion was reasonable having regard to all the circumstances.
4. The learned Resident Magistrate erred when she held that the Appellant Freddy Galue maneuvered at the airport to keep his co-accused from communicating with Special Corporal Crossdale as there was no evidence of this.
5. The learned Resident Magistrate erred when she accepted the evidence of the investigating officer as credible when the information she laid against the Appellants on the 17th May, 2006 were not supported by any evidence when first presented to the Court as she did not write her statement until the 22nd May, 2006 after two mention dates of the case in Court and after being directed by the Clerk of Courts to have consultation with the office of the Director of Public Prosecutions prior to writing her statement.
6. The learned Resident Magistrate erred when she held that the Appellants were in unlawful possession of money found on their persons and in their wallets and handbags.
7. The learned Resident Magistrate failed to consider the evidence that due to the fact that the Appellants Monica Tapias Pena, Jean Carlos Molina Montalvo and Gloria Plaico Obregon did not have any knowledge of the money contained in the luggage that they were not in possession of same.
8. The learned Resident Magistrate erred when she failed to accept the account of the Appellant, Freddy Leonel Galue Molina on how he came into possession of the money as being satisfactory.

9. The learned Resident Magistrate failed to consider the fact that Special Corporal Crossdale having released the Appellant Monica Tapias Pena into the care of the Columbian [sic] Consulate meant that she was no longer a suspected person under the Act.
10. The learned Resident Magistrate erred when (she) considered the evidence of Special Corporal Crossdale in relation to statements made by the Appellant Freddy Galue Molina without being cautioned as they were in breach of the Judges rules.
11. The Unlawful Possession of Property Act is unconstitutional and a breach of the presumption of innocence."

Submissions

Miss Jacqueline Cummings, Counsel for the appellants submitted in grounds 1, 2 and 3 that the learned Resident Magistrate erred when she imported her own reasons for holding that the appellants were suspected persons and not examine the reasons given by W/Spl./Cpl. Crossdale the arresting officer for her suspicion. She said that the learned Resident Magistrate failed to consider that the time when the suspicion ought to have been formed in the mind of the officer was from the acts of the appellant that aroused her attention prior to the viewing or opening of the luggage, and not after.

Miss Cummings further contended that the Magistrate failed to consider that any suspicious circumstances must arise from the conduct of the appellants individually. She contended that W/Spl./Cpl. Crossdale's sole ground for

suspicion was that the appellants "looked afraid and uneasy". All four of them looked sad and had frowns on their faces. W/Spl./Cpl. Crossdale said if they were all smiling and looked happy she would have had no reason to suspect them. W/Spl./Cpl. Crossdale's explanation that the appellant Freddy told her that he had clothing first and then money caused her to believe that he was hiding something was not reasonable as both answers were correct and that the appellant Freddy was not hiding any facts from her.

In sum, counsel submitted that the appellants were not suspected persons, as the suspicion of W/Spl./Cpl. Crossdale was not reasonable in the circumstances. The learned Resident Magistrate, therefore, ought not to have called upon the appellants to account by what lawful means they came into possession of all the money found in their possession. Counsel referred to the cases of **Regina v. Henry Rivas and Giovanni Infante** R.M.C.A .33/2002 delivered on the 20th December, 2002 and **Regina v. Spragg** (1975) 13 J.L.R. 57.

In ground 4 Counsel for the appellants complained that the learned Resident Magistrate erred when she held that the appellant Freddy Galue "maneuvered at the airport to keep his co-accused from communicating with W/Spl./Cpl. Crossdale" as there was no evidence of this. Counsel submitted that nowhere in the evidence of W/Spl./Cpl. Crossdale did she suggest at any time

that the appellant Freddy Galue had kept his co-accused from communicating with her as the evidence was that they did not understand or speak English.

The complaint in ground 5 is that the investigating officer W/Spl./Cpl. Crossdale delayed in writing her statement until some time after the appellants appeared before the court. W/Spl./Cpl. Crossdale sought guidance from the Office of the Director of Public Prosecutions prior to writing her statement. Counsel submitted that this would cast doubt on the totality of her evidence in light of the provisions of the Act that require the matter to be dealt with within a reasonable time.

In ground 6 it was submitted that the finding by the learned Resident Magistrate that the appellants were in unlawful possession of the money found on their persons and in their wallets was contrary to the evidence. The evidence of W/Spl./Cpl. Crossdale was that the suspicion she formed in her mind, was that if they were carrying something illegal it would not be on their persons. Counsel further submitted that the money found on the person of the appellants totaling U.S. \$27,466 ought to have been given back to them as there was no suspicion that they were in unlawful possession of anything on their person.

The complaint in ground 7 is that the learned Resident Magistrate failed to consider the evidence that only the appellant Freddy Galue had knowledge of the money in the suitcases. His admission to W/Spl./Cpl. Crossdale when he said "all mine they knew nothing about it" was evidence which should have exonerated

the other appellants. It was submitted also that the learned Magistrate failed to consider the evidence of Freddy Galue that he had packed all the suitcases with money in the absence of the other appellants of which they had no knowledge.

It was Counsel's submission in ground 8 that the account given by the appellant Freddy Galue as to how he came into with possession of the money was reasonable and probable. It was further submitted that the prosecution produced no evidence to disprove the evidence of the appellant that the agreement for sale of his farm was not legitimate. There was nothing to cast doubt on the integrity of the sales agreement as it was an authentic document. There was no evidence that the learned Resident Magistrate addressed her mind to this aspect of the evidence in her findings.

Counsel submitted in ground 11 that the Unlawful Possession of Property Act is unconstitutional and a breach of the presumption of innocence as the burden of proof shifts to an accused. The Act erodes the presumption of innocence as spelt out in the Constitution as it predated the Constitution.

In grounds 1, 2 and 3 the question for determination is whether W/Spl./Cpl. Crossdale had reasonable grounds for suspicion. The offence of unlawful possession of property is committed whenever a person is a suspected person under the Unlawful Possession of Property Act in relation to items or goods found in his possession by any Constable of the Jamaica Constabulary Force. If the person fails to explain to the satisfaction of the Resident Magistrate

by what lawful means he came into possession of the said goods found on him, the Resident Magistrate may convict him.

Section 2 of the Act defines a "suspected person" as:

"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 circumstance as shall reasonably cause any constable or authorized person to suspect that that thing has been stolen or unlawfully obtained".

It is quite clear that before a constable can entertain a reasonable suspicion that a person was in possession of something which was stolen or unlawfully obtained, there must exist some facts which caused such suspicion. In the instant case the starting point is the conduct of the appellants on their approach to the security checkpoint. What did the learned Resident Magistrate find in relation to the 'suspicion' of the officer?

She stated:

"I find that the evidence given by Special Corporal Crossdale both specifically and inferentially establishes that she was suspicious of the accused persons (appellants) prior to her charging them.

I find that the officer's suspicion was reasonable having regard to all the circumstances..."

The learned Resident Magistrate went on to give the basis for her findings from the evidence of W/Spl./Cpl. Crossdale:

- "(a) Her own observations of the accused persons conduct at the airport.
- (b) Her observations of the luggage via the x-ray machine.
- (c) The inconsistent answers given by the accused Freddy when taxed at the airport as to contents of the suitcases and later the sum of money in the suitcases.
- (d) The response of Freddy as given to D.S.P. Leebeert's questions as to how he came in possession of the money.
- (e) The maneuvering of Freddy at the airport to keep his co-accused from communicating with Special Corporal Crossdale at the airport.
- (f) The large sum of money and the means of its concealment."

It can be seen from these findings that the learned Resident Magistrate took into account the sequence of events that unfolded from the conduct of the appellants on their approach to the security checkpoint. As Harrison J.A., (as he then was) said in this Court in **R v. Henry Rivas** and **Giovanni Infante** (supra) at p. 9:

"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."

Based on the observations of the officer as to the conduct of the appellants she formed the suspicion that they were carrying something illegal in their suitcases. The concealment of the money in false compartments in the suitcases is the telling evidence and is the "thing" suspected to have been stolen or unlawfully obtained.

Guidance is given to Resident Magistrates in several cases as to how to deal with persons arrested under Section 5 of the Unlawful Possession of Property Act. In a decision of this Court in **R v. Williams** (1964) 6 W.I.R. 320 it was 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 this 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".

In **R v. Curtis** (1964) 6 W.I.R. 234 this court (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... ”

It is quite clear that once the Resident Magistrate finds that a person is a suspected person it calls for an explanation to the satisfaction of the Resident Magistrate. The onus of proof is on the person charged once he has been ordered to account to prove on a balance of probability that the goods were acquired by lawful means. In the instant case the appellants Monica, Gloria and Jean Carlos gave no account whatsoever, notwithstanding the requirement to do so. In her findings the learned Resident Magistrate said:

“I find that Monica, Gloria and Jean Carlos has given no explanation at all, let alone one that satisfied this Court as to how they came to be in possession of the money found in the suitcases and that the said money was lawfully obtained.”

Section 5 (4) of the Act states:

“(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...”

We see no reason to disturb the findings of the learned Resident Magistrate who demonstrated that there was conduct on the part of the appellants which raised suspicion and that the officer’s suspicion was reasonable having regard to all the circumstances. For these reasons grounds 1, 2 and 3 must fail.

Grounds 4 and 5 are without merit. In ground 4, the learned Resident Magistrate used the word "maneuvering" in respect of the conduct of the appellant Freddy in order to describe his role in the activities. From the evidence it appeared he was spokesperson and translator for the group and sought to take full responsibility for the money found in the suitcases.

In ground 5 Counsel for the appellants contended that the officer's delay in writing her statement and in seeking advice from the Director of Public Prosecution's office would cast serious doubt on her credibility. The short answer to that, is that credibility was an issue for the learned Resident Magistrate who in her findings accepted the officer as a credible witness. As stated grounds 4 and 5 are without merit.

In ground 6, the arguments of Counsel for the appellants are not without merit. The evidence of W/Spl./Cpl. Crossdale, was that the suspicion she formed in her mind that if the appellants were carrying something illegal it would not be on their person. The focus of attention was the contents of the suitcases which revealed large sums of money. We agree with Counsel that the learned Resident Magistrate never addressed her mind to this in her findings. Counsel for the Crown conceded the point. The total sum of U.S. \$27,466 found on the person of the appellants should therefore be returned to them.

In ground 7 this was dealt with in grounds 1, 2 and 3. The learned Resident Magistrate made a finding that all the appellants had knowledge of the money contained in their luggage. The learned Resident Magistrate rejected the evidence of the appellant Freddy when he sought to claim responsibility for the money found in the other appellants suitcases. The evidence of W/Spl./Cpl. Crossdale revealed that money found on the persons of Monica and Gloria were packaged similar to that found in their suitcases. It would seem quite strange indeed that they would have money on their persons packaged similar to that found in their suitcases and not have knowledge of it. The finding of the learned Resident Magistrate on this aspect is worth repeating when she said:

"I find that Monica and Gloria must have been aware of the money contained in their suitcases, having regard to the evidence of Special Corporal Crossdale as to the similarity in the packaging of the money found on their persons. I find that Monica's denial was not truthful. I find that Monica, Gloria and Jean Carlos has [sic] given no explanation at all, let alone one that satisfies this court as to how they came to be in possession of the money found in the suitcases and that the said money was lawfully obtained." (emphasis mine).

We are of the view therefore that this ground must fail.

In ground 8 the complaint was that the learned Resident Magistrate failed to accept the account given by the appellant Freddy as being satisfactory. It is obvious that she did not accept his account as satisfactory and convicted him. In **Regina v. Mario Alvarez** R.M.C.A. No. 21/05 delivered the 31st July, 2006 Harrison, P. said at page 9:

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

The learned Resident Magistrate had several accounts to consider that was given by the appellant Freddy. The Appellant claimed that he came to Jamaica to escape extortionists in his country. He said he had sold his farm and kept some of the money at home. He packed the money taping them to the bottom of five suitcases in a false compartment. The money totalled over U.S. \$800,000. This he said was to avoid paying a 16% tax in Colombia. He exhibited a sales agreement which appeared to be an authentic document. There was nothing to cast doubt on its integrity. It was not demonstrated in the findings of the learned Resident Magistrate that she exercised her thought process on this. However, there were other accounts given by the appellant which the Resident Magistrate had to consider. He had said that the money was given to him by a man while he was in his hotel room in Negril.

Although he admitted saying so, he said that was a lie. However, what is more revealing is the fact that when he arrived in Jamaica he declared on a Declaration Card that he had less than \$10,000 in his possession. With these varying accounts one cannot fault the learned Resident Magistrate for not accepting his explanation that the money was the proceeds of sale of land in Colombia. This ground also fails.

In ground 9 the fact that W/Spl./Cpl. Crossdale released the appellant Monica after being charged into the care of the Colombian Consulate meant that she was no longer a suspected person under the Act is completely without merit. This was done according to W/Spl./Cpl. Crossdale on humanitarian grounds. The offence was already committed and the appellant already charged.

In ground 10 the complaint is that there was a breach of the judge's rules in that the appellant Freddy was allowed to make statements without being cautioned. W/Spl./Cpl. Crossdale said she could not recall if she cautioned the appellants as they did not speak English quite well. Assistant Superintendent Janet Leebert who was the interpreter for the appellants said she did not caution them. The judge's rules are directory and not mandatory. W/Spl./Cpl. Crossdale was making enquiries and the Court can exercise discretion to admit statements where voluntariness is an issue even after a suspect has been charged. [See **Shabadine Peart v. the Queen** (Privy Council No. 5 of 2005) delivered on 14th February, 2006.] The learned Resident Magistrate was cognizant of this when she said in her findings:

"I find that this evidence given by DSP Leebert and others as to Freddy's oral reply to the questions as to how he obtained the money is admissible. I find that said answer was made voluntarily and the circumstances of the admission were not oppressive or unfair. The questioning of an accused or apprehension by a constable and adverse inferences from silence is a deviation from his right to remain silent where it concerns unlawful possession of property."

We see no merit in this ground.

In ground 11 it was argued that the Unlawful Possession of Property Act is unconstitutional and a breach of Section 20 of the Constitution, as the burden shifts to the accused. This view is incorrect as at no time has the onus of proof been placed on an accused. Section 5 (4) of the Unlawful Possession of Property Act states that, a person who is ordered to account do so to the satisfaction of the court providing a reasonable explanation and one that is probably true. This issue was addressed in a case from this court in **R. v. Outar and Senior** R.M.C.A. No. 47/97 delivered the 31st July, 1998 where this court recognized and affirmed that the presumption of innocence lies in favour of the accused. The reversed onus of proof that may be constitutionally placed on him by Section 20 (5) of the Constitution being; that the burden of proving particular facts is an evidential burden only. Such a reverse onus is placed on a suspected person under the Act. So it is quite clear that only an evidential burden lies on an accused constitutionally and only on a balance of probabilities.

This ground also fails.

As stated we dismissed the appeals. The convictions and sentences are affirmed except that the sums of money found on the person of each appellant are hereby ordered to be returned to the respective appellants.