

IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 27 OF 2005

BETWEEN:

CPL. #451 EDISON PALACIO

Appellant

AND

**JOSEPH GRANT
ANTHONY WILLIAMS
CARYL MEIGHAN**

Respondents

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BEFORE:

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| The Hon. Mr. Justice Mottley | - | President |
| The Hon. Mr. Justice Carey | - | Justice of Appeal |
| The Hon. Mr. Justice Morrison | - | Justice of Appeal |

**Mr. Kirk Anderson, Director of Public Prosecutions, for the appellant.
Mr. Anthony Williams in person.**

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6 July, 27 October 2006.

MOTTLEY P.

1. The Director of Public Prosecutions (“the Director”), pursuant to the provisions of s 25(1)(a) of the Court of Appeal Act Cap. 90 has appealed against the decision of the Chief Justice who had upheld a ruling

previously made by the Chief Magistrate. The Chief Magistrate had upheld a no case submission made on behalf of the respondents and had acquitted them on a charge of unlawful possession of property. The Director also appealed against the ruling of the Chief Justice that s 2(4) and s 6(2) of the Unlawful Possession of Property Act Cap 113 were in violation of the provision of s 6(3) (a) of the Belize Constitution. Under that provision, every person charged with a criminal offence is presumed to be innocent.

2. The Director filed five grounds of appeal. These grounds are:
 - (i) That the Honourable Chief Justice erred in law, insofar as he concluded that the charge for the offence of unlawful possession of property, as had been brought against the respondent and tried in the Belize City Magistrate's Court, had been improperly framed, thereby entitling the respondents to have been acquitted of that charge; and
 - (ii) That the Honourable Chief Justice erred in law, insofar as he concluded that the respondents were also entitled to have been acquitted in the Magistrate's Court, upon the close of the prosecution's case at the respondents' trial for unlawful possession of property, on the basis that such charge having been instituted as against the respondents approximately three and a half months after the cause for complaint had first arisen, had been instituted out of the scheme of time as contemplated by the unlawful possession of property Act; and
 - (iii) That the Honourable Chief Justice erred in law, insofar as he concluded that the respondents were also entitled to have been acquitted in the Magistrate's Court, upon the close of the case for the prosecution, on the basis that the arresting officer did not, as at the time of his arrest of the respondents, have any reasonable suspicion that the Belize \$180,000.00

which he had found in the possession of the respondents, was unlawfully obtained; and

- (iv) That the Honourable Chief Justice erred in law, insofar as he concluded that s 2(4) and s 6(2) of the Unlawful Possession of Property Act are in violation of s 6(3) (a) of the Constitution of Belize – which grants to the respondents a right to be presumed innocent until proven guilty; and
- (v) That the Honourable Chief Justice erred in law, insofar as, without either party to the proceedings having raised, much less argued the issue before him and without this having been an issue addressed during the trial of the Respondents in the Magistrate’s Court either, he not only addressed issue as to the constitutionality of s 2(4) and s 6(2) of the Unlawful Possession of Property Act, but also held that these sections were in violation of the Respondents’ constitutional right to be presumed innocent until proven guilty.

- 3. The Director sought an Order from this Court to set aside the ruling of the Chief Justice.

BACKGROUND

- 4. On 10 June 2004, two police officers were on a joint mobile patrol with two members of the Belize Defence Force on Partridge Street in Belize City. A motor car with heavily tinted glasses, all of which were rolled up was observed being driven towards the officers. The condition of the car attracted the attention of the patrol who stopped their vehicle in the middle of the road. The police positioned their vehicle in such a way in an effort to prevent the car from passing. The car attempted to pass the police vehicle. The persistent efforts of the driver of the car to pass the police vehicle led the police becoming suspicious of the driver of the motor car. Having eventually succeeded in stopping the vehicle the police told the

driver that he wanted to search the vehicle to find out whether they were in possession of illegal firearms and controlled drugs. As a result of the search, a sum of money totaling one hundred and eight thousand dollars, Belize currency, was found. The respondents were arrested and subsequently charged with the offence of money laundering contrary to s 3 of the Money Laundering Act Cap. 104. In September 2004, a further charge of unlawful possession of property was brought against the respondents. At the close of the case for the prosecution, the Magistrate accepted a submission that no case had been made out against the respondents and dismissed the charges. It is not necessary to examine the reasons for his decision.

5. The Director appealed to the Supreme Court. When the matter was heard, the Chief Justice dismissed the appeal. It is against that dismissal by the Chief Justice that the Director is now appealing. In the light of the ruling by the Chief Justice, the Director was invited to deal with his fourth and fifth grounds of appeal which related to the constitutionality of the provisions of s 2(4) and s 6(2) of the Unlawful Possession Act.

6. In his judgment the Chief Justice concluded that:

“Although the 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 s 2(4) and s 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 s 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 amendable in a criminal prosecution unlike in a civil case.”

7. While it is correct that the Director did not have opportunity to address the Chief Justice on the issue of whether the provision of s 2(4) and s 6 (2) of the Unlawful Possession of Property Act offends the Belize Constitution, he was invited by this Court to deal specifically with this issue as the Chief Justice stated that the sections could “pass constitutional muster”.

THE LAW

8. It is therefore necessary to examine the law involved in this matter. Section 2(1) of the Unlawful Possession of Property Act empower a police officer to arrest without a warrant any person who has in his possession or control anything which the officer has reasonable cause to suspect has been stolen or unlawfully obtained. This section does not create any offence. It gives the police officer power to arrest in certain circumstances. Once arrested the suspected person is taken before a Magistrate, who will require him within a reasonable time, to give an account of his possession. If he fails to prove to the Magistrate that he came into possession or control of the thing by lawful means, he may be convicted by the magistrate.
9. S 2(4) of the Act purports to create an offence i.e. being unable to give an account to the magistrate within the time assigned of the lawful manner by which he came into possession of the thing. The offence is only committed when he fails to give and account to the magistrate of the lawful manner by which he came into possession of the thing.
10. S 2(4) of the Unlawful Possession of Property Act provides:
“s 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.”

11. S. 6 of the Act also deals with the issue of unlawful possession. The section provides:

“6(1) If any person brought or appearing before a magistrate under s 2, 4 or 5 declares that he received anything 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 that thing for some other person, the magistrate may cause every such other person, and also any other person through whose possession that thing shall previously have passed, to be brought before him either by summons or by warrant, as the magistrate in each case thinks fit.

(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.”

12. S. 6(2) of the Act sets out the procedure to be followed after the person who has been arrested appears before the magistrate. If the magistrate is satisfied that that person had possession of the property either as a result of evidence led or by admission of the person, the magistrate may call on that person to give an account of the lawful means by which he came into possession of the thing. However, if he fails to give an account within the time fixed by the magistrate he is guilty of an offence. Again the offence is only completed when the accused fails to give to the magistrate a satisfactory account for his possession.
13. We are in full agreement with the Chief Justice when he stated in his judgment that:

“...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.”
14. Under s 2(4) and s 6(2) of the Act, the offence is committed when the person fails to give a satisfactory account to the magistrate within the time assigned by him of the lawful manner by which he came into possession of the property. In order for the person to be acquitted under s 2(4) and s 6(2) of the Act that person has the burden of proving to the satisfaction of the magistrate that he did not come into possession of the property by unlawful means. For the reasons set out below we are of the view that to require the accused to prove his innocence is contrary to the presumption of innocence which is provided for by s 6(3)(a) of the Constitution.
15. S. 6(3)(a) of the Belize Constitution 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;

“(10) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of – (a) subsection (3)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.....”

16. What effect does the Belize Constitution have on the provisions of s 2(4) and s 6(2) of the Unlawful Possession of Property Act? Are the provisions of these sections in any way repugnant to the provision of S. 6 (3)(a)? In our view, they are.

17. Section 2 of the Belize Constitution provides for the supremacy of the Constitution. This section states:

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

The Unlawful Possession of Property Act came into force on 30 April 1955 prior to the coming into force of the Belize Constitution in 1981. Nonetheless it must be read subject to the provisions of s 2 of the Belize Constitution.

18. S. 134(1) of the Belize Constitution provides:

“Subject to the provisions of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications, adaptations, qualifications and exceptions

as may be necessary to bring them into conformity with this Constitution.”

19. The Unlawful Possession of Property Act is an “existing law” as it was an Ordinance which had effect in Belize immediately before Independence Day (s 134(6)). By virtue therefore of the provisions of s 134(1) of the Constitution, s 2(4) and s 6(4) must be construed in a manner so as to bring it “into conformity with the Constitution. The question arises whether it is possible to construe s 2(4) and s 6(4) in such a way that it does not offend the provisions of the Belize Constitution. If it does offend the provision of the Belize then it would be void under the provision of s 2 of the Belize Constitution.

20. In **Vasquez (Dean) v. R (1994) 45 WIR 103** the Privy Council had to deal with the issue whether the provisions of s 116(a) of the Criminal Code of Belize placed the burden of proof of provocation on the accused and whether in such circumstances the section was unconstitutional as infringing the requirements of s 6(3) (a) of the Belize Constitution. In concluding that the provision was unconstitutional, Lord Jauncey of Tullichettle said at p. 114:

“In their lordships’ view s 116(a) of the Code, by placing the burden of proof of provocation upon an accused, is in conflict with s 6(3) (a) of the Constitution and must accordingly be modified to conform therewith.”

21. The Privy Council was in fact doing no more than construing the provisions of s 116(a) of the Criminal Code with such modifications as to make it compatible with the presumption of innocence as set out in s 6(3) (a) of the Constitution.

22. In reaching their conclusion in Vasquez case, their Lordships considered the case of **Attorney General of Hong Kong v. Lee Kwong – Kut [1993]**

2 LRC 259. The respondent had been charged with contravening. S. 30 of the Summary Offence Ordinance. This section provides:

“Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate how he came by the same shall be liable to a fine of \$1,000 or to imprisonment for 3 months.”

23. Lord Woolf, in delivering the judgment of the Board, had this to say at p. 264:

“S 30 is therefore an offence which contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession.

The third element is not a special defence as is contended by Mr. Bratza in his extremely persuasive argument, on behalf of the Attorney-General, but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.

This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law.”

24. The requirement that the defendant is to give an account to the satisfaction of the magistrate of how the property came into his possession is an essential element of this offence.

25. Later in his judgment, Lord Woolf dealt with the inter-action of s 30 of the Summary Offences Ordinance and the provision of Article 11(2) of the Hong Kong Bill of Rights which provided that in the determination of a criminal charge a person charged had the guarantee that he would not be compelled to testify against himself or confess his guilt. The learned Law Lord concluded at p. 275 that:

“So far as the first issue in the present appeals is concerned, that is whether the Hong Kong Bill has repealed the statutory provisions, their Lordships regard the answer as being straightforward once the substance of the offences has been identified. In the case of the first defendant the substantive effect of the statutory provision is to place the onus on the defence 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 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 article 11(1) of the Hong Kong Bill in a manner which the Attorney-General could not justify.”

26. It is clear from these authorities that the provisions of s 2(4) and s 6(2) of the Unlawful Possession of Property Act are unconstitutional and in our view cannot be saved. It follows therefore that the Chief Justice was indeed correct when he concluded that these sections cannot “pass constitutional muster”.

27. In his fifth ground of appeal, the Director complained that the Chief Justice had erred in law when he decided that the provisions of s 2(4) and s 6(2) were unconstitutional without having heard the parties on the law involved. In our opinion, if a court is going to decide the case on an issue or a point

of law which the court has not had the benefit of submission from the parties or on which the parties have not been given an opportunity to address the court, in our view, the court should inform the parties of the particular issue or point of law which it considers to be relevant and afford the parties and their counsel an opportunity of addressing the court. At the outset of the hearing of this appeal, this Court brought to the attention of the Director that he would have an opportunity to address the Court on the issue whether s 2(4) and 6(2) are in conflict with the Constitution and whether those provisions should be struck down as being repugnant to the provision of s 6(3) (a) of the Constitution.

28. Having afforded that opportunity to the Director, it is clear, for the reasons stated above, that the provisions of s 2(4) and s 6(2) of the Act are void as being inconsistent with the provisions of s 6(3) (a) of the Constitution. The appeal of the Director is dismissed and the order of the Chief Justice is affirmed.

MOTTLEY P

CAREY JA

MORRISON JA