IN THE SUPREME COURT OF BELIZE, A.D. 2005

(APPELLATE JURISDICTION)

INFERIOR COURT APPEAL NO. 3

APPEAL FROM THE INFERIOR COURT – BELIZE DISTRICT

CPL. #451 EDISON PALACIO Appellant

BETWEEN AND

JOSEPH GARBUTT
ANTHONY WILLIAMS
CARYL MEIGHAN Respondents

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown/Appellant.
Mr. Edwin Flowers S.C., with Mr. Richard 'Dickie' Bradley, for the Respondents.

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JUDGMENT

1. This appeal arises out of the submission of "no case to answer" by the attorney for the respondents on their trial before the Chief Magistrate on the charge of unlawful possession of property pursuant to section 6(2) read along with sections 2(1) and 2(4) of the Unlawful Possession of Property Act – Chapter 113 of the Laws of Belize, Rev. Ed. 2000.

Background

2. From the record it is clear that the incident that gave rise to this case occurred on Thursday 10th June, 2004, at about 11:00 a.m. On that date, Police Corporal 451 Edison Palacio, (in whose name the learned DPP has brought this appeal), was, together with Police

Constable Awayo and two Belize Defence Force Soldiers, on a mobile patrol along Partridge Street heading towards Mahogany Street in Belize City. The mobile patrol was patrolling the city in a police pick-up truck when it noticed a black fully tinted Mercedes Benz car coming from Mahogany Street towards its direction on Partridge Street. After some attempts by the Mercedes Benz car to bypass the patrol, it succeeded in bringing it to a halt. Inside the car were the three respondents, Messrs. Joseph Garbutt, Anthony William Johnson and Caryl Meighan. After refusing first to lower his windows, the driver of the car later complied when ordered by Cpl. Palacio, who testified that he then saw the other two occupants of the car, one in the back seat and the other in the front passenger seat.

3. Cpl. Palacio testified that he told the three occupants (the respondents in this case) that he would conduct a search inside the car for illegal firearms and controlled drugs. He also conducted a search on the persons of the respondents but he testified that he found nothing incriminating. A search conducted inside the car however yielded the sum of $180,000.00 found on the floor of the front passenger seat and the glove compartment. Cpl. Palacio testified that by his count the money found in the glove compartment was $50,000.00 and that the amount found on the floor was $130,000.00.

4. The three respondents, according to Cpl. Palacio's testimony, were then escorted to the Queen Street Police station where a further search was conducted on the Mercedes Benz car but nothing illegal was found. At the station, the money, after having been counted, was placed in an envelope to which was attached, according to Cpl. Palacio's testimony, a pink Exhibit label with the respondents' names and the signature of Cpl. Palacio.

5. Cpl. Palacio further testified that he then swore to an information/complaint and formally charged the three respondents with the offence of money laundering.

6. He however, further testified that on **<u>22nd September, 2004</u>**, he was "further instructed to charge the (respondents) with unlawful possession of property." These instructions he said he duly followed. He did not say who instructed him, but this was over three months after the incident in Partridge Street, and the laying of a complaint for the offence of money laundering against the respondents.

7. It is therefore clear that when Cpl. Palacio apprehended the respondents on Thursday 10th June 2004 in Partridge Street in the black Mercedes Benz with the sum of $180,000.00 in their possession he did not think or reasonably suspect that they were unlawfully in possession of the money or that the money was unlawfully obtained. He in fact stated in evidence that when the respondents were stopped they were told that their car would be searched for illegal firearms and drugs. Cpl. Palacio also stated that after the discovery of the money, he had intended to take it to the Income Tax Department as that was what the police would do in such a situation. But he laid a complaint of money laundering against them, and then on instructions, on 22nd September 2004, he charged them with unlawful possession of property to wit, the sum of $180,000.00 found in the car on 10th June 2004. He however, stated in answer in cross-examination by Mr. Richard Bradley, who represented the respondents at their trial before the Chief Magistrate, that in fact it was on 22nd October 2004, that he charged them with the offence of unlawful possession.

8. This was the state of play when the trial of the respondents finally got underway on Tuesday 2nd November 2004. From the record

two charges were originally preferred against them before the Chief Magistrate on that date, namely, 1) *Money Laundering contrary to section (3) Chapter 104 R.E. 2000* (sic) and 2) *Unlawful possession of property, contrary to section 6(2) read along with 2(1), 2(4), Chapter 113, Laws of Belize R.E. 2000*.

But from the records the charge of money laundering was withdrawn, and only the charge of unlawful possession was proceeded with against all three respondents.

9. At the end of the case for the prosecution, Mr. Bradley, the learned attorney for the respondents before the Chief Magistrate, then made a "no case" submission.

   After hearing from both Mr. Bradley and Mr. Carlo Mason, the Crown Counsel who represented the prosecution, the learned Chief Magistrate accepted the submission of "no case" and dismissed the case against all three accused.

The Appeal by the Director of Public Prosecutions

10. It is against this decision of the Chief Magistrate that the Director of Public Prosecutions has brought the present appeal.

11. Two grounds of appeal were filed by the Director of Public Prosecutions; he however, only argued one and abandoned the other. As filed, Ground 1 which he argued is, in my view, somewhat cumbersomely expressed and not exactly easy to understand.

12. However, in argument, the learned Director of Public Prosecutions was, with respect, more lucid: the essence of his complaint against the Chief Magistrate's decision to uphold the "no case" submission is that he failed to appreciate the elements of the offence of unlawful possession of property and that he did not properly apply

his mind to the offence. He therefore submitted that the element of unlawful possession is that the possession was unlawful and distinct from reasonable suspicion at the time of arrest. He therefore submitted the Chief Magistrate erred in ruling to uphold the 'no case' submission because the arresting officer did not at time of arrest indicate that he had at the time reasonable suspicion of unlawful possession; and that the Chief Magistrate failed to appreciate that the property was unlawfully obtained given the circumstances of the arrest of the respondents. The Director of Public Prosecutions therefore submitted that a prima facie case had been made out against the respondents which they should have been called upon to answer.

13. The Director of Public Prosecutions also argued that the fact that the respondents were charged with the offence of unlawful possession some three and a half months after their arrest was not material and that once they were charged within six months of their arrest, it was a valid charge.

The Law of unlawful possession of property as contained in the Unlawful Possession of Property Act – Chapter 113 of the Laws of Belize R.E. 2000 (Referred to hereafter as the Act)

14. **Chapter 113 – Unlawful Possession of Property Act**, may seem odd in our criminal calendar (more on this later). It is of some relative vintage, having been in force since 30th April 1955. From its title, it seems to give the impression that it is the "unlawful possession of property" that is criminalized by the Act. What section 2(1) of the Act does is to clothe any police officer with the power of arrest without warrant, of any person who has in his possession or control, anything which the police officer has reasonable cause to suspect has been stolen or unlawfully obtained.

15. This section creates no offence. Sub-sections (2) and (3) also do not create any offence – they only set out the procedure to deal with person arrested on suspicion of being in unlawful possession of property by: i) requiring his production together with thing found in possession before a magistrate "as soon as possible", ii) providing that the person to be granted bail, if within 72 hours, he is not brought before a Magistrate Court after his arrest.

    It is **subsection (4) of section 2** that creates the **offence of unlawful possession**. This it does by an inversion of the burden of proof: If the suspected person (who may well be on bail pursuant to subsection (3)) does not, within a reasonable time assigned by the magistrate, give an account to the satisfaction of the magistrate by what lawful means he came by the property (or thing), he shall, on summary conviction, be liable to a fine or imprisonment.

16. It is therefore the failure to give an account to the satisfaction of the Magistrate of the lawful means by which the person came by the thing in question that gives rise to liability.

17. This must be distinguished from the **mere possession** of the thing or property, which, by subsection (1) of section 2, gives rise only to liability to arrest by any police officer who has reasonable cause to suspect that a person has in his possession or control anything that has been stolen or unlawfully obtained.

18. If, of course, the suspected (and arrested) person gives an account of his possession of the thing to the satisfaction of the magistrate as to what lawful means he came by it, this would obviate liability.

19. Failure to so understand and apply the Act, gives rise to confusion which, itself, may be directly attributable to the very title of the Act – **Unlawful Possession of Property Act**.

20. The failure to understand the structure and operation of the Act was, I believe, at the heart of the case before the learned Chief Magistrate on the "no case" submission on behalf of the respondents which was upheld and has given rise to this appeal.

21. The offence of unlawful possession of property may sound simple even though it is triable summarily, but it has some technical aspects which may not be easily appreciated. The offence created by the statute is not the **mere possession** of the property in question that is penalized. From the scheme of the act several steps precede the finding, if any, of criminal liability for the purposes of the Act. The following steps, I find, are the combined operation of **sections 2 and 6** of the Act to ground liability:

    1) The arrest of the person in whose possession or control the thing the police officer had reasonable cause to suspect was stolen or unlawfully obtained.

    2) The arresting police officer at the time must have reasonable cause to suspect that thing found in the possession of the suspect was stolen or unlawfully obtained.

    3) The bringing of that person before the Magistrate.

    4) The admission by the person of possession or control of the thing in question; or upon proof to the Magistrate's satisfaction that the person was in control or possession of the thing.

5) Then, the Magistrate calls upon the person to give an account of his possession or control of the thing in question within a reasonable time assigned by the Magistrate.

6) It is the failure of the person in whose control or possession the property suspected to have been stolen or unlawfully obtained, to give an account of his possession or control of the thing to the satisfaction of the magistrate before whom he is brought, that gives rise to criminal liability – section 2(4). The time to give such account to the magistrate is stated in the Act to be "a reasonable time to be assigned by the magistrate". This is however not defined.

22. Also, the Act in section 6 provides for the tracing of possession of the thing in question. Therefore if the person brought before the Magistrate as a result of **section 2** (where a police officer without warrant arrests someone on reasonable cause he suspects of possessing or being in control of stolen or unlawfully obtained property); or under **section 4** (a person is arrested pursuant to a search warrant for having concealed in his house, store, yard or other place, stolen or unlawfully obtained property); or **section 5** (a person arrested in a vessel (which may include a vehicle) on which there is reasonable ground for suspecting stolen or unlawfully obtained property); and the person declares to the magistrate that he received the thing reasonably suspected to have been stolen or unlawfully obtained from **some other person**, or that he was employed as a carrier, agent or servant to convey the thing for some other person, the magistrate will then cause **that other person** and **also any other person** through whose possession the

thing or property had previously passed, to be brought before him either by summons or warrant.

23. The magistrate shall then examine this **other person** regarding his control or possession and call upon such person to give an account of by what lawful means he came by the property. It is the failure of this other person to give a satisfactory account within a reasonable time assigned by the magistrate that gives rise to criminal liability.

24. Therefore, from the scheme of the Act, I do not think it is one to which a charge under it can be easily or readily repulsed with a 'no case' submission by the defendant at the end of the case for the prosecution. Clearly, the Act requires some response from the person charged. That is, to give an account satisfactory to the magistrate of his possession or control of the thing reasonably suspected to have been stolen or unlawfully obtained.

25. This duty to give an account satisfactory to the magistrate is not, in my view, discharged by recourse to a 'no case' submission.

The account may well be that the person charged was only acting for some other person. In this case, the Act provides in **section 6** for the tracing of possession. By this means, the other person from whom the person brought before the magistrate is alleged to have obtained the thing, is then brought forward whether by summons or warrant, to give his own account to the satisfaction of the magistrate, otherwise there is liability.

26. It is therefore evident that the intent of the Act is to require some account to be given to the satisfaction of the magistrate by the person in whose possession the thing suspected to have been stolen or unlawfully obtain or **some other person** from whom the

thing was allegedly originally obtained, as to the lawful means the person came by the thing.

27. Therefore, the thing or property must be reasonably suspected to have been stolen or unlawfully obtained. Then an account to the satisfaction of the magistrate must be given. The failure to give that account is what is penalized under the Act.

28. It is therefore not easy to see or appreciate how, on the conclusion of the case for the prosecution, a 'no case' submission can **ordinarily** apply to a charge under the Act. I say "ordinarily apply" because each case is different and it may be possible that as a result of discrediting prosecution witnesses or lack of any evidence, there may be no case to answer along the **Galbraith** principles on a 'no case' submission, **73 Cr. App. R. 124 (1981)**; **(1981) 1 WLR 1039**; **(1981) 2 All E.R. 1060**. But, as I have said, by the scheme of this particular Act **some** response is required from a person charged under it. A 'no case' submission can hardly be an account of the possession or control of the thing reasonably suspected to have been stolen or unlawfully obtained, to the satisfaction of the magistrate, unless possession or control of the thing by the person charged is unsupportable by the evidence.

29. Therefore, to uphold a "no case" submission in such circumstances without hearing from the person charged would hardly meet the provisions of the Act. But, more on this later in the light of the proceedings before the learned Chief Magistrate.

30. I have set out above at paragraphs 21 – 26 the steps which I think flow from the operation of sections 2 and 6 of the Act in relation to liability for the possession of thing reasonably suspected to have been stolen or unlawfully obtained and failure to give a satisfactory

account for the possession to the magistrate before whom the person is brought.

31. However, from the record of this and the circumstances attendant on the respondents being ultimately tried for the charge of unlawful possession, I am satisfied that the submission of 'no case' was properly made.

32. Was the learned Chief Magistrate right to uphold this submission?

33. I am of the considered view that given the evidence before him, first as regards to the time for bringing of the charge of unlawful possession, and secondly the requirements to sustain a charge under the Act, the learned Magistrate was correct to uphold the 'no case' submission on behalf of the respondents in the particular circumstances of this case.

34. I turn now to an examination of these two considerations.

Time and the offence of unlawful possession

35. Time is evidently, from the provisions and scheme of the Act, of some importance. In the first place, the person in whose possession the thing is found should **"as soon as possible"** after his or her arrest be brought before a magistrate sitting in court by the police officer making the arrest - subsection (2) of section 2. Secondly, if within seventy-two hours after the arrest of the suspect and he/she is not brought before a magistrate, then the suspect shall be admitted to bail by a police officer not below the rank of an inspector after entering into a recognizance with or without sureties, for a reasonable amount, to appear before the court at the time and place stated in the recognizance – subsection (3). Thirdly, if the suspected person does not within a **reasonable time** to be assigned by the magistrate, give an account satisfactory to the

magistrate by what lawful means she came by the thing found in her possession, then she may be liable to be convicted – subsection (4). Time is also provided for in **subsection 6(2)** within which **some other person** who is alleged by a suspect to have been the source of the thing in question, to give an account to the satisfaction of the magistrate by what unlawful means he acquired the thing in question.

36. In view of the time that had elapsed since the arrest of the respondents, their initial charge for money laundering and the adjournment of their trial and ultimately their trial under the Act on instructions (as the arresting officer testified), some three and a half months after their arrest, it would not clearly be in keeping with the spirit, intendment, scheme and provisions of the Act: it contemplates a speedy and summary procedure. This was not the case here. For all these reasons I don't think the magistrate's decision to uphold the 'no case' submission should, in the circumstances be disturbed – **Balladin v Mondesir (1962) 5 WIR 245** – to produce a suspect three weeks after arrest to answer charge of unlawful possession under a similar statute like the Act in question here was held not in keeping with the procedure provided for by the statute. The appellant's conviction was quashed.

37. I therefore, do not accept the argument and submission of the learned Director of Public Prosecutions that to charge the respondents with the offence of unlawful possession some three and a half months after their arrest was immaterial since by section 20 of the Summary Jurisdiction Act – Chapter 99 of the Laws of Belize, R.E. 2000, the time limitation for complaints for a summary conviction offence is six months. I am rather persuaded by the argument of Mr. Edwin Flowers S.C., the learned attorney for the respondents in this appeal, that in the context of the offence of

unlawful possession charged under the Act and the circumstances of preferring the charge of unlawful possession against them, section 20 of Chapter 99 would not be applicable because of the nature of the offence and the structure of the Act.

38. From the structure of the Act, it is intended that an arrested person should be brought before a magistrate as soon as possible and he is to give an account that is satisfactory to the magistrate for his possession of the goods in question within a reasonable time as may be assigned by the magistrate.

39. I therefore accept that in view of the time interval, from the arrest of the respondents on 10 June 2004 (who, it may be recalled were only then charged with money laundering) to their ultimate charge with the offence of unlawful possession, on 22nd September 2004, it would not be in keeping with the procedure contemplated and provided for dealing with persons arrested for the unlawful possession of property under the Act. Also, the arresting officer, Cpl. Palacio did not think of charging this offence and instead had preferred another, that is, money laundering; and that it was only as a result of instructions, that he ultimately charged the offence of unlawful possession of property. This, I find, is outside the structure and provisions of Chapter 113.

40. Also, from the circumstances of the arrest of the respondents and the evidence led against them and in the light of the offence they were ultimately charged with, it was manifest that a "no case" submission on their behalf was bound to succeed. The learned Chief Magistrate was therefore correct to accept that submission.

41. In the first place, the respondents were only proceeded against ultimately with *"Unlawful possession of property contrary to section 6(2) read along with sections 2(1) and 2(4), Chapter 113 of the Laws of Belize,*

R.E. 2000" (emphasis added). Section 6 of the Act, as I have mentioned above at paragraph 22, deals with the tracing of possession of the thing in question. That is, if the person brought before the magistrate either as a result of being arrested by a police officer pursuant to section 2(1), or pursuant to section 4 as a result of the execution of a search warrant on a house, store, yard or other place, land or vessel, and the person in charge thereof is arrested for keeping thereon anything stolen or unlawfully obtained or pursuant to section 5 a vessel is boarded and an arrest effected, and the person arrested in any of these situations declares to the magistrate before whom he is brought that he received the thing from **some other person**, or that he was employed as a carrier, agent or servant to convey the thing reasonably suspected to have been stolen or unlawfully obtained, of some other person, then the magistrate may cause that **other person** to be brought before him either by summons or warrant, to give an account of the lawful means he came by the thing in question.

42. From the facts of this case, there was no evidence that the respondents were in possession of the money found with them for some other person. Quite why they were charged under section 6 of the Act is a matter of some mystery, a mystery that nonetheless, in my view, hobbled the prosecution and presentation of the case against the respondents. There was no evidence other than that the money was found in their possession and that they were in control of it and not in some other capacity or for someone else.

43. I therefore think that the addition of section 6(2) to the complaint against the respondent flawed their prosecution. Section 6 is intended to **trace the possession** of the thing reasonably suspected to have been stolen or unlawfully obtained to **some other person**, not the person who is arrested pursuant to section 2

of the Act as the respondents were in this case. Section 6 is only relevant and applicable if the person brought before the magistrate as a result of either sections 2, 4 or 5 declares that he received the thing from **some other person** either as an employee, carrier, agent or servant of that other person. Then in that case the magistrate may have this other person brought before him.

44. Furthermore, the addition of subsection (1) of section 2 is somewhat perplexing and quite beside the point in this case. This subsection, as I have pointed out at paragraphs 14 and 15 above, creates no offence. It only empowers a police officer to arrest without warrant, any person having in his possession or control anything which the police officer has reasonable cause to suspect to have been stolen or unlawfully obtained.

45. In my view, therefore, the addition of these two subsections, that is subsection (1) of section 2 and subsection (2) of section 6 to the charge attest to the confusion that attended the prosecution of the respondents in this case.

Liability under the Act

Secondly, the considerations to sustain a charge of unlawful possession.

46. A close reading of the Act will disclose that for liability to attach for this statutory offence of unlawful possession of property, there must be a failure to give an account of the possession of the thing reasonably suspected to have been stolen or unlawfully obtained to the satisfaction of the magistrate by the person found with it or the other person he declares to have obtained it from, of the lawful means by which he obtained the thing in question.

47. From the attendant circumstances of the arrest of the respondents and their ultimate prosecution and trial for the offence of unlawful possession of property under the Act, it is evident, from the record, that Cpl. Palacio, the arresting officer, did not stop, suspect or arrest them for any offence under the Act. In fact he first charged them with the offence of money laundering on their arrest in June 2004. This offence, of course, needs a predicate offence for a successful prosecution. Evidently, none could be found or laid against them. Therefore sometime later, over three months, and on instructions, the offence of unlawful possession under the Act was laid against them. This of course was quite contrary to and outside the provisions of subsection (2) of section 2 of the Act. This in plain terms provides:

> *"(2) As soon as possible after the arrest of a suspected person, the police officer making the arrest shall bring the suspected person, together with anything found in his possession or under his control which is reasonably suspected to have been stolen or unlawfully obtained, before a magistrate sitting in court."*

48. It is therefore difficult to avoid the conclusion from the records in this case, that the prosecution of the respondents on the charge of unlawful possession under the Act was nothing short of a make weight, if not an afterthought. In any event, from the testimony of the arresting officer, their prosecution under this Act was on instructions, well after their arrest, not as a direct result of his belief or any reasonable cause to suspect that they stole the money or unlawfully obtained it.

49. Though it does not create any offence I believe the effect of section 2(1) of the Act is substantive in terms of grounding liability under it: the arresting police officer must have, at the time of arrest,

reasonable cause to suspect that the thing found in the possession or control of the suspect had been stolen or unlawfully obtained. This would therefore preclude a charge for unlawful possession under section 2 that is brought, some appreciable time later after arrest and then only on instructions, as seemed to have happened in this case. Reasonable cause for suspicion must be present and operative in the mind of the arresting officer at the time of affecting arrest in order to ground a charge properly under section 2. From the records, especially the testimony of Cpl. Palacio, the respondents were charged under the Act, only as a result of instructions he was later given and not because of any reasonable cause of suspicion on his part as is required under section 2(1) when he arrested them on 10th June 2004. The charge for unlawful possession came well after their arrest on that date.

50. In the circumstances, it is difficult to fault the learned Chief Magistrate for upholding the "no case" submission on behalf of the respondents. In the event I agree with the Chief Magistrate's conclusion in this respect that:

> "*The Corporal had a suspicion but not the suspicion as required by the Unlawful Possession of Property Act. Therefore the reasonableness of his suspicion to prove unlawful possession has not been proved by the prosecution as required by the Act.*"

51. The prosecution of the respondents for unlawful possession was not I find, from the records, the result of any reasonable cause to suspect by Cpl. Palacio that the money was stolen or unlawful obtained but rather of instructions, given later **after** their arrest. This is in my view, placed their prosecution outside the purview of the Act.

52. For all these reasons, I find it was quite in place for the Chief Magistrate to have upheld the submission of "no case" on behalf of the respondents. Consequently, the appeal by the learned Director of Public Prosecutions is dismissed.

The implications for and effect of the Constitution of Belize on the law of unlawful possession as contained in the Act

53. As I had mentioned earlier the law of unlawful possession as contained in Chapter 113 of the Laws of Belize, R.E. 2000, especially section 2(4), seem odds in our criminal calendar. The offence of unlawful possession of property as a result of the failure of the person charged to give an account to the satisfaction of the magistrate by what lawful means that person came by the property would I think, present some challenges for the criminal law of this country. It reverses the traditional burden of proof and puts it instead, on the shoulders of a suspect charged under its provisions. This is contrary to the ordinary **burden of proof** (and the concomitant **standard of proof**) almost invariably to be found in a criminal prosecution) which rests with the prosecution.

54. It is perhaps not surprising therefore that in practice, the operation of the Act and prosecutions under it have given rise to difficulties. For example, see the decision of Cyril C. Henriques, Q.C., acting Chief Justice in the case stated in **R v Harvey Francis** (reported in a supplement to the British Honduras **Gazette** of 13 November 1954 at p. 647. This was a prosecution for unlawful possession of property contrary to paragraph (iii) of subsection 1 and section 3 of the then Summary Jurisdiction (Offences) Ordinance No. 9E of 1952, which is not dissimilar to the provisions of section 2(4) of the Act in the instant case; and also the decision of the erstwhile Meerabux, J. in **Leopold Wade and others v Sgt. Linden Flowers** (unreported of 17 February 1999); and the text by Sir

Alfred Crane, **<u>The Law of Unlawful Possession</u> (1966)** and the comments at p. 1, cited by Meerabux J. in **<u>Wade</u> <u>supra</u>**.

55. I had earlier referred to the vintage of the Act, a pre-independence statute, some of whose provisions, in particular, its sections 2(4) and 6(4), in my view, may now sit at odds with the constitutionally guaranteed **<u>presumption of innocence</u>** stipulated in **<u>section 6)(3)(a)</u>** of the Belize Constitution which provides:

> *(3) Every person who is charged with a criminal offence*
>
> *(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*
>
> *(b) …*
>
> *(c) …*

56. It is unarguable that implicitly if not expressly, but certainly in effect, that on a prosecution under the Act, its section 2(4) shifts the burden of proof at least, on to the accused. This shift, in my view, to require the suspect on a charge under section 2(4) to give an account of his possession of the thing in question to the satisfaction of the magistrate before whom he is brought, can hardly be in keeping with the constitutionally guaranteed presumption of innocence in criminal prosecution, no matter the charge or the mode of trial, whether summarily or on indictment. The same observations are, I think, applicable to prosecutions under **<u>section 6(2)</u>** of the Act. These sections provide in terms:

> *"Section 2(4): If the suspected person does not, within a reasonable time to be assigned by the magistrate, give an account to the satisfaction of the magistrate by what lawful means he came by it he shall, on summary conviction, be liable to a fine not exceeding two*

hundred and fifty dollars or to imprisonment for a term not exceeding six months";

and

"*Section 6(2): Upon any person mentioned in subsection (1) being brought before him, the magistrate may examine that person on oath as to whether he has been in possession or control of any such thing as aforesaid and upon his admitting such possession or control, or upon its being proved to the satisfaction of the magistrate that such person has been in possession of any such thing, the magistrate may call upon such person to give an account to the satisfaction of the magistrate by what lawful means he came by such thing, and if such person fails, within a reasonable time to be assigned by the magistrate, to give such account, he shall on summary conviction be liable to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding six months."*

57. Therefore, I think, to the extent that these provisions shift the burden of proof on to the accused by requiring him to give an account of his possession of the thing in question to the satisfaction of the magistrate, to that extent they undercut or set at naught the presumption of innocence guaranteed by **section 6(3)(a)** of the Constitution.

58. The Constitution, of course, is expressly stipulated in its section 2 to be the supreme law. This section provides in terms:

"2. This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

59. Although this issue was not raised or argued before me, nor I believe, for that matter, before the learned Chief Magistrate, I am of the considered view that the provisions of the Act such as **sections 2(4) and 6(2)**, that put the burden on an accused having to give an account of his possession of the thing in question to the satisfaction of the magistrate, may well now not pass constitutional muster to the extent that they, in effect, render nugatory the constitutional presumption of innocence guaranteed to **every** person charged with a criminal offence. At the very least, as provisions of an existing law, they would, in accordance with section 134(1) of the Constitution have to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with the Constitution, a procedure not readily amenable in a criminal prosecution unlike in a civil case.

60. I find support for this conclusion from the decision of the Privy Council in the case of **The Attorney General of Hong Kong v Lee Kwong-Kut**, and **The Attorney General of Hong Kong v Lo Chak-man and another (1993) 3 All E.R. 939**. These were two appeals from Hong Kong to the Privy Council in London, which in the opening words of Lord Woolf (as he then was), *"…illustrate the effect on existing legislation of adopting a Bill of Rights."* In the case before me it would be the Belize Constitution which came into force on 21st September 1981, many years after the Act on unlawful possession of property had been in operation. That is, what effect does the Constitution have on the provisions of the Act?

One of the two issues for decision in that case was whether section 30 of the Hong Kong's Summary Offences Ordinance survived after the coming in to force of that country's Bill of Rights. Section 30 provided as follows:

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

It may be noted that the penalties apart, the similarity of section 30 of the Hong Kong Ordinance and sections 2(4) and 6(2) of the Unlawful Possession of Property Act is such as to make one almost a carbon copy of the other.

On 8 June 1991, the Hong Kong Bill of Rights came into force. Its Article 11(1) provides as follows:

> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until provided guilty according to law."*

This is almost *ipsissima verba* as section 6(3)(a) of the Belize Constitution.

61. On the issue of the compatibility or continued validity of section 30 in the face of Article 11(1) of the Hong Kong Bills of Rights, Lord Woolf delivering the unanimous opinion of the Board stated:

> *"The application of Article 11(1) to ss.30 and 25*
>
> *So far as the first issue in the present appeals is concerned, that is whether the Hong Kong Bill of Rights has repealed the statutory provisions, their Lordships regard the answer as being straightforward once the substance of the offence has been identified. In the case of the first respondent the substantive effect of the statutory provision is to place the onus on the defendant to establish that he can give an*

explanation as to his innocent possession of the property. That is the most significant element of the offence. It reduces the burden on the prosecution to proving possession by the defendant and the facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It therefore contravenes Art. 11(1) of the Hong Bill of Rights…" (emphasis added)

62. As I have pointed out earlier, what is criminalized under the Act is not the possession of the thing reasonably suspected to have been stolen or unlawfully obtained but, rather, the inability of the suspect with whom the thing was found, to give to the satisfaction of the magistrate an account of the lawful means by which he came by it. This is the substantive effect of both sections 2(4) and 6(2) of the Act. This undoubtedly places the onus on an accused charged under either of these subsections. The effect of this, in my view, is to make the constitutional guarantee of the presumption of innocence for anyone charged under the Act meaningless. And I can think of no reason that would justify this, even for prosecutions under the Act. I hold that the presumption of innocence is central in our criminal justice system and a pillar of due process, and that nothing should be done to whittle it down.

63. I can only therefore, in this regard, re-echo the memorable dictum of Viscount Sankey, Lord Chancellor in **Woolmington v DPP (1935) A.C. 462** at **p. 481**; **(1935) 1 All. E.R. at p. 8**:

> *"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exceptions."*

Yes, sections of the Act putting the onus on an accused to explain to the satisfaction of the magistrate his innocent possession of the thing in question are, of course, statutory. But today in Belize with the primacy of the Constitution, any statutory exceptions to the golden thread of having the prosecution prove the guilt of an accused, must yield to the constitutional imperative of the presumption of innocence. Therefore, I hold that since the coming into force of the Belize Constitution on 21st September 1981, these statutory provisions putting the onus on an accused person to prove, in effect, his innocence, can no longer hold sway. They offend and are contrary to the presumption of innocence now embedded in section 6(3)(a) of the Constitution.

Conclusion

64. In light of all the foregoing, I find that the decision of the learned magistrate to uphold the submission of "no case" on behalf of the respondents should not be disturbed. Accordingly, I dismiss the appeal of the learned Director of Public Prosecutions.

65. At the conclusion of the hearing of this appeal, I had ordered that the sum of $180,000.00 taken away from the respondents on 10th June 2004, which led to their prosecution, should be placed in an interest-bearing account with one of the commercial banks in Belize City until the determination of the appeal. I now order that this sum together with any interest that might have accrued on it be given back to the respondents forthwith.

A. O. CONTEH
Chief Justice

DATED: 5th October 2005.