

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2015/0019

**In the matter of an Appeal pursuant to CPR
62.**

and

**In the matter of section 441 of the Criminal
Code of Saint Lucia Cap 3.01 of the Revised
Laws of Saint Lucia.**

and

**In the matter of section 8 of the Constitution
of Saint Lucia Cap 1.01 of the Revised Laws
of Saint Lucia.**

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

**[1] PETER HIPPOLYTE
[2] MICHAEL AUGUSTIN
[3] MARTINUS ALEXANDER**

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Dwight Lay for the Appellant
Mr. Horace Fraser for the Respondents

2016: February 8;
April 4.

Civil appeal – Section 441 of the Criminal Code of Saint Lucia – Whether section 441 of the Criminal Code is inconsistent with sections 8(1), 8(2) and 8(7) of the Constitution of Saint Lucia – Whether section 441 of the Criminal Code interferes with the requirement of reasonable doubt – Whether section 8(12) of the Constitution is applicable to section 441 of the Criminal Code

The respondents were charged, pursuant to section 441 of the Criminal Code of Saint Lucia,¹ with having in their possession a large quantity of foreign currency reasonably suspected to have been stolen or unlawfully obtained. The respondents (the claimants in the court below) filed an originating motion pursuant to section 16 of the Constitution of Saint Lucia² (“the Constitution”) contending in essence that section 441 of the Criminal Code contravenes sections 8(1), 8(2) and 8(7) of the Constitution as it: (a) puts the onus on them to disprove that they did not know the money was stolen; (b) reverses the burden of proof and offends section 16 of the Constitution; and (c) is disproportional in all of the circumstances.

The appellant (the defendant in the court below) filed an affidavit in response stating, amongst other things, that section 441 of the Criminal Code is reasonably required for the purpose of apprehending and prosecuting criminals and that under section 441, the prosecution is first required to prove the elements of the offence and then afterwards an accused person had the option to offer proof, on a balance of probabilities, of facts which are rationally open to the accused to prove or disprove.

The learned trial judge found that: (a) the words ‘who does not give an account to the satisfaction of the Court, as to how he or she came by it’ in section 441(1) and the entirety of section 441(2) of the Criminal Code are unconstitutional, null and void; (b) that the appellant had the burden of proof to justify that sections 441(1) and 441(2) are reasonably required in a democratic society; (c) the requirement for an accused person to provide a satisfactory explanation to the court of his or her possession is an element of the offence which was created by section 441(1); and (d) section 441(1) reduces the burden on the prosecution to prove the ingredients of the offence such as possession and the facts from which reasonable suspicion of unlawful possession may be based. The learned trial judge therefore struck down

¹ Cap. 3.01, Revised Laws of Saint Lucia 2008.

² Cap. 1.01, Revised Laws of Saint Lucia 2008.

what he considered the offending words of section 441(1) and the whole of section 441(2).

The appellant, being dissatisfied with the judge's decision, appealed on a number of grounds. The appellant complains, *inter alia*, that the learned judge misdirected himself when he held that section 441 of the Criminal Code was unconstitutional, null and void, to the extent that it requires a person to give an account of how he or she came into possession of an item that is reasonably suspected to have been stolen or unlawfully obtained; and that the learned judge followed the decisions of the Privy Council in *Attorney-General of Hong Kong v Lee Kwong-Kut*; *Attorney General of Hong Kong v Lo Chak-Man and another*³ and *Attorney General of Gambia v Momodou Jobe*⁴ without taking sufficient account of the judicial guidance provided in, amongst other cases, *Attorney General's Reference (No 1 of 2004)*.⁵

Held: dismissing the appeal; and awarding costs to the respondents to be assessed if not agreed within 21 days, that:

1. Section 441 of the **Criminal Code** creates 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 the most important ingredient of the offence. It places the onus on the defendant, in order to avoid a finding of guilt, to establish that he or she is able to give an explanation as to his or her innocent possession of the property. 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 was stolen or unlawfully obtained. It therefore contravenes the presumption of innocence in section 8(2)(a) of the **Constitution of Saint Lucia**. Accordingly, in this case, the learned trial judge was correct in making this finding.

Attorney-General of Hong Kong v Lee Kwong-Kut; Attorney-General of Kong v Lo Chak-Man and another [1993] AC 951 applied.

2. A provision such as section 8(2)(a) of the **Constitution of Saint Lucia** which embodies the presumption of innocence, has to be given a generous and purposive construction. Section 8(12)(a) of the Constitution which imposes upon a person charged with an offence, the burden of proving particular facts, should not be construed in a manner which emasculates the provision of the presumption of innocence embodied in section 8(2)(a) of the Constitution. Further, section 8(12)(a) of the Constitution is not intended to apply to the

³ [1993] AC 951.

⁴ [1984] AC 689.

⁵ [2004] EWCA Crim 1025.

essential ingredient of an offence. In the circumstances of this case, the learned judge was right in concluding that section 8(12)(a) would not be applicable to section 441 of the Criminal Code and correctly held that section 441(1) of the **Criminal Code** contravened the presumption of innocence embodied in section 8(2)(a) of the Constitution. Consequently, in the present case, the judge quite properly severed the offending part of section 441(1) and to the extent that the offending part of section 441(1) was inextricably linked to section 441(2), he was also correct in striking down section 441(2) in its entirety.

Attorney-General of Hong Kong v Lee Kwong-Kut; Attorney-General of Kong v Lo Chak-Man and another [1993] AC 951 applied; **The Attorney General of The Gambia v Momodou Jobe** [1984] AC 689 at p. 100 applied; **Beezadhur v The Independent Commission against Corruption and another** [2014] UKPC 27 distinguished.

JUDGMENT

- [1] **BAPTISTE JA:** Section 441 of the **Criminal Code** of Saint Lucia⁶ bears the burden of this appeal. It provides (in so far as is applicable):

“441. UNLAWFUL POSSESSION OF PROPERTY SUSPECTED TO HAVE BEEN STOLEN

- (1) A person who has in his or her possession or conveys in any manner anything which is reasonably suspected to have been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the Court, as to how he or she came by it is liable on summary conviction to imprisonment for 2 years.
- (2) Where a person charged with an offence under subsection (1) refuses or is unable to satisfy the Court that his or her possession of the thing is lawful it shall be deemed to be *prima facie* evidence of his or her guilt and the Court may convict him or her accordingly.

...”

- [2] The main issue is whether section 441 of the **Criminal Code** is inconsistent with sections 8(1), 8(2) and 8(7) of the **Constitution of Saint Lucia** (“the

⁶ Cap. 3.01, Revised Laws of Saint Lucia 2008.

Constitution”).⁷ This issue arises consequent upon Belle J holding that certain parts of section 441(1) and the whole of section 441(2) of the **Criminal Code** are unconstitutional, null and void. The issue of section 441 was brought to the fore as a result of the respondents having been charged, pursuant to that section, with having in their possession a large quantity of foreign currency (US\$252,755.00 and €99,440.00) reasonably suspected to have been stolen or unlawfully obtained. The currency was seized when the police conducted a search of a motor car which the respondents were in.

- [3] The matter came up before the learned judge in the form of an originating motion, pursuant to section 16 of the Constitution, with the respondents (the claimants in the court below) basically contending that section 441 contravenes sections 8(1), 8(2) and 8(7) of the Constitution as it, *inter alia*, (a) puts the onus on them to disprove that they did not know the money was stolen, (b) reverses the burden of proof and offends section 16 of the Constitution and (c) is disproportional in all of the circumstances.
- [4] The appellant (the defendant in the court below) filed an affidavit in response stating, *inter alia*, that (a) section 441 of the **Criminal Code** is reasonably required for the purpose of apprehending and prosecuting criminals and (b) under section 441 the prosecution is first required to prove the elements of the offence and then afterwards an accused person has the option to offer proof, on a balance of probabilities, of facts which are rationally open to the accused to prove or disprove. The respondents filed no reply to the appellant’s affidavit.
- [5] Belle J found that:
- (a) the words ‘who does not give an account to the satisfaction of the Court, as to how he or she came by it’ in section 441(1) and the whole

⁷ Cap. 1.01, Revised Laws of Saint Lucia 2008.

of section 441(2) of the **Criminal Code** are unconstitutional, null and void;⁸

- (b) the appellant had the burden of proof to justify that sections 441(1) and (2) of the **Criminal Code** are reasonably required in a democratic society;⁹
- (c) the requirement for an accused person to provide a satisfactory explanation to the court of his or her possession is an element of the offence, which is created by section 441(1) of the **Criminal Code**;¹⁰
- (d) section 441(1) of the **Criminal Code** reduces the burden on the prosecution to prove the ingredients of the offence such as possession and the facts from which reasonable suspicion of unlawful possession may be based.¹¹

[6] Belle J struck down what he regarded as the offending words in section 441(1) – ‘who does not give an account to the satisfaction of the Court, as to how he came by it’ – and the whole of section 441(2).

[7] The appellant complains that the learned trial judge erred in law and/or misdirected himself when he:

- (a) held that section 441 of the **Criminal Code** is unconstitutional, null and void, to the extent that it requires a person to give an account of how he or she came into possession of an item that is reasonably suspected to have been stolen or unlawfully obtained;
- (b) failed to adequately recognise that facts that are peculiarly or exclusively within the knowledge of a person, should be regarded as matters for him or her to establish;
- (c) held that the requirement for an accused person to provide a satisfactory explanation of his or her possession, as an element of proof of the offence, infringes on the right not to be compelled to give evidence at trial;

⁸ At para. 46 of the judgment.

⁹ Ibid at para 45.

¹⁰ At para. 44

¹¹ Ibid.

- (d) failed to adequately recognise that there is a clear public interest in the prosecution of cases involving possession or receiving of stolen or unlawfully obtained items;
- (e) failed to adequately recognise that sections 441(1) and (2) of the **Criminal Code** do not represent a disproportionate response to the suppression of criminal activities concerning possession or receiving of stolen or unlawfully obtained items;
- (f) failed to adequately recognise that the Constitution places the onus of establishing that legislation is not reasonably justifiable in a democratic society upon an applicant who seeks constitutional redress; and
- (g) followed the decision of the Privy Council in **Attorney-General of Hong Kong v Lee Kwong-Kut; Attorney-General of Hong Kong v Lo Chak-Man and another**¹² and **The Attorney General of Gambia v Momodou Jobe**¹³ without taking sufficient account of the judicial guidance provided in, *inter alia*, **Attorney General's Reference (No 1 of 2004)**.¹⁴

[8] Mr. Lay submits on behalf of the appellant that section 441 of the **Criminal Code** creates an offence (as distinct from a criminal procedure) which is based upon two constituent elements, namely: (i) that a person has an article in his possession, and (ii) that article is reasonably suspected to be stolen or unlawfully obtained. Further, the provisions of section 441 of the **Criminal Code** which require the respondents to satisfy the criminal court that their possession of the money was lawful will assist them in avoiding a possible conviction but it is not an essential element of the offence. In other words, under section 441, the prosecution is first required to prove the essential ingredients of the offence charged and then the respondents have an opportunity to disprove the matters for which section 441 permits. Under section 441 of the **Criminal Code** the presumption of innocence operates throughout in favour of the respondents and will only be displaced at the conclusion of their criminal trial. The factual matters that are required to be proved by the respondents, under section 441 of the **Criminal Code** relate to facts which,

¹² [1993] AC 951.

¹³ [1984] AC 689.

¹⁴ [2004] EWCA Crim 1025.

if they exist, are readily provable by them as matters within their own knowledge or to which they would have ready access. The factual matters required to be proved by the respondents go no further than is proportionate in all of the circumstances contemplated by section 441 of the **Criminal Code**; and there is nothing in section 441 of the **Criminal Code** that conflicts with section 8(7) of the Constitution.

[9] Mr. Fraser contends on behalf of the respondents, that the Privy Council interpreted a similar provision to section 441 in **Attorney-General of Hong Kong v Lee Kwong-Kut** and the learned judge was bound by that case. Further, the authority of **Attorney General's Reference (No 1 of 2004)** is only persuasive, thus, is not binding on this Court.

[10] In my judgment, the Privy Council's decision in **Attorney-General of Hong Kong v Lee Kwong-Kut** is critical to the disposition of this appeal. I am of the view that the fundamentals of Mr. Lay's submissions are quite contrary to the reasoning of the Privy Council and what it held in **Lee Kwong-Kut**. In **Lee Kwong-Kut**, the Board interpreted a provision similar to section 441(1) of the **Criminal Code** and struck it down as being inconsistent with the presumption of innocence in the **Hong Kong Bill of Rights Ordinance 1991** ("the Hong Kong Bill of Rights").

[11] An information was preferred against Lee Kwong-Kut under section 30 of the Summary Offences Ordinance of Hong Kong, alleging that he had in his possession HK\$1.76 million, reasonably suspected of having been stolen or unlawfully obtained. Section 30 of the Summary Offences Ordinance provided that:

"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 \$1,000.00 or to imprisonment for three months."

- [12] The Privy Council stated that section 30 contains three elements: (1) the possession or conveying of 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 Board reasoned that the third ingredient is not a special defence, but the most important ingredient of the offence.
- [13] The Privy Council ruled that the substantive effect of the statutory provision placed the onus on the defendant to establish that he can give an explanation as to his innocent possession of the property. This, the Board considered to be 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 contravened Article 11(1) of the Hong Kong Bill of Rights – that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law – in a manner which the Attorney General could not justify.
- [14] The provisions of section 441(1) of the **Criminal Code** of Saint Lucia and section 30 of the Summary Offences Ordinance of Hong Kong are almost identical. In my judgment, by parity of reasoning, the same considerations which led the Privy Council to hold that section 30 of the Summary Offences Ordinance of Hong Kong contravenes the presumption of innocence would apply to section 441(1) of the **Criminal Code** Saint Lucia. Thus, contrary to what Mr. Lay posits, section 441 of the **Criminal Code** creates 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 the most important ingredient of the offence. It 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. 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 was stolen or unlawfully obtained. It therefore contravenes the presumption of innocence in section 8(2)(a) of the **Constitution of Saint Lucia**. Belle J was right in so finding. The matter, however, does not end here as the court is enjoined to pay regard to the provision of section 8(12) of the Constitution.

[15] Belle J held¹⁵ that section 8(12)(a) of the Constitution which permits the imposition of the burden of proving certain facts, was inapplicable to section 441. He reasoned that the explanation of possession of allegedly stolen goods given to the court pursuant to section 441 of the **Criminal Code** interfered with the requirement of reasonable doubt. The section required the explanation to be satisfactory. Section 441 creates a situation where the accused could be convicted in spite of the existence of reasonable doubt since the failure to satisfy the court with an explanation makes him liable to be convicted of an offence.

[16] Mr. Lay argues that section 441 of the **Criminal Code** imposes a legal reverse burden of proof or presumption on the respondents which is authorized by section 8(12)(a) of the Constitution. In that regard, Mr. Lay says that Belle J erred in law by concluding that section 8(12) was inapplicable to section 441.

[17] In **Attorney-General of Hong Kong v Lee Kwong-Kut**, Lord Woolf set down a test for when a reverse burden of proof would be acceptable. He stated:

"Whether they [reverse burdens] are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of

¹⁵ At para 48 of the judgment.

maintaining the principle [of the presumption of innocence]...If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v. United States* (1969) 23 L.Ed. 2d 57, 82, "it can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."¹⁶

[18] Mr. Lay submits that the learned judge erred in not applying section 8(12) on the basis of the following:

"(i) under section 441, the prosecution is first required to prove the essential ingredients of the offence charged and then the respondents have an opportunity to disprove the matters for which section 441 permits..."

"(ii) the extent and nature of the factual matters required to be proved by the respondents relate to facts, which if they exist are readily provable by them as matters within their own knowledge or to which they would have ready access - see page 11 para 3 in *Michael Cox and Michael Mitchell v The Queen* - Grenada Criminal Appeal Nos. 25 and 26 of 1996, 15th September 1997..."

"(iii) the extent and nature of the factual matters required to be proved by the respondents go no further than is reasonably required to achieve the objective of a reverse burden (i.e. it is proportionate in all of the circumstances) - see para 52(d)-(e) in *Attorney General's Reference...*"

"(iv) in practice, if the prosecution had to prove matters within the respondents own knowledge or to which they would have ready access, fewer investigations would be undertaken and fewer prosecutions would take place - see paras 36, 37 and 52(g) in *Attorney General's Reference ...*"

"(v) that the realistic effect of any such reverse burden of proof will not preclude the respondents from having a fair trial - see para 52(f) in *Attorney General's Reference...*"¹⁷

¹⁶ At p. 969.

¹⁷ Skeleton arguments of the appellant (filed 21st October 2015) at para. 12(9).

[19] Mr. Lay states that the above-mentioned submissions have gained approval in more recent times by the Privy Council in **Beezadhur v Independent Commission against Corruption and another**.¹⁸

[20] I will get to **Beezadhur** in a while. It seems to me, however, that the attraction of Mr. Lay's submissions is clearly nullified by the decision of the Privy Council in **Lee Kwong-Kut**. To put it briefly, the Board unambiguously held that section 30 of the Summary Offence Ordinance of Hong Kong (the equivalent of section 441 in Saint Lucia) violates the presumption of innocence, for the reasons indicated earlier in the judgment. Although Mr. Lay contends that the law has moved on since **Lee Kwong-Kut**, it is notable that no case has been cited to this Court which has doubted its correctness.

[21] I will consider the application or the applicability of section 8(12) of the Constitution. This Court is not without guidance, as the Privy Council has pronounced on the matter. Before examining the cases, it would be useful to start by placing section 8(12) in context. The relevant provisions of section 8 of the Constitution state as follows:

"8. PROVISIONS TO SECURE PROTECTION OF LAW

(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence—
(a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;

...

(7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

...

¹⁸ [2014] UKPC 27.

- (12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—
- (a) subsection (2)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
 - (b) ...”

[22] I now treat with the authorities. In Belize, section 116(a) of the Criminal Code placed the burden of proof on the defendant to prove extreme provocation as a defence to murder. In **Dean Edwardo Vasquez v The Queen**¹⁹ the Privy Council had to consider the question whether section 116(a) contravened the defendant's right to be presumed innocent until he was proved guilty. The Board opined that section 116(a) of the Belize Criminal Code, by placing the burden of proof of provocation upon an accused, conflicted with section 6(3)(a) of the Constitution and must accordingly be modified to conform to it. Therefore the words “if either of the following matters of extenuation be proved on his behalf” were construed as though they read “if there is such evidence as raises a reasonable doubt as to whether.”

[23] The Board applied the dictum of Lord Diplock in **Attorney General of The Gambia v Momodou Jobe**,²⁰ that a constitution, and in particular, that part of it which protects and entrenches fundamental rights and freedoms is to be given a generous and purposive construction. The Board reasoned that section 6(3)(a) should receive a generous construction whereas section 6(10)(a) should not be construed in such a way so as to emasculate the provisions of section 6(3)(a). I note here that section 6(3)(a) embodies the presumption of innocence, whereas section 6(10)(a) contains the identical provision to section 8(12)(a) of the **Constitution of Saint Lucia**; it imposes upon a person charged the burden of proving particular facts.

¹⁹ [1994] 1 WLR 1304.

²⁰ [1984] AC 689 at p. 700.

- [24] The Board referred to the advice Lord Woolf gave in **Attorney-General v Lee Kwong-Kut** and his reference to the observations of Lawton LJ in **R v Edwards**²¹ and concluded that it is to these exceptions referred to by Lawton LJ and Lord Woolf that section 6(10)(a) is intended to apply and not to the essential ingredients of an offence. The Board opined that any other construction would enable the legislature to drive a coach and four through the fundamental provisions of section 6(3)(a) whenever it wished.
- [25] In **Lee Kwong-Kut**, Lord Woolf, at page 969, pointed to the good sense and reason in allowing deviations from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. An obvious example noted was an offence requiring the performance of an act without a licence. Lord Woolf stated that the other qualification which Viscount Sankey LC made in **Woolmington v Director of Public Prosecutions**²² as to statutory exception clearly has to be qualified when giving effect to a provision similar to Article 11(1) of the Hong Kong Bill of Rights.
- [26] Article 11(1) of the Hong Kong Bill of Rights is broadly similar to section 6(3)(a) of Belize – the presumption of innocence. I note that sections 6(3)(a) and (10)(a) of the Belize Constitution are identical to section 8(2)(a) and (12)(a) of the **Constitution of Saint Lucia**. Accordingly, the reasoning of the Privy Council would be equally applicable to Saint Lucia.
- [27] In **R. v Edwards**,²³ Lawton LJ stated that the common law had evolved an exception to the fundamental rule that the prosecution must prove every element of the offence. His Lordship stated that the exception is limited to offences arising under enactments which prohibit the doing of an act save in specified

²¹ [1975] QB 27.

²² [1935] AC 462.

²³ At pp. 39 to 40.

circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Lawton LJ pointed out that whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If on its true construction the enactment prohibits the doing of acts, subject to provisos and exemptions, the prosecution can rely upon the exception.

[28] A provision such as section 8(2)(a) of the **Constitution of Saint Lucia** which, embodies the presumption of innocence, has to be given a generous and purposive construction. A provision such as section 8(12)(a) of the Constitution, which imposes upon a person charged with an offence, the burden of proving particular facts, should not be construed in a manner which emasculates the provision of the presumption of innocence embodied in section 8(2)(a) of the Constitution. This gives effect to the dictum of Lord Diplock in **Attorney General of The Gambia v Momodou Jobe**²⁴ that a constitution, and in particular, that part of it which protects and entrenches fundamental rights and freedoms is to be given a generous and purposive construction. Further, section 8(12)(a) of the Constitution is not intended to apply to the essential ingredient of an offence. In the circumstances, the learned judge was right in concluding that section 8(12)(a) would not be applicable to section 441 of the Criminal Code.

[29] Section 10 of the Constitution of Mauritius is in similar terms to the **Constitution of Saint. Lucia**. It provides:

"(2) Every person who is charged with a criminal offence –
(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

...

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of –

²⁴ [1984] AC 689 at p. 700.

(a) subsection (2)(a), to the extent that the law in question imposes upon any person charged with a criminal offence **the burden of proving particular facts;**" (My emphasis).

In **Beezadhur v The Independent Commission against Corruption and another**,²⁵ Lord Carnwath stated that section 10 gives expression to a fundamental rule of the common law that the general burden of proof in criminal cases lies on the prosecution. He went on to state that that rule is subject to a well-established exception, the best known statement of which is probably in the judgment of Lawton LJ in **Regina v Edwards**.²⁶ The exception, he notes, has been held equally relevant where the general rule is enshrined in a constitutional provision.²⁷ At paragraph 27, Lord Carnwath stated that the same approach has been followed by the Supreme Court of Mauritius in a number of decisions, which it also relied on in the case. They have treated section 10(11)(a) of the Constitution as giving effect to the exception. Lord Carnwath noted that in **Police v Moorbannoo**,²⁸ the court said:

"The principle which section 10(11) (a) of the Constitution aims at expressing in a compendious and general form may be expounded thus. To say that an accused party is to be presumed innocent is really to say that the burden is on the prosecution to prove every ingredient of the charge against him. It has long ago been realised, however, that if that rule were strictly adhered to, many acts or omissions which the Legislature deems of the utmost importance to prohibit for the public good would have to be left unpunished, because the prohibition would be incapable of enforcement, and there has from early times been elaborated a qualification to the rule which is, that facts which bring a Defendant within the ambit of a particular exception, if they are peculiarly or exclusively within his knowledge, should be regarded as matters which it is for him to establish."

²⁵ [2014] UKPC 27 at para 26.

²⁶ 1975] QB 27 at pp. 39-40.

²⁷ See: Lee Kwong-Kut at pp. 968-70, relating to article 11(1) of the Hong Kong Bill of Rights, which provided: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

²⁸ (1972) MR 22 at pp. 25-26.

[30] Similarly in **Police v Fra**,²⁹ the court said:

“It is also permissible for the legislature, subject to [the Constitution], to make the doing of any particular act an offence, save in specified circumstances, or by persons of specified classes, or with special qualifications or with the permission of license of specified authorities; the effect of the enactment being in such a case to prohibit either expressly or by necessary implication the doing of the act in question subject to a proviso, exception, excuse or qualification, and the burden of proving that the proviso and the like applies being placed on the contravener. Such an enactment would not infringe subsection (2)(a) of section 10 of the Constitution and is expressly allowed by subsection (11)(a) of that section, which provides that a law that imposes upon a person charged with a criminal offence the **burden of proving particular facts** is not inconsistent with the presumption of innocence protected by subsection (2)(a)”. (My emphasis).

Lord Carnwath stated at paragraph 36:

“In agreement with the Supreme Court in the cases to which reference has been made, the Board reads s10(11)(a) as intended to give constitutional effect to the common law principle enunciated in cases such as *R v Edwards*. It applies whenever the relevant law (“the law in question”), interpreted in the light of that principle, has the effect of placing the burden of proof on the Defendant. If that effect is clear from the form of the provision in issue, it does not need to be spelt out in express terms. In the present case, the structure and content of the statutory offence and of the specific exemptions are in the Board's view clearly designed to bring into play the *Edwards* principle. The Supreme Court was right to hold that, in accordance with s 10(11)(a), it was for the Defendant to show that the transaction was within one of the exempt categories.”

[31] Mr. Lay contends that section 441 of the **Criminal Code** is capable of falling squarely within the above mentioned principles as described in **Beezadhur**. In light of the foregoing, he submits that the respondents' rights under section 8(2)(a) of the Constitution have not been infringed by section 441 of the **Criminal Code**.

²⁹ (1975) MR 157 at pp. 158-159.

- [32] It appears to me that **Beezadhur** may not be as attractive for the appellant as it might at first blush appear to be. The reason being that Lord Carnwath's reasoning at paragraph 36 has to be considered in light of the clear finding by the Privy Council in **Lee Kwong-Kut** that section 30 of the Summary Offences Ordinance of Hong Kong (and by extension and parity of reasoning section 441 of the **Criminal Code** of Saint Lucia) does not create an offence of the class identified in **Regina v Edwards**. That being the case, the principle in **Regina v Edwards** is not brought into play.
- [33] In **Lee Kwong-Kut**, the Privy Council heard arguments with respect to **Regina v Edwards** on section 30 of the Summary Offences Ordinance of Hong Kong. Lord Woolf³⁰ set out the three ingredients of section 30 and stated that the third ingredient, which he stated to be the most important element – the inability of the defendant to give a satisfactory account of how the property came into his possession – was not a special defence. Lord Woolf stated that:
- “...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. He could, for example, be in possession of the property without having any knowledge of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him. Section 30 therefore does not create an offence of the class identified in *R v Edwards* [1974] 2 All ER 1085 at 1095, [1975] QB 27 at 39–40 by Lawton LJ”.³¹
- [34] Finally, Mr. Lay states that section 8(7) of the Constitution gives expression to a fundamental rule that a person who is tried for a criminal offence cannot be compelled to give evidence at the trial. Mr. Lay submits that upon consideration of section 441 of the **Criminal Code** it becomes clear that it does not conflict with section 8(7) of the Constitution. He contends that this is evident from the

³⁰ At p. 944.

³¹ Ibid.

following:

“section 441 does not compel the respondents to give evidence at trial. In fact section 441 makes provisions that allow the respondents to give an account to the court, if they so choose, as to how they came by the money which is the subject of their criminal charge;”³²

In light of the above, Mr. Lay submits that the respondents’ rights under section 8(7) of the Constitution have not been infringed by section 441 of the **Criminal Code**.

[35] To my mind the issue is merely academic at this stage. In light of **Lee Kwong-Kut**, Belle J correctly held that section 441(1) of the **Criminal Code** contravened the presumption of innocence embodied in section 8(12)(a) of the **Constitution of Saint Lucia**. Belle J quite properly severed the offending part of section 441(1). To the extent that the offending part of section 441(1) was inextricably linked to section 441(2), section 441(2) could not be saved.

[36] For all the reasons indicated, the appeal is dismissed with costs to the respondent to be assessed if not agreed within 21 days.

Davidson Kelvin Baptiste

³² Skeleton arguments of the appellant (filed 21st October 2015) at para. 13(a).

Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]