DOMINICA

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL No. 1 of 1993

BETWEEN:

SAMANTHA BERRIDGE

Appellant

and

THE POLICE

Respondent

Before: The Honourable Dr. N.J.O. Liverpool - Justice of Appeal
The Honourable Mr. Satrohan Singh - Justice of Appeal
The Honourable Mr. A.N.J. Matthew - Justice of Appeal (Ag.)

Appearances: Mr. Anthony W. Astaphan for the Appellant
Mrs. Desiree Wilson, D.P.P., for the Respondent

1993: March 12,
September, 13.

JUDGMENT

LIVERPOOL, J.A.

The appellant was charged with having in her possession forty five thousand two hundred dollars ($45,200) Eastern Caribbean Currency which Acting Inspector Albert reasonably suspected of having been unlawfully obtained. She and the money were taken before a Magistrate there to give an account by what means she came into lawful possession of the same. Section 44(2) of the **Small Charges Act** under which the appellant was charged reads as follows:

> "Any person having in his possession in any manner or in any place anything which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account satisfactory to the Magistrate as to how he came by the same, is liable to a fine of three thousand dollars or to imprisonment for twelve months; but such person shall not be liable to be convicted under this subsection if he proves that he had or has had possession of such thing for more than three months."

It is generally agreed that in order to satisfy a Magistrate as to entitle him to call upon any person to account, two requisites are necessary: (1) the goods must be found in the possession of the person who is to be called upon to account, and (2) there must be evidence before the Magistrate to satisfy him that there is reasonable cause to suspect the thing found to have been unlawfully obtained.

In the present case there is no doubt that the appellant was in possession of the money. Indeed, she was so much in possession of it, that at first she claimed it as her own. The question then was, was there reasonable cause to suspect that the money was unlawfully obtained?

According to P.C. Christmas, who was on duty at the Melville Hall airport; she was keeping the appellant and two other ladies under observation when she observed one of the ladies hand the appellant a brown paper bag and a small brown and black ladies hand bag. She noticed that the appellant ".... had been fighting with herself, she appeared to be nervous and uncomfortable, and I noticed that the pants she was wearing appeared rather bulky in the rear area (pockets area)". In the departure lounge P.C. Christmas identified herself to the appellant and told her that she had reason to believe that she was in possession of drugs. The appellant denied this, whereupon P.C. Christmas with her consent carried out a search and found this sum of money in the two rear pockets of the pants which the appellant was wearing. She then told the appellant that she had reasonable grounds to believe that the money had been unlawfully obtained. The appellant accompanied her to the Immigration Office at the airport. Whilst she was counting the money Inspector Albert arrived, and she handed him the money.

Inspector Albert testified that P.C. Christmas told him in the presence of the appellant that she had found the sum of money in the possession of the appellant. He asked the appellant to give an account of the money and she claimed that it was her money. He told her he did not believe her and took her to Police Headquarters for questioning where she elaborated on the circumstances by which she came by the money, claiming that she had sold some jewelry and other items; but she was unable to say just how much money she had made from the sale. Later that day the appellant gave the Inspector a different version of how the money came to be in her possession. This time she claimed that she had been given that sum of money to carry to St. Lucia in return for an airline ticket.

At the close of the case for the prosecution, Counsel for the appellant submitted that the appellant ought not to be called upon to account for possession of the money because (a) at the time the money was found the arresting officer must have knowledge that the money was stolen or unlawfully obtained, and that the prosecution had not proved that the money was either stolen or unlawfully obtained; and (b) no where in the evidence was it stated that W.P.C. Christmas had reason to believe that the money was stolen or unlawfully obtained. His submission was overruled. Reasonable suspicion having been found in the evidence of the police officers, it then fell to the appellant to give an account to the satisfaction of the Magistrate by what lawful means she came into possession of the money. She elected to give no explanation. The Magistrate therefore decided to convict her.

Before this Court Counsel for the appellant sought to argue that the Magistrate erred in law when he overruled the no case submission since the prosecution had failed to lead evidence (1) either that the money was stolen or unlawfully obtained or (2) that the prosecution witness may reasonably have suspected that the money was stolen or unlawfully obtained. He cited the cases of **R v June Williams** (1970) 16 W.I.R. 269, and **R v Melvin Spragg** (1975) 23 W.I.R. 371. I am of the view that the prosecution was under no duty to prove that the money had actually been stolen or unlawfully obtained.

The provisions of the subsection under which the appellant was charged, merely require that there should be reasonable suspicion that the thing found in possession of the person charged should have been stolen or unlawfully obtained.

The two cases cited by learned Counsel for the appellant concerned the interpretation of s.8 of the Unlawful Possession of Property Law (Cap. 401 of the Laws of Jamaica. The operative part of this section provides -

> "(1) If information is given on oath to any Resident Magistrate or Justice that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any house, store, yard or other place.....the resident Magistrate or Justice may, by warrant under his hand directed to any constable, cause the house, store, year, place....to be entered and searched at any time of the day or, if the warrant so authorises, by night.
>
> (2)...............
>
> (3) If upon search made in accordance with the provisions of subsections (1) and (2) of this section, anything which the constable has reasonable cause to suspect to have been stolen or unlawfully obtained is found, the constable shall arrest and bring before a Resident Magistrate -
>
> (a) the person in whose house, store......such thing is found; and
>
> (b) ....
>
> if the constable has reasonable cause to suspect that such person placed or was privy to the placing of the thing in such house, store....knowing or having reasonable cause to suspect the same to have been stolen or unlawfully obtained."

In Melvin v Spragg where the earlier authorities were reviewed it was held that (1) it cannot be assumed by a Magistrate that if an arresting constable suspected anything he found to have been stolen or unlawfully obtained, still less that his suspicion was reasonable; (2) it must always be demonstrated by evidence that an arresting constable did in fact suspect, and that he had reasonable cause to suspect, that the thing found had been stolen or unlawfully obtained since it was the state of his mind that was called into question; and (3) in the absence of such evidence a resident Magistrate cannot call upon an accused to account for his possession.

These findings are based on the peculiar nature of the wording of the offence in Jamaica which specifically requires the arresting constable to have a particular state of mind. No such provision is contained in the Laws of Dominica. In Trinidad and Tobago the comparative provision in their law speaks of "reasonable cause to suspect (the thing) to have been stolen or unlawfully obtained" (see S. 37(3) of the **Summary Offences Act**). And in **Boodoo v Joseph** (1964) 7 W.I.R. 373, Wooding C.J. had this to say about those words (at p. 379):

> "In my judgment, the test for determining whether or not reasonable cause exists must at all times be objective. Not only must cause exist; it must also be reasonable. And whether it is reasonable or not will depend upon all the known circumstances of each case. In some cases, the possession or lack of relevant information may be significant; in others, it may be of no consequence whatever. No single factor can be pointed as essential. The facts must be examined dispassionately and assessed objectively according to the standards of the reasonable man."

I adopt this test from a distinguished jurist. the test for determining whether or not a reasonable suspicion exists must be objective. Not only must a suspicion exist; it must also be reasonable. And whether it is reasonable or not must depend upon all the known circumstances of each case. I now turn to assess the facts objectively and examine them dispassionately according to the standards of the reasonable man, and as they were before the Magistrate for consideration.

The appellant's behaviour at the airport was such that it aroused suspicion in P.C. Christmas who kept her under observation, challenged her, searched her, and discovered this large sum of money made up entirely of EC $100 dollar notes. When asked by Inspector Albert to account for the possession of such a large sum of money, the appellant gave conflicting explanations. At the Magistrate's Court she elected to give no account.

In my view the combined evidence of P.C. Christmas and Acting

Inspector Albert as to the behaviour of the appellant and the conflicting explanations which she gave are, if believed, such as would make it impossible to avoid the conclusion that the appellant was seeking to hide the existence of the money.

It is not surprising therefore in the face of this evidence that the Magistrate convicted the appellant. I agree entirely with the Magistrate. This appeal must be dismissed.

SATROHAN SINGH, J.A.

On Tuesday, October 20, 1992, the appellant was in the departure lounge at the Melville Hall Airport in Dominica en route to Barbados through St.Lucia. She appeared to be in company with two other women. Immigration Officer Vincia Christmas observed that the appellant was lying on a couch in the departure area, that she "appeared nervous" and seemed to be "fighting with herself" and that one of the other two ladies handed her a brown paper bag and a small ladies side bag. Christmas also observed that the appellant's trousers "appeared rather bulging in the rear area by the pocket". Christmas approached the appellant and told her that she had reason to believe that she was in possession of drugs to which the appellant replied "No". Christmas then searched her and found no drugs but found $45,200 EC in the appellant's back trousers pocket. Christmas then contacted Inspector Albert, after which Christmas told the appellant that she had reasonable grounds to believe that the money found on her was illegally obtained. Inspector Albert then arrived at the scene and questioned the appellant as to her possession of the $45,200: The appellant gave three different explanations. The appellant was then arrested and charged for having in her possession $45,200 reasonably suspected of having been unlawfully obtained contrary to S.44(2) of the Small Charges Act Cap.10.39 of the Revised Laws of Dominica 1990. The evidence of Inspector Albert under cross-examination by Mr. Astaphan was that:

> "On 20th October, 1992 I had no report of $45,200.00 was stolen, or that it was lost. I had no knowledge that someone had defrauded a company of $45,200.00, or that someone was tricked to deprive him of $45,200.00. It is true to say that the first time I got to know about the $45,200.00 was when W.P.C. Christmas told me she had gotten that money on the Defendant".

Constable Christmas also under cross-examination by Mr. Astaphan testified that she suspected the appellant of being in possession of Drugs, not money, that she received no report that $45,200: was stolen or that it was lost or obtained by fraudulent means. She testified that she did not know of the existence of the $45,200.00: in that pocket before she found it and that she cannot say that the appellant tried to hide the money or to run away.

On November 11, 1992 Magistrate Moise on these facts, overruled a submission of no case to answer made by Counsel for the appellant that the prosecution failed to prove that element of the charge which read "may reasonably be suspected of having been unlawfully obtained" and convicted the appellant of the offence charged after the appellant rested her case on that submission. The learned Magistrate then imposed on the appellant the penalty of a fine of $500.00: to be paid by January 1, 1993, in default imprisonment for two months and ordered that the $45,200.00 be forfeited and paid to the Government Treasury. The appellant appeals from this conviction and Mr.Astaphan's submission to the Magistrate suitably worded was argued before this Court as the appellant's sole Ground of Appeal.

The submission of Counsel for the appellant was that the suspicion necessary to prove the offence must exist in the mind of the arresting officer before detention and search and it must be on reasonable grounds and that the explanation of the appellant after detention cannot be used to found such suspicion. Counsel submitted that what would constitute reasonable grounds would be for the Magistrate to determine and that from the Magistrate's reasons for decision it did not appear that the Magistrate gave any thought to that element of the charge. On this latter aspect, the record shows that the sum total of what the Magistrate said in his reasons before he convicted the appellant was that he accepted the evidence led by the prosecution. The learned Magistrate made no allusion to that aspect of the charge.

<u>S.44(2) of the Small Charges Act reads:</u> -

> "Any person having or having had in his possession in any manner or in any place anything which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account satisfactory to the Magistrate as to how he came by the same, is liable to a fine or three thousand dollars or to imprisonment for twelve months; but such person shall not be liable to be convicted under this subsection if he proves that he had or has had possession of such thing for more than three months".

Counsel for the appellant does not dispute possession in the appellant of the $45,200.00 The issue then to be decided is what is contemplated in law by the words "reasonably suspected of having been unlawfully obtained".

In my opinion, for the prosecution to establish a prima facie case of a charge under S.44 (2), they will have to show that at the time that the possessor of the thing was found by the officer to be in possession thereof, there existed in the mind of that officer the suspicion to which the section is directed. It is the state of mind of the particular arresting officer prior to the arrest that is called into question. That state of mind must be shown by evidence. In the absence of such evidence, a Magistrate cannot call upon an accused to account for his possession. R. v Melvin Spragg (1975) 23 W.I.R. 371, and R v June Williams (1970) 16 W.I.R. 269 cases from the Court of Appeal of Jamaica, are persuasive authorities which support this opinion of the law.

In this matter two officers were involved and the evidence is pellucid, that before the case was discovered on the appellant, Inspector Albert had no reason to suspect the appellant of the offence charged. With respect to Constable Christmas, when after speaking with Inspector Albert, she told the appellant that she had reasonable grounds to believe that the money was illegally obtained, that belief or those grounds could not have emanated from her conversation with Inspector Albert having regard to the evidence of the Inspector in cross-examination, already set out in this judgment. That would then have left the issue of suspicion to be decided on the observations of Constable Christmas of the appellant before the search. Of these observations, little or no weight can be attached to her evidence that the appellant appeared to be "fighting with herself" and that she "appeared nervous", these being opinions of the witness with no evidence led to show the basis for such opinions, especially when the witness is not an expert in that field. In any event, being nervous at an airport can be said to be equivocal. And, there is nothing suspicious per se in a woman lying down on a couch at the Airport or in a person giving her a brown paper bag or a small side bag or in a person having bulging back pocket or for that matter in a person having $45,200.00 in that back pocket at the Airport, especially when there is no attempt to conceal or hide the bulge or the money.

My conclusion from all of this , is that on the evidence, the alleged suspicion of both Constable Christmas and Inspector Albert could only have been aroused from the fact of this large sum of money being found on the appellant and nothing more. In my view, that standing alone cannot be the evidence which the law contemplated as being necessary to prove the element of suspicion in the offence alleged. That evidence could have disclosed no more than some measure of concern or, perhaps, surprise that the appellant should have had on her person the amount of money found thereon. Adopting the words of Graham-Perkins J.A. in R v Spragg at page 375, it would, I think, be unfortunate in the highest degree if a citizen of this country could not have in her possession a large quantity of money without being exposed to a charge of unlawful possession of that money founded on the mere fact of possession without more.

Regarding the different explanations given to Inspector Albert by the appellant as to her possession of the money, those were matters for the Magistrate to ponder on had a prima facie case been made out. Standing alone they cannot be used by the prosecution to prove reasonable grounds for suspicion. They may be used to bolster the grounds for the suspicion that should exist when the search is carried out and the money is found. It is of the utmost importance to appreciate that the suspicion to which the section is directed is one which must exist in the mind of the officers at the time that the possessor of the thing is found to be in possession thereof (R V Whyte (1972) 18 W.I.R. 291).

For these reasons, in my judgment, I am constrained to the conclusion that the evidence led by the prosecution on the issue of suspicion, fell short of that which could have justified the learned Magistrate in calling on the appellant to account for her possession. Accordingly, I would allow this appeal and set aside the conviction, sentence and order of forfeiture made thereon.

MATTHEW J.A. (Ag.)

The facts of this case are set out in the first one and one-half pages of the judgment of Singh J.A. which I have had the opportunity to read. I do not intend to set them out in detail.

The Appellant was convicted of having in her possession the sum of forty five thousand and two hundred East Caribbean dollars reasonably suspected of having been stolen contrary to Section 44(2) of the Small Charges Act of the Laws of Dominica. That money was found on her person just before she prepared to board a LIAT aircraft at Melville Hall Airport on October 20, 1992.

Two police officers, namely, W.P.C. Vincia Christmas and Acting Inspector Kelvin Albert, gave evidence before the Magistrate. The Appellant did not give evidence at the trial.

Section 44(2) of the Small Charges Act is as follows:

> "Any person having or having had in his possession in any manner or in any place anything which may reasonably be

suspected of having been stolen or unlawfully obtained, and who does not give an account satisfactory to the Magistrate as to how he came by the same, is liable to a fine or three thousand dollars to imprisonment for twelve months; but such person shall not be liable to be convicted under this subsection if he proves that he had or has had possession of such thing for more than three months".

The substantive ground of appeal before this Court was that the learned Magistrate erred in law when he overruled the no-case submission made on behalf of the Appellant at the end of the Prosecution's case to the effect that the Prosecution had failed to lead any evidence or the necessary evidence to establish the condition precedents required by Section 44(2) of the Small Charges Act and that therefore there was no need, and the learned Magistrate ought not to have called upon the Appellant, to account for the money in her possession.

As will be illustrated later Section 44(2) of the Small Charges Act seems to require two conditions precedent before the Magistrate ought to ask an Accused to account for his possession of the particular goods. Put briefly they are:

(1) The person must have the goods in his possession; and
(2) Such goods must be reasonably suspected of having been stolen or unlawfully obtained.

Let me deal briefly with a submission that was made before the Court. Importance is placed upon it for it was stated before the learned Magistrate, before this Court and it is reproduced in the Appellant's skeleton argument. The submission I refer to is that there was no evidence either that money was stolen or unlawfully obtained, that there was no report that $45,200 was stolen, or that any company was defrauded of that amount, or that someone was tricked to deprive him of $45,200. In my judgment there is no merit in that submission. It is irrelevant that no report of the kind referred to was made. If there was that information perhaps an appropriate charge could be framed under Section 44(1) which deals with receipt of stolen property or property obtained by false pretence or some other charge. Section 44(2) is framed to catch the kind of actus reus presently under consideration, namely, possession of goods reasonably suspected of having been stolen or unlawfully obtained. And then all the Accused is required to do is to give a satisfactory account of his possession.

Learned Counsel for the Appellant in his submission before this Court that W.P.C. Christmas suspected the Appellant of drugs and not of money. But that kind of suspicion I would venture to say is guesswork and is not related to an offence when no possession has been established. Police officers are not expected to be soothsayers and guess that an Accused has money and not drugs or vice versa and depending upon his guess his case succeeds or collapses. The suspicion comes into operation when the officer has found the thing in the particular circumstances surrounding that finding.

Learned Counsel for the Respondent asked the Court to look at the circumstances of the finding. She paid attention to the fact that this large sum of money was found in the Appellant's back pockets; and that the Appellant known by one of the witnesses to be unemployed gave contradictory explanations to the police as to how she came by that money.

Two West Indian cases were cited to the Court:

R v JUNE WILLIAMS (1970) 16 W.I.R. 269; and
R v MELVIN SPRAGG (1975) 23 W.I.R. 371.

In the first case, the Court of Appeal of Jamaica held that before calling upon the person brought or appearing before him to account for possession of property found pursuant to such a search, one of the matters of which the resident magistrate must be satisfied is that the arresting constable had reasonable cause to suspect that that property was stolen or unlawfully obtained.

In the case at Page 269 letter 'I' it was stated: "No evidence was given to show any reason why it should be suspected that the goods found had been stolen or unlawfully obtained"; and at Page 270 letter 'I', it said:

> "In charges laid under the Unlawful Possession of Property Law, evidence must be given either specifically or inferentially to show that the constable, prior to arrest, had reasonable cause to suspect that the goods were either stolen or unlawfully obtained; and if such evidence is not given the resident magistrate should not call on the person charged to account".

In the second case the same Court held that it must always be demonstrated by evidence that an arresting constable did in fact suspect, and that he had reasonable cause to suspect, that the thing found had been stolen or unlawfully obtained since it was the state of his mind that was called in question. Page 374 letter 'I' states the view of Graham-Perkins J.A.: as follows:

> "It is, in my view, of the utmost importance to appreciate that the suspicion to which the section is

> directed is one which must exist in the mind of the constable at the time that the possessor of the thing is found to be in possession thereof. The section is not directed to the state of mind of the resident magistrate or anyone else".

In this case W.P.C. Christmas had the Appellant under observation. She was dressed in uniform. She looked at the Defendant and the Defendant looked at her and spoke to her companion. The constable went towards the area where LIAT flight 355 was announced destined for Martinique, St.Lucia and Barbados. It was time for security check and she noticed all of the other passengers had made their way to the Departure Lounge but the Appellant and her two friends were still on the outside. It is not unreasonable to assume that they were lingering as much as possible to board the flight at the latest possible moment and so avoid search.

What is more in the words of W.P.C. Christmas:

> "One was standing close to the entrance of the Departure Lounge, she I recognize as the Defendant. I noticed that this young lady whom I recognize as the Defendant had been fighting with herself, she appeared to be nervous and uncomfortable and I noticed that the pants she was wearing appeared rather bulky in the rear area (pockets area)".

That in my view is the evidence of the reasonable suspicion of W.P.C. Christmas which later came into operation when possession of the money was found.

W.P.C. Christmas challenged the Appellant in the Departure room that she was carrying drugs. Appellant was searched. Drugs were not found but the money was found. Christmas left her in care of Cpl. Matthew and went to make a report to the officer in charge of the Drug Squad.

Christmas then returned to the Appellant and said to her while still in the Departure Lounge that she had reasonable grounds to believe the money was illegally obtained.

W.P.C. Christmas had observed a nervous Appellant, lingering so as to be last to board the aircraft and when such an Appellant is searched a relatively large amount of money was found in her back pockets ready to leave the island.

With respect to Acting Inspector Albert who seems to have taken over the investigations he knew the Accused for about one year during which time he did not know her to be employed. That evidence was not challenged under cross-examination. The Appellant told him firstly that it was her money. The inspector told her he did not believe her.

In the course of his further investigations she said the money came from proceeds of sale of jewellery which her boyfriend had taken to the house where they lived in St. Martin before he was sent to jail there. She said she sold the jewellery and returned to Dominica. When asked how much money, she said she never checked it. What she was not asked is how the money became converted into Eastern Caribbean Currency.

And later she gave another explanation to the effect that she was only carrying the money to St.Lucia for somebody unknown to her who had over the telephone promised to pay her air fares from Dominica to Barbados.

She was later charged by Albert. In my view there was an abundance of reasonable suspicion that the money was unlawfully obtained.

I am of the view that the learned Magistrate was quite right to call upon the Appellant for an explanation as to how she came by the money. She elected to say nothing and was rightly convicted.

I would therefore dismiss the appeal.

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NICHOLAS J.O. LIVERPOOL
Justice of Appeal

Satrohan Singh
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SATROHAN SINGH
Justice of Appeal

....
ALBERT N. J. MATTHEW
Justice of Appeal (Ag.)