



1 successfully to have the conspiracy count withdrawn. The Appellant  
2 now appeals against the convictions. Regrettably, Counsel who had  
3 conduct of the appeal filed no submissions and the usual standard of  
4 preparation for appeals of this nature in this jurisdiction has not been  
5 followed. The only thing the Court has before it are the original  
6 Grounds of Appeal, and the Additional Grounds of Appeal:

- 7 (1) Judge erred in having rejected the Appellant's defence  
8 of alibi, proceeded to conviction without indicating that  
9 she was cognizant of the fact that the mere rejection of  
10 an alibi was sufficient to justify a conviction.
- 11 (2) Based on the evidence produced by the Crown, the  
12 verdict of guilt against the Appellant was inconsistent  
13 with the verdict of acquittal recorded against Horace  
14 Reid on Charge 3531/03 and the conviction of the said  
15 Horace Reid on Charge 3425/03.
- 16 (3) In rejecting the alibi the Learned Trial Judge applied the  
17 standard of proof applicable to a charge of Possession  
18 of Drugs, which is inappropriate to the burden of proof  
19 on an alibi.
- 20 (4) The Appellant suffered a disadvantage in relation to  
21 Count 3, in that he was not invited to testify in the same  
22 manner as was allowed to the accused, Horace Reid.

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24 The Additional Grounds of Appeal filed on the 3<sup>rd</sup> March 2005 are:

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- 26 (1) The Learned Trial Judge, having rejected the Appellant's  
27 defence of alibi simpliciter gave little or no regard to the  
28 remaining aspects of the Defence.

1 (2) The Learned Trial Judge erroneously drew an inference  
2 adverse to the Appellant from the fact that he exercised  
3 his right to request a Lawyer's presence during the  
4 search of his premises (see p. 153, par 3).

5 (3) The Learned Trial Judge also drew an unfavourable  
6 inference to the Appellant from his "failure" to do  
7 something rather than from something he did (see p.  
8 153, par 3).

9

10 The facts of this case are relatively simply. On Friday, 16 May 2003,  
11 around 9am acting on information received, a surveillance was  
12 conducted near the residence of the defendant Elon Dixon at #59  
13 Winfern Close, off Crew Road. While on this observation, the police  
14 observed a black Honda motorcar with a large spoiler attached to the  
15 back, drive up to the Defendant' s residence. A male wearing a  
16 sleeveless shirt and a cap exited the vehicle and went to Dixon's  
17 residence. Dixon's door opened and a male went inside. While this  
18 male was inside of Dixon's residence, the police observed that  
19 another male Winston White remained in the vehicle when the car  
20 drove away again the police followed the car, and eventually the car  
21 was disabled by the keys being removed from the ignition by  
22 Inspector Walton outside the entrance to the Credit Union. The driver  
23 was subsequently identified as Horace Reid. The occupants were

1 searched and four packets of cocaine hydrochloride with a purity of  
2 44% were found under the front passenger seat. Next Dixon's  
3 premises were searched under the Misuse of Drugs Law. Dixon  
4 advised the police that he wished to contact a lawyer. When he was  
5 informed that a lawyer would not prevent a search under the Misuse  
6 of Drugs Law, he consented to the search of his residence, and in his  
7 kitchen cabinet a body building protein bottle was found to contain 10  
8 packets of cocaine hydrochloride. He was arrested and cautioned to  
9 which he replied, "I sometimes leave my door unlocked".

10

11 These facts resulted in the accused being charged and convicted of  
12 the three charges previously described against this Appellant. The  
13 charge of conspiracy to supply cocaine laid jointly against all three  
14 defendants was withdrawn at the same time as the charge of  
15 possession of cocaine with intent to supply against Horace Reid.  
16 Winston White, the co-accused, was discharged on a no case  
17 submission at the end of the Crown's case. Dixon called alibi  
18 evidence and he gave evidence himself.

19

20

1 Grounds 2 and 3 of the additional Grounds of Appeal:

2 (2) That the Learned Trial Judge erroneously drew an  
3 inference adverse to the Appellant from the fact that he  
4 exercised his right to a request Lawyer's presence  
5 during the search of his premises, and

6 (3) That the Learned Trial Judge drew an unfavourable  
7 inference to the Appellant from his "failure" to do  
8 something rather than from something he did.  
9

10 Learned counsel in his oral submissions complained of the following  
11 statements made by the Magistrate:

12

13 "Defendant Elon Dixon was interviewed by police and  
14 exercised his right to silence, declining to inform the  
15 police of the alibi to which he testified; despite, having  
16 been advised by the police that adverse inferences  
17 may be drawn from a failure to declare his defence at  
18 an early stage."  
19

20 Another complaint was founded in the following passage:

21

22 "Further, the Court finds the defendant's conduct  
23 upon being confronted with the request for a search  
24 by the police to be inconsistent with innocence. His  
25 request to the police to delay the search until a lawyer  
26 could be present would tend to indicate that he had  
27 something to hide. The court can draw the inference  
28 that the defendant knew of the presence of something  
29 illegal which he did not want the police to find.  
30 Further, upon the police discovering the cocaine, the  
31 defendant failed to express surprise at the discovery."  
32

1 In her submissions, Crown Counsel Ms. Smith submits that the  
2 Magistrate may well have used the word "inference" somewhat  
3 loosely. The accused is entitled to know why he was found guilty.  
4 The accused is entitled to know specifically what burden of proof was  
5 used against him to conclude that he was guilty.

6

7 In the case of **R v Hoare** [1966] 50 Cr. App. R. 166. The conviction  
8 was quashed because the judge in his summing up had made strong  
9 comments on the failure of the prisoner to disclose his defence of an  
10 alibi before the trial and had not warned the jury that the prisoner was  
11 under no obligation to disclose his defence.

12

13 In this case, the Magistrate clearly draws an adverse inference on the  
14 Appellant's failure to disclose his alibi, concluding that the accused  
15 had knowledge of an illegal substance or was guilty of the charges  
16 simply because he did not advise the police of his alibi at the initial  
17 stages of this investigation. She further goes on to say that he  
18 exercised his right to silence despite having been advised by the  
19 police that adverse inferences may be drawn from a failure to declare  
20 his defence at an early stage. The word "inference" cannot be used

1 loosely by any magistrate when dealing with a serious criminal  
2 charge, which has severe consequences for the accused. Even, if  
3 used loosely, the basis for the Learned Magistrate's findings of guilt  
4 are matters in which the Appellant was entitled to exercise his right,  
5 and matters which should not be the foundation of adverse inferences  
6 being drawn against him. She further draws the inference that he  
7 knew of the presence of something illegal which he did not want the  
8 police to find, due to the insistence of a lawyer being present when a  
9 search was being conducted. The accused could have been  
10 exercising what he considers was his right. If two inferences can be  
11 drawn, the one that is consistent with his innocence must be the one  
12 that the court arrives at and not the one that is inconsistent with his  
13 innocence. It is simply not good enough for the Crown to submit that  
14 these were merely observations on the facts by the learned  
15 Magistrate.

16

17 The other ground worthy of any merit deals with the burden of proof.  
18 It is ground 1 of the original Grounds of Appeal. It is important to  
19 note that magistrates should not only quote the principal of law as  
20 they should be applied, but apply the facts to these principals. The

1 Magistrate found that the Appellant had physical control or  
2 possession of the bottle. She said that is sufficient to found  
3 possession under the Misuse of Drugs Law and came to a finding  
4 that it would appear that the Defendant had actual knowledge of it.  
5 She then held that:

6

7 "Even if this was not so, the Court finds that the  
8 defendant should be imputed with knowledge of the  
9 presence of the cocaine in the bottle because he had  
10 ample opportunity to examine the contents of the  
11 bottle whether he availed himself of the opportunity to  
12 do so or not."  
13

14 The Law imputes the knowledge to the defendant once the  
15 prosecution has proven possession. It is then open to the defence to  
16 rebut the presumption of knowledge on a balance of probabilities.  
17 The Learned Magistrate must come to a finding as to knowledge. If  
18 she is satisfied by the evidence given either by the prosecution or the  
19 defence that the Appellant did not know nor, had reason to suspect  
20 that cocaine was in the bottle then she should not find the Appellant  
21 guilty of possession of a controlled drug. There are certain burdens  
22 that must be established. The prosecution has a duty to establish  
23 certain facts beyond a reasonable doubt. When they have  
24 discharged this duty, the accused has another duty to satisfy the

1 court that he did not know, nor suspect, nor had reason to suspect  
2 the existence of the controlled drug. The burden of proof on the  
3 defendant is less than that required of the prosecution. The  
4 magistrate must address that burden and conclude that at the end of  
5 the day even if she did not believe the Defendant, the prosecution's  
6 case must satisfy her as to possession and knowledge. What she  
7 found was "an appearance" of knowledge. That simply is not good  
8 enough. At the end of the case she must be convinced beyond a  
9 reasonable doubt that he had knowledge of the contents of the bottle.  
10 A magistrate's judgment should not necessarily be dissected  
11 minutely, however, the whole judgment must be read as one, and on  
12 a reading of this judgment it is clear that the magistrate having quoted  
13 the law failed to apply the facts and misdirected herself as to the  
14 question of knowledge. I therefore allow the appeal. I do not intend  
15 to order a retrial because of the delay that has been occasioned in  
16 this matter. The charges arose on the 16 May 2003, by the time this  
17 matter comes to retrial, it will be four years and I believe that the  
18 accused would be prejudiced and it would be unfair to order a retrial  
19 in all the circumstances of the case.

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1 Dated this 15<sup>th</sup> day of June 2005

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4 Judge of the Grand Court

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